

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**



Case No

41661/15

In the matter between:

**THE CHAMBER OF MINES OF SOUTH AFRICA**

Applicant

and

**MINISTER OF MINERAL RESOURCES**

First respondent

and

**DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES**

Second respondent

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Signed at **Sandton** on the 4<sup>th</sup> of June 2015

*Naidoo*

**Norton Rose Fulbright South Africa Inc**

Attorneys for applicant

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To:

The Registrar of the above

Honourable Court

**Pretoria**

And to:

**The Minister of Mineral**

**Resources**

**Department of Mineral**

**Resources**

First Respondent

2nd Floor, Block 2B

Travenna Campus

71 Meintjies Street

Cnr Meintjies and Frances Baard

(formerly Schoeman) Streets

Sunnyside, Pretoria

**c/o The State Attorney**  
8th Floor, Manaka Heights  
167 Andries Street  
Pretoria  
Tel: 012 309 1500  
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Received on \_\_\_\_\_ 2015

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**For: First Respondent**

And to:

**Director-General: Department of Mineral Resources**  
Second Respondent  
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Cnr Meintjies and Frances Baard (formerly Schoeman) Streets  
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Received on \_\_\_\_\_ 2015

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**For: Second Respondent**

C

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case No 4661/15

In the matter between:

**THE CHAMBER OF MINES OF SOUTH AFRICA**

Applicant

and

**MINISTER OF MINERAL RESOURCES**

First respondent

and

**DIRECTOR-GENERAL, DEPARTMENT OF MINERAL RESOURCES**

Second respondent

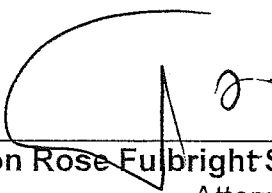
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Signed at Sandton on the 4<sup>th</sup> of June 2015

  
**Norton Rose Fulbright South Africa Inc**  
Attorneys for applicant  
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To:  
The Registrar of the above  
Honourable Court  
**Pretoria**

And to:

**The Minister of Mineral  
Resources  
Department of Mineral  
Resources**  
First Respondent  
2nd Floor, Block 2B  
Travenna Campus  
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**For: First Respondent**

And to:

**Director-General: Department of Mineral Resources**

Second Respondent

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Received on \_\_\_\_\_ 2015

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**For: Second Respondent**

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case no: 44661/15

In the matter between:

**The Chamber of Mines of South Africa**

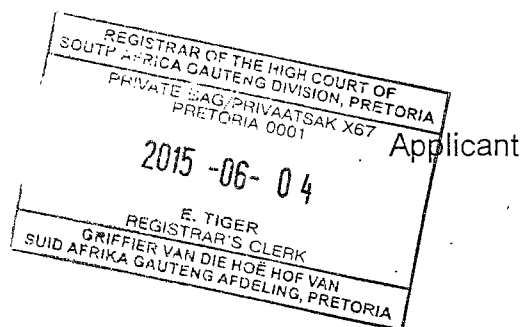
and

**Minister of Mineral Resources**

**First Respondent**

**Director-General, Department of Mineral Resources**

**Second Respondent**




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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** the Chamber of Mines of South Africa intends to make application to the above Honourable Court for an order in the following terms:

1 Declaring that:

- 1.1 once the first respondent or his delegate is satisfied in terms of section 23(1)(h) of the *Mineral and Petroleum Resources Development Act, 2002* (MPRDA) that the grant of the mining right applied for will further the objects referred to in sections 2(d) and (f) of the MPRDA and will be in accordance with *The Broad-based Socio-economic Empowerment Charter for the South African Mining Industry (Original Charter)*



published in *Proclamation GNR 1639 Government Gazette 26661* of 13 August 2004 and developed by the first respondent in terms of section 100(2)(a) of the MPRDA or will be in accordance with the *Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry* published in Government Notice 838, *Government Gazette 33573* dated 20 September 2010 (**2010 Charter**) and grants such right, 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 (as defined in section 1 of the MPRDA) (**HDPs**) or historically disadvantaged South Africans as defined in the Original Charter and in the 2010 Charter) (**HDSAs**) to the 26% target referred to in the Original Charter and in the 2010 Charter where such percentage falls below 26%;

- 1.2 once the first respondent or his delegate converts an old order mining right in terms of item 7(3) of Schedule II to the MPRDA and the holder of such converted right complies with the undertaking provided in terms of item 7(2)(k) the holder of such converted mining right is not legally obliged to restore the percentage ownership (howsoever measured, *inter alia* wholly or partially by attributable units of South African production controlled) by HDPs or HDSAs to the 26% target referred to in the Original Charter and in the 2010 Charter where thereafter such percentage falls below 26%;

- 1.3 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, and in particular a failure to maintain (should the court find that there is an obligation to do so) a 26% HDP or HDSA ownership level, does not constitute a contravention of "this Act" as defined in section 1 of the MPRDA, and in particular does not constitute a contravention for the purposes of sections 47(1)(a) or 93(1)(a), and further does not constitute an offence for the purposes of section 98(a)(viii);
- 1.4 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 empowerment transactions to address losses in HDP or HDSA ownership once the 26% ownership level has been achieved;
- 1.5 neither the Original Charter nor the 2010 Charter requires that HDP or HDSA ownership must include HDP or HDSA entrepreneurs, workers (including employee share option schemes), and/or communities;
- 1.6 paragraph 2.1 of the 2010 Charter is *ultra vires* the powers of the first respondent and void in that it purports retrospectively to deprive holders of mining rights or converted mining rights of the benefit of:
- 1.6.1 the capacity for offsets which would entail credits/offsets to allow for flexibility;

- 1.6.2 the continuing consequences of empowerment transactions concluded by them after the coming into force of the MPRDA, which benefits were conferred by the Original Charter;
  - 1.6.3 the right, where a company 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;
  - 1.6.4 the entitlement to offset the full value of the level of beneficiation achieved by the Company against its HDSA ownership commitments; and
  - 1.6.5 all forms of ownership and participation by HDPs and HDSAs, and not only those which fall within the definition of "*meaningful economic participation*" as defined in the 2010 Charter, being taken into account;
- 1.7 paragraph 3 of the 2010 Charter is *ultra vires* the powers of the first respondent and void in that it purports to render holders of mining rights or converted mining rights who fail to comply with the Original Charter or with the 2010 Charter and the MPRDA in breach of the MPRDA and subject to the provisions of section 47 thereof read in conjunction with sections 98 and 99.
- 2 Directing that any respondent that opposes the relief sought in this application shall pay the costs thereof.
- 3 Granting further or alternative relief.

AND THAT the accompanying affidavit of **AMBROSE VUSUMUZI RICHARD MABENA**, together with the annexures thereto, will be used in support of this application.

TAKE NOTICE FURTHER that the Applicant has appointed **Norton Rose Fulbright South Africa Inc** care of **Mothle Jooma Sabdia Inc** at the address set out here below at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER that if the Respondent intends opposing the relief sought in this application, it is required to –

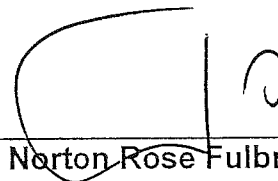
- (a) Notify the Applicant's attorneys in writing of its intention to oppose this application within 5 days of the date of this notice of motion; and
- (b) Deliver its answering affidavit, if any, no later than 15 days after delivering its notice of intention to oppose.

AND FURTHER that the Respondent is to appoint in such notification an address referred to in Rule 6(5)(b) at which it will accept notice and service of all documents on these proceedings.

If no such notice of intention to oppose is given, the application will be made on

21 July 2015 at **10:00** or soon thereafter as counsel may be heard.

Dated at Sandton on this the 4<sup>th</sup> day of June 2015

  
 Norton Rose Fulbright South Africa Inc

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**To:**

The Registrar of the above  
 Honourable Court, Pretoria

**And to:**

**The Minister of Mineral Resources**

**Department of Mineral Resources**

First Respondent

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**c/o The State Attorney**

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Fax: 012 328 2663

**[SERVICE PER SHERIFF]**

And to:

**Director-General: Department of Mineral Resources**

Second Respondent

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**c/o The State Attorney**

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[SERVICE PER SHERIFF]

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case no: 41661/15

In the matter between:

**The Chamber of Mines of South Africa**

Applicant

and

**Minister of Mineral Resources**

First Respondent

**Director-General, Department of Mineral Resources**

Second Respondent

---

**FOUNDING AFFIDAVIT**

---

I, the undersigned

**AMBROSE VUSUMUZI RICHARD MABENA**

hereby say on oath that:

**1 Deponent, definitions, the case in outline and structure of affidavit**

**1.1** I am the Senior Executive: Transformation and Stakeholder Relations of the Chamber of Mines of South Africa (**Chamber**). I am duly authorised to represent the Chamber in launching this application and deposing to this affidavit on its behalf.

1.2 The facts in this affidavit are true and correct and, unless otherwise stated or the contrary appears from the context, are within my personal knowledge. Legal submissions in this affidavit are made on the advice of the Chamber's legal advisors.

1.3 In this affidavit, the following definitions are used:

1.3.1 the *Mineral and Petroleum Resources Development Act, 2002* is the **MPRDA**;

1.3.2 the "Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)" published in Government Notice 1639, Government Gazette 26661 dated 13 August 2004 is the **Original Charter**;

1.3.3 the "Amendment of the Broad-based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry" published in Government Notice 838, Government Gazette 33573 dated 20 September 2010 is the **2010 Charter**;

1.3.4 Where appropriate the Original Charter and the 2010 Charter will be referred to collectively as the **Charters**.

1.4 The focus of this application is the ownership aspect of the Charters in so far as they relate to historically disadvantaged persons (**HDPs**) as



defined in section 1 of the MPRDA or to historically disadvantaged South Africans (HDSAs) as defined in the Charters.

- 1.5 The parties disagree about the proper meaning of these provisions of the Charter and how they may lawfully be applied, about their legal force and about the power of the Minister of Mineral Resources to use the enforcement provisions in the MPDRA to compel compliance with them in the face of disagreement about their proper interpretation. They have agreed that this Court should be approached for declaratory relief in relation to the following legal disputes.
- 1.6 As a prelude to what follows, I would emphasise that the Chamber and its members fully support the transformation objectives of the MPRDA and the Charters and have made significant progress on all elements of the Charters including meeting and exceeding the ownership target. The Chamber's members continued to support and facilitate HDSA ownership even in the face of the collapse of mining equities and constrained markets. This created significant momentum in HDSA ownership, in the mining sector and beyond. All of this is demonstrated by the fact that, as revealed in annexure "FA21" hereto to which further reference will be made below, as at the end of 2014 meaningful economic empowerment participation by HDSAs has been 38% on average, with meaningful economic value transfer of more than R159 billion. The Chamber submits that annexure "FA21" demonstrates the Chamber's members' commitment to transformation and to the spirit of the Charters.



1.7 The first dispute is about whether:

1.7.1 in the case of section 23 applications for mining rights, the successful applicant has a continuing obligation after the grant of such application to replenish any diminution in the 26% HDSA ownership level occurring after such grant; and

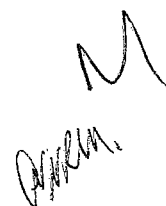
1.7.2 in the case of a conversion of an old order mining right under item 7(2)(k) of Schedule II to the MPRDA, the holder of a converted mining right has a continuing obligation, after reaching the required 26% HDSA ownership level, to replenish any diminution in that level from time to time.

1.8 The Minister's view, on the one hand, is that in both the circumstances referred to above, the holder of the mining right or of the converted mining right, has a continuing obligation to replenish any diminution in the 26% HDSA ownership level. The Chamber and its members, on the other hand, are of the view that no such continuing obligation exists.

1.9 The second dispute is about whether the Minister may use the provisions of the MPRDA to compel compliance with the 26% HDSA ownership levels in the Charters.

1.10 The third dispute is about the calculation of the 26% HDSA ownership target. Parties to the Original Charter agreed that compliance with the target would be measured on the basis of the following principles:

- 1.10.1 Government and industry recognised that one of the means of effecting entry of HDSAs into the mining industry and of allowing HDSAs to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSAs;
- 1.10.2 both active and passive involvement, and all forms of participation, would be considered for purposes of calculating ownership and participation by HDSAs;
- 1.10.3 for purposes of both active and passive involvement, the measure of transformation would include market share as measured by attributable units of South African production controlled by HDSAs;
- 1.10.4 credits or offsets would be permissible to allow for flexibility;
- 1.10.5 the full value of the level of beneficiation achieved would be offset against its HDSA ownership commitments;
- 1.10.6 where a company had achieved HDSA participation in excess of any set target in a particular operation, then such excess may be utilised to offset any shortfall in its other operations; and
- 1.10.7 the continuing consequences of all previous empowerment transactions (referred to in the Original Charter as "deals") would be included in calculating such credit/offsets in terms of



market share as measured by attributable units of production  
(**continuing consequences principle**).

1.11 I will refer to these as the **Charter principles**.

1.12 The 2010 Charter, however, departed from the Charter principles and provided the following:

1.12.1 only the continuing consequences of deals concluded *prior to the promulgation of the MPRDA on 1 May 2004* would be included in the calculation (**continuing consequences limitation**);

1.12.2 the only offsets permissible would be against the value of beneficiation and would be limited to offsets not exceeding 11%; and

1.12.3 the 26% ownership target was linked to the achievement of "*meaningful economic participation*" of HDSAs, defined to include, *among other things*, BEE transactions concluded with BEE entrepreneurs, workers (including through employee share ownership schemes (**ESOPS**)) and communities.

1.13 The Chamber disagrees with the Minister's calculation of compliance with the 26% target, and in particular with his reliance on provisions of the 2010 Charter that depart from the Charter principles.

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1.14 The fourth dispute is about the 2010 Charter and whether certain of its provisions are *ultra vires* and void. The Court is asked to declare that the following provisions of the 2010 Charter are *ultra vires* and void:

1.14.1 the entitlement to offset the full value of the level of beneficiation achieved by the Company against its HDSA ownership commitments;

1.14.2 all forms of ownership and participation by HDPs and HDSAs, and not only those which fall within the definition of "*meaningful economic participation*" as defined in the 2010 Charter, being taken into account;

1.14.3 Paragraph 3, which purports to render holders of mining rights or converted mining rights who fail to comply with the Charters in breach of the MPRDA and subject to the provisions of section 47, read with sections 98 and 99.

1.15 This affidavit is divided into the following parts:

1.15.1 Part 1 deals with introductory matters, including the publication of the Original and 2010 Charters.

1.15.2 Part 2 deals with the circumstances leading to the bringing of this application.

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1.15.3 Part 3 deals with the legal disputes in respect of which declaratory orders are sought.

## 2 Part 1: Introduction

### 2.1 The Parties

2.1.1 The applicant is the Chamber.

- (1) It is registered as an employers' organisation in terms of section 96(3) of the *Labour Relations Act, 1995*.
- (2) It carries on business at 5 Hollard Street, Johannesburg.
- (3) It is a voluntary association that has the power to sue and be sued in its own name.
- (4) The Chamber's members comprise mining finance companies and mines operating in the gold, coal, diamond, platinum, lead, iron ore, rutile, zircon, ilmenite, leucoxene, monazite, magnetite and other associated minerals, antimony and copper mining sectors. A list of the Chamber's members is attached as "FA1". The members of the applicant affected by this application are those mining companies who are either holders of, or applicants for, mining rights under the MPRDA. In this affidavit I refer to these affected members of the applicant as **mining companies**.

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QWEN

- (5) In terms of paragraph 2(a) of its constitution, one of the objects and powers of the Chamber is to "advance, promote and protect the mining and other interests of its members" and to "assist... in the prosecution...of actions involving questions the decisions whereof are likely to affect the common interests of its members". A copy of its constitution is attached as "FA2".
- (6) The Chamber is the principal advocate of major policy decisions endorsed by the mining companies and represents these to various organs of South African national and provincial governments and to other relevant policy-making and opinion-forming entities, both within South Africa and abroad. The Chamber also works closely with the various employee organisations in formulating these positions where appropriate.
- (7) It is a signatory to the Original Charter and represents industry in the forums established in order to review performance under the Charters.
- 2.1.2 The Chamber brings this application on its own behalf and in the interest of its members.
- 2.1.3 The first respondent is the Minister of Mineral Resources of the Republic of South Africa (**Minister**):-

M  
Anthem.

- (1) The Minister's address is at 2<sup>nd</sup> Floor, Block 2B, Travenna Campus, 71 Meintjies Street, Cnr Meintjies Street and Frances Baard (formerly Schoeman) Street, Sunnyside, Pretoria.
- (2) The Minister is cited in this application in his official capacity as the responsible minister under the provisions of the MPRDA and because of his involvement and interest in this matter.

2.1.4 The second respondent is the Director-General of the Department of Mineral Resources (DG).

- (1) The DG's address is Second Floor, Block 2B Travenna Campus, 71 Meintjies Street, Cnr Meintjies Street and Frances Baard (formerly Schoeman) Street, Sunnyside, Pretoria.
- (2) The DG is cited in this application in his official capacity as the representative of the Department of Mineral Resources (Department).
- (3) The DG is cited for his involvement and interest in this matter. The Deputy Directors-General in the Department report to the DG, who exercises control over the performances of their functions. Although the Deputy Directors-General participated in the discussions referred to

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below, they are not cited separately and any order made in respect of the Minister and the DG will, I am advised, bind all functionaries employed in the Department.

2.1.5 This is an application for a number of declaratory orders to determine certain legal disputes which have arisen between the Chamber and its members, on the one hand, and the Minister and his functionaries, on the other. The disputes are about the interpretation and implementation of the Charters. The Minister and the Chamber agree that it is appropriate and necessary that this court determine the various legal disputes between them. The disputes are neither academic nor abstract. Their resolution is a matter of great importance for both the Chamber and mining companies, on the one hand, and for the Minister and his Department, on the other hand.

## 2.2 The Original Charter

2.2.1 The MPRDA requirement to develop a Charter (3 October 2002)

- (1) The MPRDA was assented to on 3 October 2002, and took effect from 1 May 2004.

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- (2) Section 2(d) of the MPRDA provided at the time<sup>1</sup> that it was one of the objects of the Act to:

“substantially and meaning fully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources;

- (3) Section 100(2) of the MPRDA provided<sup>2</sup> the following:

- (2) (a) To ensure the attainment of Government’s objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad based socio-economic empowerment Charter that will set the framework-targets and timetable for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources.
- (b) The Charter must set out, amongst others how the objects referred to in section 2 (c), (d), (e), (f) and (i) can be achieved.”

## 2.2.2 Reaching agreement on the Charter (October 2003)

<sup>1</sup> This provision was subsequently amended in terms of the *Amendment Act 49 of 2008*. The provision as amended now reads as follows: “(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women and communities, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation’s mineral and petroleum resources;”.

<sup>2</sup> This provision was subsequently amended in terms of the *Amendment Act 49 of 2008*. The provision as amended now reads as follows: “(a) To ensure the attainment of the Government’s objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.”.

M  
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- (1) The Minister initiated a process of consultation with industry stakeholders in order to reach agreement on the contents of the charter contemplated in section 100(2) of the MPRDA.
- (2) Representatives of the Department (then called the Department of Minerals and Energy), the Chamber, the South African Mineral Development Association (**SAMDA**) and the National Union of Mineworkers (**NUM**) were involved in these consultations.
- (3) On 11 October 2003 the stakeholders reached agreement on a proposed charter.

#### 2.2.3 Publishing the Original Charter (13 August 2004)

- (1) The Original Charter was published on 13 August 2004. A copy of this charter is attached as "**FA3**".
- (2) It was the vision of the parties that all the actions and commitments contained in the Original Charter would be:

"in the pursuit of a shared vision of a globally competitive mining industry that draws on the human and financial resources of all South Africa's people and offers real benefits to all South Africans. The goal of the empowerment charter is to create an industry that will proudly reflect the promise of a non-racial South Africa."

- (3) The preamble of the Original Charter recognised, amongst other things, the mining industry's stated intention to adopt

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a "proactive strategy of change to foster and encourage black economic empowerment (**BEE**) and transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development".

(4) The preamble also noted the following:

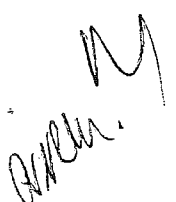
- "It is government's stated policy that whilst playing a facilitating role in the transformation of the ownership profile of the mining industry it will allow the market to play a key role in achieving this end and it is not the government's intention to nationalise the mining industry.
- The key objectives of the Mineral and Petroleum Resources Development Act and that of the Charter will be realised only when South Africa's mining industry succeeds in the international market place where it must seek a large part of its investment and where it overwhelmingly sells its product and when the socio-economic challenges facing the industry are addressed in a significant and meaningful way.
- The transfer of ownership in the industry must take place in a transparent manner and for fair market value."

(5) It was agreed by the signatories to the Original Charter that government's regulatory framework and industry agreements would strive to facilitate the objectives of this charter.

#### 2.2.4 The ownership commitment in the Original Charter

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- (1) All the stakeholders undertook in paragraph 4 of the Original Charter to create an enabling environment for the empowerment of HDSAs by subscribing to a number of commitments. The relevant one for present purposes is the "Ownership and Joint Ventures" commitment in paragraph 4.7.
- (2) In making this commitment, both government and industry recognised that one of the means of effecting the entry of HDSAs into the mining industry and of allowing HDSAs to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSAs.
- (3) The parties agreed that both active and passive involvement of HDSAs would be recognised.
  - (a) Passive involvement was defined as "greater than 0 percent and up to 100 percent ownership with no involvement in management, particularly broad based ownership like ESOPs [employee share option schemes]".
  - (b) Active involvement was stated to be:
    - "HDSA controlled companies (50 percent plus 1 vote), which includes management control.
    - Strategic joint ventures or partnerships (25 percent plus 1 vote). These would include a



management Agreement that provides for joint management and control and which would also provide for dispute resolution.

- Collective investment, through ESOPS and mining dedicated unit trusts. The majority ownership of these would need to be HDSA based. Such empowerment vehicles would allow the HDSA participants to vote collectively.”.

(4) The parties agreed in paragraph 4.7 of the Original Charter that the following indicators would apply in order to measure progress on the broad transformation front:

- The currency of measure of transformation and ownership could, inter alia, be market share as measured by attributable units of South African production controlled by HDSAs.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.
- The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.
- Government will consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period”.

#### 2.2.5 The 26% target in the Original Charter

(1) Based on these principles, and in order to increase participation and ownership by HDSAs in the mining industry, mining companies agreed that each company

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would achieve 26% HDSA ownership of the mining industry assets within 10 years.

- (2) It was further agreed that where a mining company had achieved HDSA participation in excess of any set target in a particular operation, then such excess may be utilised to offset any shortfall in its other operations.
- (3) All stakeholders accepted that transactions would take place "in a transparent manner and for fair market value".
- (4) Stakeholders agreed to meet after five years to review the progress and to determine what further steps, if any, needed to be made to achieve the 26% target (**five-year review commitment**).
- (5) In relation to financing participation in the industry, the industry agreed in paragraph 4.12 to assist HDSA companies in the amount of R100 billion within the first five years. This represented the 15% HDSA ownership necessary to enable lodgement of old order mining rights for conversion in terms of Item 7 in Schedule II to the MPRDA. Beyond that R100 billion commitment, it was agreed that HDSA participation would increase based on "a willing seller-willing buyer basis, at fair market value, where the mining companies are not at risk".

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#### 2.2.6 The review commitment in the Original Charter

- (1) In addition to the five-year review commitment, the signatories to the Original Charter also agreed in paragraph 4.14 thereof to a number of consultation, monitoring, evaluation and reporting mechanisms in respect of that charter.
- (2) Relevant for present purposes, they agreed to report on an annual basis on their progress to achieving their commitments, with these annual reports to be verified by their external auditors. This was a reflection of the reporting requirements in sections 25(2)(h) and 28(2)(c) of the MPRDA.
- (3) In addition, a review mechanism would be established which would provide flexibility to the company's Original Charter commitments.
- (4) The parties further agreed to participate in annual forums for the purposes of monitoring progress in the implementation of plans, and reviewing the Charter if required.

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## 2.3 Reviewing the Original Charter

### 2.3.1 Establishing MIGDETT (2008)

- (1) The Mining Industry Growth, Development and Empowerment Task Team (**MIGDETT**) was established in 2008 by Government to address transformation in the mining industry against the background of the world economic crisis.
- (2) MIGDETT is a tri-partite forum in which government (represented by the Department), industry (represented by industry bodies, the Chamber and the SAMDA) - and labour (represented by the trade unions NUM, the United Association of South Africa (**UASA**), subsequently the Association of Mining and Construction Union (**AMCU**), and Solidarity) participate.
- (3) The structure of MIGDETT is the following:
  - (a) The **Principals** – these are the office-bearers of the various stakeholders. These include:
    - (i) For the Department – the Minister, sometimes the Deputy Minister, the DG, and the Deputy DGs;

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- (ii) For the Chamber – the president, the two vice-presidents and the CEO;
  - (iii) For SAMDA – the chairperson and the president;
  - (iv) For organised labour – the presidents and the general-secretaries of the NUM, AMCU, UASA and Solidarity;
- (b) The Steering Committee (sometimes referred to, somewhat tautologically as the **MIGDETT Task Team**) – this is the structure comprising senior level leaders of the constituent parts of MIGDETT, headed by the DG; and
- (c) Three sub-committees – these are the Industry Stability Technical Task Team, the Competitiveness, Growth and Transformation Technical Task Team and the Sustainable Development Technical Task Team.

### 2.3.2 The Mining Charter Impact Assessment Report, October 2009

As contemplated in paragraph 4.14 of the Original Charter, the Department undertook an assessment to determine the extent to which the objectives of the Original Charter had been achieved. In the resultant report which was published in

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October 2009, paragraph 3.9, the conclusion was reached that analysis of the available data showed that aggregated BEE ownership of the mining industry had, at best, reached 9%. The mining industry was however not allowed to understand the basis of the assessment, nor was the mining industry given the opportunity to have its inputs and perspectives incorporated in the assessment and in the report.

#### 2.3.3 Charter revisions arising out of MIGDETT structures (2010)

- (1) In the course of 2010, various revisions of the Original Charter were suggested in the course of the tripartite efforts of the various MIGDETT structures. These included changes to the scorecard and to the definitions used in the Original Charter. No agreement had been reached on a limitation of the continuing consequences principle.
- (2) The tripartite MIGDETT review process resulted in a stakeholders' declaration of their commitments in this regard.

#### 2.3.4 The Stakeholders Declaration (30 June 2010)

- (1) On 30 June 2010 industry stakeholders, including the applicant and respondents, signed the "Stakeholders' Declaration on Strategy for the Sustainable Growth and

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Meaningful Transformation of South Africa's Mining Industry" (**Stakeholders' Declaration**).

(2) The Stakeholders' Declaration contained a number of commitments by the stakeholders:

(a) Commitment 6 dealt with the regulatory framework. It noted that "an internationally competitive regulatory framework is a key instrument to promote sustainable growth and meaningful transformation of the mining industry and that negative perceptions about the regulatory framework have adverse impact on the promotion of foreign investments". The parties committed to finalising the review of the Charter by August 2010.

(b) Commitment 12 reaffirmed the 26% target. There was no agreement to depart from the Charter Principles, and in particular, no agreement to limit the continuing consequences principle.

(c) Commitment 13, which dealt with monitoring and evaluation, recorded that the parties would comply with the annual progress reporting requirements, and that they would "monitor and

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take into account the impact of constraints beyond the stakeholders' control which may result in not achieving set targets".

## 2.4 The 2010 Charter

### 2.4.1 The introduction of the 2010 Charter (September 2010)

- (1) The Minister published the 2010 Charter in September 2010. A copy thereof is attached hereto marked "FA4". Industry stakeholders were not signatories to the 2010 Charter.
- (2) Although the publication of the 2010 Charter was preceded by a consultative process between the stakeholders who were signatories to the Original Charter, when the Chamber requested insertion of the reference to the continuing consequences principle, the Department, without consulting the Chamber, included the wording which resulted in the continuing consequences limitation. Government issued it as a regulatory instrument.
- (3) The 2010 Charter reflects in its preamble that it was issued pursuant to the five-year review commitment in the Original Charter. The following is stated in the preamble in this regard:

"In line with this provision, the DMR has concluded a comprehensive assessment to ascertain the

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progress of transformation of industry against the objectives of the Charter in the mining industry. The findings of the assessment identified a number of shortcomings in the manner in which the mining industry has implemented the various elements of the Charter, [including] ownership. To overcome these inadequacies, amendments are made to the Mining Charter of 2002 in order to streamline and expedite attainment of its objectives.”.

- (4) It is not known to which assessment findings the Minister referred. Possibly she was referring to the abovementioned Mining Charter Impact Assessment Report, October 2009.
- (5) It is also not known what “inadequacies” the Minister had in mind in introducing the changes in relation to the 26% target, or to what extent these inadequacies were thought to be addressed by the Minister’s departure from the Charter principles, the continuing consequences limitation, or the introduction of the penalty provisions.

#### 2.4.2 The ownership requirement in the 2010 Charter

- (1) Paragraph 2.1 of the 2010 Charter provided that in order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of HDSAs for attainment of sustainable growth of the mining industry, “stakeholders commit to”:
  - “- Achieve a minimum target of 26 percent ownership to enable meaningful economic participation of HDSA by 2014;

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- The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework.

The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/ offsets in terms of market share as measured by attributable units of production.”

- (2) “Meaningful economic participation” is defined to include, amongst others, the following “key attributes”:

- “- BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities;
- Barring any unfavourable market conditions, some of the cash flow should flow to the BEE partner throughout the term of the investment, and for this purpose, stakeholders will engage the financing entities In order to structure the BEE financing in a manner where a percentage of the cash-flow is used to service the funding of the structure, while the remaining amount is paid to the BEE beneficiaries. Accordingly, BEE entities are enabled to leverage equity henceforth in preparation to vested interest over the life of transaction in order to facilitate sustainable growth of BEE entities;
- BEE (*sic*) shall have full shareholder rights such as being entitled to full participation at annual general meetings and exercising of voting rights, regardless of the legal form of the instruments used;
- Ownership shall vest within the timeframes agreed with the BEE entity, taking into account market conditions.”.

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- (3) In paragraph 2.3 of the 2010 Charter, dealing with beneficiation, the Minister also introduced the following limitation:

“- Mining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11 percent”.

- (4) As set forth in prayer 1.6 of the notice of motion, the 2010 Charter refers to the 26% target as being a “commitment” by stakeholders. The stakeholders indeed did commit to this target in both the Original Charter and in the Stakeholders’ Declaration. The 2010 Charter, however, departed from the Charter principles on which that commitment was premised.
- (5) In the 2010 Charter the ability of mining companies to offset in the manner contemplated by the Original Charter in order to meet the target was materially limited. The continuing consequences limitation means not only that those consequences are limited to offsets or credits arising from the value of beneficiation, but also that they are limited to deals concluded prior to the promulgation of the MPRDA. This limitation, introduced in 2010, materially affected the ability of the mining companies to meet the target by 2014, including those mining companies which had already met the target.

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#### 2.4.3 The reporting requirement under the 2010 Charter

In paragraph 2.9 of the 2010 Charter the Minister provided that:

- (1) every mining company must report its level of compliance with the Mining Charter annually as provided in section 28(2)(c) of the MPRDA;
- (2) the Department shall monitor and evaluate, taking into account the impact of material constraints which may result in not achieving set targets.

#### 2.4.4 The penalty provisions

- (1) The 2010 Charter introduced in paragraph 3 a new provision regarding non-compliance. It provided the following:

"Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of section 47 read in conjunction with sections 98 and 99 of the Act."

- (2) Section 47 provides the following:

#### **47. Minister's power to suspend or cancel rights, permits or permissions.**

- (1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit, retention permit or holders of old order

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rights or previous owner of works, if the holder or owner thereof—

- (a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;
- (b) breaches any material term or condition of such right, permit or permission;
- (c) is contravening to any condition in the environmental authorisation;
- (d) has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application or in connection with any matter required to be submitted under this Act”.

- (3) Section 98 renders non-compliance with the Act an offence in certain circumstances. Section 99 sets the penalties for such offences.

### **3 Part 2: Circumstances leading to this application**

#### **3.1 The Charter compliance assessment process**

##### **3.1.1 The Charter audit (2013)**

- (1) In 2012 the DMR commissioned auditing firm Moloto Solutions to assess the Mining Industry’s performance in relation to the Charter for 2012 and 2013.
- (2) For purposes of the review process, templates were created which would be used to gather detailed information from mining right holders relating to a range of issues, including

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information on economic participation in the business of the mining right holder concerned, the identity of HDSA participants in the business and the vehicles through which HDSAs benefited economically. These vehicles included community structures, ESOPs, broad-based black economic empowerment (BB-BEE) companies or other BB-BEE groups or structures.

- (3) The industry participants agreed that the audit results would not be made public, but that the companies would be given individual feedback. The feedback was not, however, given to the mining companies.

### 3.1.2 The compliance assessment process and consultation on templates (October and November 2014)

- (1) The Department had decided to use the audit templates prepared by Moloto as the point of departure for the compliance assessment process. They wished to make some changes to the template, however, to simplify the template and for it to be more in line with the 2010 Charter. The Department approached industry to obtain its inputs and comments in this regard.
- (2) In October 2014, the Department initiated engagement with mining companies regarding the template for the assessment of their performance against the 2010 Charter.

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- (3) The engagements involved consultations, in the course of which the Department explained the template, and collected comments from companies in this regard. The final template had not, however, been released.
- (4) The Chamber facilitated meetings between its members and the Department regarding the compliance assessment process.
- (5) There were meetings of the Charter Reference Group on 6 and 25 November 2014 but at which the issue of the continuing consequences limitation was not raised since the DDG was not in attendance.
- (6) However at the meeting of the Charter Reference Group on 12 November 2014 the DDG stated the following:
  - (a) The continuing consequences limitation would be applied for purposes of measuring compliance with the ownership target in the 2010 Charter. This means that no BB-BEE transactions concluded after 1 May 2004 would be accepted for purposes of measuring compliance with the ownership element of the 2010 Charter.
  - (b) The "once empowered, always empowered" principle would not be applied by the DMR in measuring

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Charter compliance. This is the principle that a mining right holder retains its empowerment status as contemplated in section 23(1)(h) and Item 7(2)(k) in Schedule II of the MPRDA after being granted a mining right regardless of a subsequent reduction or change in HDSA ownership.

### 3.1.3 Migdett Principals meeting (5 December 2014)

- (1) The DMR provided a simplified template for discussion and to finalise the review process.
- (2) On 5 December 2014, at a MIGDETT Principals meeting, the stakeholders considered the simplified template and the timing of the review and reporting process.
- (3) At this meeting, the Chamber raised a concern about the requirements for ownership as contemplated in the template. SAMDA highlighted that ownership remained a burning issue which the DMR still needed to clarify. The meeting resolved that the outstanding matters of clarity be dealt with a part of on-going engagement within the established process dealing with the Charters.

### 3.1.4 Comments in the press attributed to the Minister (16 January 2015)

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On 16 January 2015 an article appeared in the Business Day in which the Minister was quoted as stating that "he will no longer accept 'once-off empowerment' principle for those whose BEE deals have ended". A copy of this article is attached hereto marked "FA5".

3.1.5 Presenting the final template and announcing deadlines (30 January 2015)

- (1) On 30 January 2015 the Department convened a MIGDETT meeting of all stakeholders to present the final template and announce the deadlines for submitting the templates for the years 2012, 2013 and 2014.
- (2) Because the returns for 2012 and 2013 had been based on the Moloto audit templates, which were not web-based, the Department on 30 January 2015 requested mining rights holders effectively to re-submit the annual return information for the years 2012 and 2013.
- (3) The Department set the deadline for online submission of the completed template questionnaires for the 2012 and 2013 reporting periods as 28 February 2015.
- (4) In respect of the 2014 reporting period, the original deadline, as imposed by the 2010 Charter initially remained as 31 March 2015. During early February 2015, the

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Department brought this deadline forward to 7 March 2015, but later extended it to 14 March 2015.

3.1.6 The release of the audit templates (3 February 2015)

On 3 February 2015, the Department released the audit templates for completion by mining companies.

3.1.7 The Chamber's letter to the DDG (5 February 2015)

- (1) On 5 February 2015 the Chamber's Chief Executive Officer, Mr Bheki Sibiya, sent a letter to the DDG in which he raised the industry's disagreements with the ownership element. A copy of this letter is attached as "FA6".
- (2) In this letter, the Chamber emphasised that the exclusion of the continuing consequences of previous deals from consideration would materially prejudice the mining sector. It would penalise mining companies which had concluded empowerment agreements for value in compliance with the MPRDA after its promulgation and in compliance with the Charters, in circumstances where their HDSA partner had exited the transaction – the power to stop such exiting not being within the power or control of the mining companies.
- (3) The letter also pointed out that the audit template's ownership component would deliver an inaccurate,

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incomplete and misleading result. The reasons for this included the following:

- (a) The exclusion from consideration of post-MPRDA deals failed to reflect the value of those deals that had in fact resulted in actual empowerment of BEE partners, despite their subsequent exit of the BEE partners from the deal.
  - (b) Many of the post-MPRDA deals now excluded were approved by the Department prior to the introduction of the 2010 Charter.
  - (c) The audit template failed to reflect the value of the transactions at the time of the deal, but only reflect current value at the time of submission.
- (4) The Chamber requested the following from the Department:
- (a) an explanation of the methodology employed by the Department in collating and processing information;
  - (b) an opportunity to engage with the Department in the event of a disagreement on the Department's interpretation of the information; and

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- (c) a commitment that, prior to publication, the affected mining companies first be provided with their results.

- (5) There was no written response to this request, instead the parties met on 8 February 2015, as dealt with below.

### 3.1.8 The bilateral meeting between the parties (8 February 2015)

On 8 February 2015 a bilateral meeting was held in Cape Town between representatives of the respondents (including the Minister, the DDG and senior officials of the Department) and the president of the Chamber. At this meeting, the Minister echoed his support for the DDG's contention that past transactions will not be included in the template or compliance assessment process underway.

### 3.1.9 The investor forum (9 February 2015)

On 9 February 2015 the DDG addressed a closed investor forum where he indicated that the Mining Charter review results would be released at the end of March. He stated that the "once empowered always empowered" principle was a matter of compliance with the law. He stated that, since 2010, the 2010 Charter limited the application of this principle. Whether or not the target has been achieved would be assessed in line with this principle.

### 3.1.10 The launch of the MCMIS (9 February 2015)

- (1) Also on 9 February 2015 the DMR officially launched a web-based system to measure compliance with the 2010 Charter, called the Mining Charter Management Information System (**MCMIS**).
- (2) The MCMIS, in the words of the DMR, "allows the mining companies to capture data in regard to the level of compliance with the Mining Charter."
- (3) The template used in the MCMIS did not allow submissions of post-2004 deal data.

### 3.1.11 The Chamber Council meeting (17 February 2015)

- (1) On 17 February 2015, an emergency Chamber Council meeting was held to discuss the Minister's intention to exclude past transactions from the Charter assessment.
- (2) At this meeting, the Chamber was presented with information, sourced from Deal Makers Online, that the value of BB-BEE transactions in the mining industry over the fifteen years between 2000 and 2015 totalled R138 billion, of which only 32 transactions to a value of R7 billion pre-dated 2004.



- (3) The Chamber was also presented with an analysis of member data that showed the following impact of the continuing consequences limitation on the compliance levels of its members:

- (a) In the gold and platinum sector a 5-15% loss;
- (b) In the coal, iron ore, manganese ore and diamond sector a 0-5% loss.

- (4) The Council noted the following implications of the Minister's approach for mining companies:

- (a) The resulting loss of investor confidence, in particular the destruction of remaining investor appetite for South African mining equities;
- (b) The constraints it introduced in capital allocation, including the further weakening of balance sheets, and reduction in dividend and capital spends;
- (c) Flat or reduced production rates as a result of lower capital spend; and
- (d) Further strain on employment and community relations.

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- (5) In light of these potentially damaging implications, it was decided at this meeting that a last attempt would be made to meet with the Minister and engage with him on the issue.

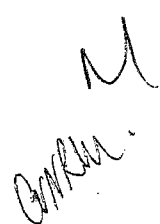
3.1.12 The meeting with the Minister (23 February 2015)

- (1) On 23 February 2015, the president of the Chamber, Mr Mike Teke, and the Honourable Minister Ngoako Ramatlhodi met in Johannesburg.
- (2) At this meeting, Mr Teke delivered to the Minister a letter addressed to him on behalf of the Chamber which raises the Chamber's concerns regarding the exclusion of the post-MPRDA empowerment deals from the continuing consequence principle. A copy of this letter is attached as "FA7".
- (3) In this letter, the following was brought to the Minister's attention:
  - (a) Excluding from consideration post-MPRDA deals where the HDSA partner has exited will result in a material misrepresentation of the facts regarding the mining industry's contribution to ownership of mining assets by HDSAs.
  - (b) For some companies in the gold and platinum sector the effect of the exclusion of those deals

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from consideration would result in it being represented that they have achieved only a 16% level of HDSA ownership, while they would have achieved and exceeded the 26% target based on the continuing consequences principle properly applied.

- (c) Excluding these deals involves reputational and regulatory risks to companies. Reporting the review results would trigger reporting duties to companies' shareholders. There is a risk of a negative impact on shareholder value.
  - (d) The continuing consequences limitation in the 2010 Charter was not introduced by mutual consent. Industry did not agree to its introduction, and does not agree with the Department's interpretation and application of the principle.
  - (e) The mining companies would need to take legal action to preserve their interest in these circumstances.
- (4) The letter called on the Minister to provide an opportunity for engagement in order to pursue an urgent resolution of the dispute.


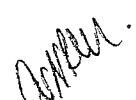
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### 3.1.13 The meeting with the Department (3 March 2015)

- (1) On 3 March 2015 the Chamber met with the Department to discuss progress on the Charter assessments as well as the challenges it posed to its members. I refer in this regard to the Chamber's Charter Reference Group Circular No 06/15 dated 4 March 2015, a copy of which is attached as "FA8".
- (2) Among other things, at that meeting the Department reaffirmed its commitment to involve all stakeholders in the review of Charter compliance report through the MIGDETT process prior to publicising it.

### 3.1.14 The "directive" to provide information (3 March 2015)

- (1) On 3 March 2015 Mr Heinrich Mundt, the Project Manager of the DMR Mining Charter project, sent an email to industry stakeholders. I attach a copy of this email as "FA9".
- (2) In the email Mr Mundt informed stakeholders that the Department had extended the deadline for the online submission of the Charter assessment questionnaires for the reporting period 2012, 2013 and 2014 from Saturday 28 February 2015 to 7 March 2015.
- (3) Mr Mundt in the email also purported to direct stakeholders in terms of section 29 of the MPRDA to make available the

information required in the Charter assessment questionnaire in the following terms:

"You are therefore directed in terms of Section 29 of the Mineral and Petroleum Resources Development Act to make available the required information as directed by the Department in the Web-based Mineral Resources Management Information System.

Companies are required to submit information which is accurate, correct and truthful. Failure to do so amounts to a contravention of the provisions contained in the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002)."

- (4) Section 29(b) provides that the Minister may, in order to achieve the objects of the MPRDA and to fulfil any of the functions in terms of the Act, direct in writing that specified information or data be submitted by a number of categories of persons, including, in section 29(b) any holder of a mining right.

#### 3.1.15 Response from the Minister (4 March 2015)

- (1) On 4 March 2015, the Minister responded by way of telephone call to the Chamber president to the Chamber's letter dated 23 February 2015.
- (2) He indicated that he was now aware of the industry's concerns. He shared the industry's concern about the disagreement on the continuing consequences principle.

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- (3) The Minister proposed that the Chamber should meet urgently with the DG in order to discuss the matter. The possibility was canvassed that companies that are materially affected by the continuing consequences limitation may be requested to make separate submissions to the Department.
- (4) I attach a copy of Council Circular 21/15 dated 4 March 2015 as "FA10", which sets out the Chamber president's account of the telephone conversation.

3.1.16 The meeting with the DG (6 March 2015)

- (1) As a result of the Minister's suggestion, the Chamber arranged to meet with the DG on 6 March 2015. I attach a copy of the Council Circular 22/15 dated 6 March 2015 as "FA11".
- (2) In the course of the meeting, the Chamber advised the DG that:
  - (a) The continuing consequences limitation would have a negative impact on the Chamber's members, and would harm their reputation. It would be contrary to the interest of the mining industry.

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- (b) The continuing consequences limitation had not been agreed to by the stakeholders, and had been introduced retrospectively.
- (c) The industry had met the spirit and intent of the Charters. The Department had acknowledged this by issuing rights to the mining companies based on their transformation plans. Various HDSA companies had sold their mining assets, in part due to the impact of the global financial crisis on the share price performance of mining companies. The mining companies could not, however, be held responsible for this.
- (d) The Department asked that the Chamber provide it with a document showing the scale of the problem caused by the application of the continuing consequences limitation. This would allow the respondents to assess properly the extent of the problem.

3.1.17 Memorandum to the DG on the impact of the limitation (7 March 2015)

- (1) On 7 March 2015 the Chamber provided the DG with the memorandum he requested on the impact on companies potentially affected by the exclusion of past empowerment

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transactions. A copy of this memorandum is attached as "FA12".

- (2) In its memorandum, the Chamber emphasised the following:
- (a) Mining companies had complied with the transformation objectives at the time that their mining rights had been granted by the Department.
  - (b) The fact that some HDSA participants had exited the mining deals in order to invest in other sectors, or that equity prices had fallen and resulted in challenges for BB-BEE deals, could not be held against the mining companies.
  - (c) The companies never agreed to limit the continuing consequences principle to deals prior to the promulgation of the MRPDA.
  - (d) It would be unfair to include this limitation retrospectively.
- (3) The Chamber had done an impact assessment of the continuing consequences limitation. It involved 23 mining companies, and covered 80 to 90% of the mining industry

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by value. The memorandum also included the results of this assessment, which showed the following:

- (a) All of these companies had met or exceeded the 26% target by 2014.
- (b) The value of empowerment transactions undertaken by the industry since 2000 equated to R205 billion (in 2014 money terms). A significant number of transactions were concluded between 2004 and 2010.
- (c) The empowerment level ranged from 26 to 50%.
- (d) The past transactions component of this was estimated to be between 0 and 17 % across the sector.
- (e) Of the 23 companies,
  - (i) two-thirds would experience a negative impact on their ownership scores if the continuing consequences of their previous deals were excluded;
  - (ii) one-third would be at risk of their ownership scores falling below 26%.

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- (f) There was also a risk of HDSA companies exiting their investment to realise value beyond 2014, which would impact negatively on future assessments.
- (g) All HDSA companies in the mining industry would be entitled at some stage to monetise value through the process of decreasing their shareholding or exiting deals. This was a normal consequence of all transactions, and did not mean that transformation had not taken place.
- (h) If the consequences of these deals were not included and the Department nevertheless insisted that companies had to retain a 26% HDSA level, this would force mining companies to perpetually dilute other shareholdings if the required HDSA companies could be found in the open market. This would result in shareholder revolt, significant divestment from mining companies and a significant constraint on companies to raise capital in future.

### 3.2 The MIGDETT feedback meeting (13 March 2015)

3.2.1 A MIGDETT Steering Committee meeting was held on 13 March 2015 at the Department's Pretoria offices. The purpose

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of the meeting was for the Department to provide feedback on its progress in collating the charter assessment questionnaires through the online MCMIS system. A copy of the Chamber Charter Reference Group Circular 08/15 is attached as "FA13".

3.2.2 At the meeting, the Department confirmed that 14 March 2015 would be the final date for all online submissions. Only the web-based template could be used. No other form of submissions could be made.

3.2.3 The DG had agreed at the meeting of the Transformation Task Team on 10 March 2015 to engage bilaterally with those companies who would be most adversely affected by the Minister's and the Department's interpretation of the continuing consequences limitation. On 13 March 2015, the DDG: Mineral Regulation provided feedback on this issue. The DG and departmental officials had met with some companies on a bilateral basis to allow them to present their ownership status to the Department and to address the specific impact of the continuing consequences limitation on their assessment.

3.2.4 The DDG raised the following key issues:

- (1) treatment of assets sold to HDSAs prior to 1 May 2004;

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- (2) treatment of assets sold after 1 May 2004 to HDSAs who had since disposed of their shareholding (or a portion of their shareholding) in the mining companies;
- (3) the "once empowered always empowered" principle;
- (4) the impact that company restructuring or unbundling has had on the empowerment credits of mining companies; and
- (5) BB-BEE transactions which were "under water" (that is, where the value of debt incurred by the shareholder in acquiring its shareholding exceeds the value thereof).

3.2.5 Whilst the Department recognised the complexities of ownership transactions for purposes of Charter compliance, the Department had been grappling with what it termed "double-dipping", namely where more than one company claimed credit for the same asset or HDSA shareholding. Accordingly, the DG, following the presentation by the DDG, emphasised that the Department would invite more companies to present on their HDSA ownership structures.

3.2.6 At the meeting the Chamber was afforded an opportunity to present its case on the continuing consequences principle. A copy of this presentation made by Ms Monique Mathys, Head of Economics of the Chamber, is attached as "FA14".

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3.2.7 In its presentation the Chamber emphasised the critical importance of recognition for the continuing consequences of previous empowerment transactions. The Chamber's presentation showed current industry trends in terms of which shareholders' value is impacted by struggling performance in the mining sector. As against these losses for shareholders, mining companies continued to support and facilitate HDSA ownership, to the extent of R205 billion since 2000, in the face of the collapse of mining equities and constrained capital markets. This created significant momentum in HDSA ownership, in the mining sector and beyond.

3.2.8 Against this background, a perpetual 26% requirement would destroy investor confidence. A perpetual lock-in for HDSA partners would imply no value realisation proposition.

3.2.9 In particular, the Chamber addressed:

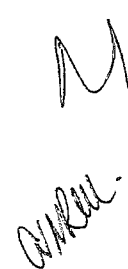
- (1) the constraints on ownership in the industry, including the declining size of the pie and the limited growth potential, including decreased investor appetite;
- (2) the fact that the industry had met and exceeded compliance requirements, despite challenges;

- (3) the limitations of taking a snapshot view of transformation at a particular point in time, when meaningful economic value occurs over an extended period; and
- (4) the implications of a narrow focus to analysing costs and benefits, without regard to capturing facilitation, discounts, opportunity costs and capital constraints.

3.2.10 In response, a departmental official cautioned that it was not for the Chamber to determine whether companies were compliant with the ownership element of the Charter scorecard, but that it was for the Department to make that determination.

3.2.11 Ms Mathys explained that the Chamber's submission was based on the fact that Charter compliance by mining right holders ought to be measured as at the date they were granted their respective mining rights or converted mining rights. In this regard:

- (1) Mining rights were only issued on the basis of an agreed HDSA ownership plan, past or present.
- (2) Companies have complied and exceeded compliance targets, based on these agreed plans that had been agreed with the regulator.

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- (3) HDSA structures, including provision for participation and exit, had been approved by the Department in its capacity as regulator.

3.2.12 The DG said that because the Department was still in the process of collating and considering the completed assessment questionnaires, the MIGDETT Steering Committee meeting which had been scheduled for 19 March 2015 might have to be postponed. In the event, the meeting was indeed postponed to 24 March 2015.

### 3.3 The MIGDETT Steering Committee meeting (24 March 2015)

3.3.1 At the 24 March 2015 meeting of the MIGDETT Steering Committee, Ms Khensani Maseko, a Department official, made a presentation to the meeting on the progress the Department had made in collating the Charter assessment questionnaires.

3.3.2 Ms Maseko dealt with the ownership element of the Mining Charter scorecard. She dealt with three generic components of the 26% target:

- (1) identifiable beneficiaries in the form of HDSA entrepreneurs, ESOPs and local communities;
- (2) cash-flow to beneficiaries and servicing of debt; and
- (3) shareholder voting rights.

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- 3.3.3 She made no reference to the continuing consequences principle in relation to the scoring principles for Ownership. A copy of the relevant slide from her slide presentation is annexed marked "FA15".
- 3.3.4 At this meeting the Department first notified the other stakeholders of the scoring principles it had applied to measure mining right holders' compliance with the targets in the scorecard.
- 3.3.5 In respect of the ownership element of the scorecard, the Department indicated that it would treat mining right holders as either compliant (indicated by a "Y" in the scorecard) or non-compliant (indicated by an "N"). A mining right holder would be considered non-compliant if it failed to comply with any of the three generic components.
- 3.3.6 The three generic elements were only introduced in 2010 by way of the 2010 Charter. Mining right holders who concluded BB-BEE transactions prior to the introduction of the 2010 Charter, would accordingly be found non-compliant retrospectively.
- 3.3.7 For example, if a mining right holder sold 50% of its shares to an HDSA entrepreneur, but did not take any steps to comply with the other two elements, the company would be rendered non-compliant, retrospectively, measured, in terms of the



Department's scoring principles. This would be the case despite the mining company having far exceeded the minimum requirement of 26% HDSA ownership.

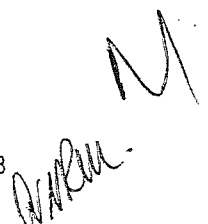
- 3.3.8 The DG said that all information returned by mining right holders in their completed template questionnaires would be presented in the Department's final report.

3.4 The 26 March 2015 meeting

- 3.4.1 The MIGDETT Principals meeting scheduled for 27 March 2015 was brought forward to 26 March 2015. It was held at the Department's Pretoria offices.

- 3.4.2 The meeting was chaired by the Minister and attended by, amongst others, the DG, Chamber president Mr Mike Teke, vice president Ms Khanyisile Kweyama, chief executive Mr Bheki Sibiya, Ms Mathys, representatives from the unions and SAMDA, and me.

- 3.4.3 The DG made a presentation regarding progress regarding the Charter assessment report, based on the returned Charter assessment questionnaires. His slide presentation contained a slide dealing with the ownership element of the Charters' scorecard, which differed from the ownership element slide of Ms Maseko's presentation on 24 March 2015. A copy of the DG's slide is annexed marked "FA16".

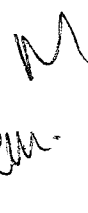


3.4.4 In particular, the DG's slide differed from Ms Maseko's slide in that it set out five categories which purportedly made up the scoring principles for the ownership element for purposes of measuring compliance. The first category was framed as "continuing consequence of previous deals concluded pre-charter will be considered (2004)", whereas Ms Maseko's slide referred to in paragraph 3.3.3 above made no reference at all to the continuing consequences principle.

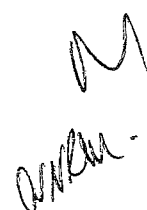
3.4.5 After the DG's presentation, the meeting was invited to respond to the presentation. In her response, on behalf of the Chamber, Ms Mathys:

- (1) pointed out that the DG's slide "**FA16**" differed from Ms Maseko's slide "**FA15**" in the respects set out above;
- (2) noted the exclusion of post-1 May 2004 empowerment transactions;
- (3) reiterated the Chamber's objection to the Department's interpretation of the continuing consequences principle; and
- (4) emphasised that the implication of this interpretation – the exclusion of post-1 May 2004 empowerment transactions – remained a significant concern for the Chamber and its members.

3.4.6 To this the Minister responded, in relevant part, as follows:



- (1) He was very concerned about the ownership aspect of Charter compliance;
- (2) He recommended that the MIGDETT Principals convene a special meeting on 31 March 2015 to agree a mechanism to clarify the law, in particular for the parties to explore approaching the court for a declaratory order with regard to the differing interpretation of the continuing consequences principle.
- (3) The Minister expressed surprise that a gazetted document (a reference to the publication of the 2010 Charter in the Government Gazette in 2010) was now being questioned by the Chamber, in their letter of 22 February 2015 to him (which was handed to him by Mr Teke on 23 February 2015, as mentioned above).
- (4) The Minister said that the day after the proposed special meeting on 31 March 2015 the Department would hold a media conference to publish the results of the Mining Charter assessment report, based on the returned charter assessment questionnaires. He said that the media conference would be "handled responsibly", but that the Department "would not shy away from the law", or words to that effect.



- (5) The Minister expressed concern as to the extent of the alleged non-compliance of the industry with the Charters.
- (6) The Minister intimated that the Department intended to “implement the law” and would be doing so. It would hold mining companies accountable for non-compliance, based on the Department’s interpretation of the continuing consequences principle, pending determination of the issue, in due course, by way of declaratory order. In the meantime, the Department also intended to proceed with the media conference planned for 1 April 2015 at which it intended to publish the results of the assessment.

3.4.7 The Minister made specific reference to the negative consequences the media conference would have for the mining industry overall, in particular with regard to company value and employment.

3.4.8 In reply to the Minister, Mr Teke said that the Chamber would support a declaratory order being sought.

### 3.5 Relevant post-26 March 2015 events

3.5.1 The meeting with the Minister on 29 March 2015

- (1) On 29 March 2015, the President of the Chamber, Mr Mike Teke, and the Minister met in Cape Town.

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(2) At this meeting, Mr Teke raised the following with the Minister:

- (a) The Chamber differed from the Minister on his interpretation of the ownership element of the Charters, as enunciated by him at the 26 March 2015 MIGDETT Principals meeting (dealt with above).
- (b) Publication of a report by the Department that the mining industry does not comply with the Charters (based on the Department's interpretation) is likely to precipitate an extremely adverse market reaction.
- (c) The correct course of action would be to avoid the incalculable permanent damage to South Africa's investment image by applying to court to seek legal certainty on the interpretation of the Charters.

(3) The Minister agreed that a declaration application was necessary to provide certainty on the interpretation of the ownership element of the Charters. The Minister said that he still needed to release a report on the Charter assessment, as the report will cover not only the ownership element but also all the other pillars of the Charter.

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However, the Minister agreed that the report would be an interim one, pending the finalisation of the declaration application.

### 3.5.2 The MIGDETT Principals special meeting on 31 March 2015

- (1) This meeting, mentioned by the Minister at the 26 March 2015 meeting, indeed took place on 31 March 2015. It was held at the Department's Pretoria office.
- (2) At this meeting, the Department presented its preliminary Charter assessment results to the Principals. Some representatives, in particular those representing the labour components, noted their objection to the arrangement that the results of the assessment in respect of the ownership element would not be released. This was because, they contended, the ownership was at the heart of transformation in the industry.
- (3) However, the Minister again undertook not to release the results on the ownership element, until such time as the court has determined the declaration application.

### 3.5.3 The media conference on 31 March 2015

- (1) The media conference initially planned for 1 April 2015 (as dealt with above) had in the meantime been brought forward to midday on 31 March 2015. Shortly after the

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conclusion of the MIGDETT Principals special meeting held earlier that day, the Minister addressed a media conference where he released a statement, a copy of which is annexed as "FA17". Both in the statement and orally at the conference, the Minister conveyed that:

- (a) The relevant stakeholders were not of the same mind on the principles applicable to the assessment of the ownership element of the Charters.
  - (b) It was agreed that the court would be approached to pronounce on the correct interpretation of the "applicable principles" by way of a declaration application (**declaration application**).
- (2) The Chamber simultaneously released its own media statement on the agreement reached that a declaration application would be brought to obtain clarity on the issue. The Chamber made the point that it and its members had invested significantly in transforming the mining industry, which transformation had been both profound and substantial with the result that a process towards normalising the country's economic landscape was now irreversible. A copy of this statement is annexed as "FA18".

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#### 3.5.4 Agreement not to release reports

- (1) Subsequent to this announcement, the parties agreed not to release the DMR's ownership data pending the outcome of the declaration application.
- (2) The legal teams of the parties had been meeting to progress the launch of the declaratory application.

#### 3.5.5 The last-minute MIGDETT meeting of 14 May 2015

- (1) The MIDGDETT Principals were given late notice of a meeting at the DMR offices in Pretoria on 14 May 2015. They were informed that the purpose of the meeting was to consider, among other things, the DMR's Mining Charter audit process.
- (2) At the meeting, the Minister announced that, despite the agreement between the parties that the Minister would not release their ownership data pending the resolution of the declaration application, the DMR would release the findings of its Mining Charter report, including the ownership data that form the basis of the dispute between the parties.
- (3) After the meeting, the Minister issued a media statement, a copy of which I attach as "FA19".

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- (4) In response, the Chamber also released a media statement, a copy of which I attach as "FA20".

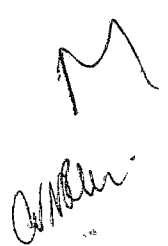
3.5.6 The media statement of 14 May 2015

- (1) The Minister's media statement is stated to be based on information submitted by 442 out of 962 mining companies, representing 95% of employment in the mining sector. The media statement (attached as FA19) is stated to contain a summary of the DMR's Final Mining Charter Report (**DMR Report**).
- (2) The DMR in compiling the DMR Report presumably relied on a calculation of the ownership element based on the DMR's contested interpretation of these aforementioned Charter provisions.
- (3) The extent of the difference between the parties' interpretation of the ownership provisions is apparent from the Minister's summary of the results. The Minister's summary of the DMR's Report suggests that 79% of the industry submissions met or exceeded the 26% target (a figure which reaches 90% if weighted according to employment figures) The Chamber's results as reflected in the Chamber's media statement of 14 May 2015 (annexure FA20) – based on the Charter principles – show a 100% compliance with the 26% target. The DMR's Report as

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summarised by the Minister apparently declared an industry compliance average of 30,6% (32,5% if weighted). The Chamber's results as summarised in its media statement of 14 May 2015 showed an industry average of 38,5%.

- (4) What is also significant is the massive discrepancy created if the so-called "meaningful economic participation" standard is introduced. In this regard, the DMR Report as summarised by the Minister has apparently used as an assessment standard the question of whether mining companies have concluded deals with HDP or HDSA entrepreneurs, workers (including EOSs) and communities. Even on the DMR's own calculation, 79% of the companies (90% on an employment-weighted basis) achieved the 26% target. However, when "*meaningful economic participation*" is introduced as a measure, only 20% of the transactions comply.
- (5) The Minister in his statement said that the results to be presented are subject to "*verification and interrogation*" by individual right holders, and that there would be room for engagement with individual right holders, but at the top of page 7 described these engagements as being "*with individual right holders who have failed to comply with the*



*laws*". He indicated that in terms of section 47 of the MPRDA, *"the necessary remedial steps must be taken"*.

- (6) In addition to the continuing consequences principle and the proper application of offsets and credits, the dispute between the parties has in consequence extended to include also the application of the "meaningful economic participation" principle, which would have a far-reaching impact on compliance. The Minister, furthermore, apparently has every intention of approaching non-compliance with the Charter as non-compliance with the MPRDA, and that he is entitled to rely on section 47 of that Act to enforce those provisions.

### 3.5.7 The Chamber's media conference of 15 May 2015.

A media conference was held by the Chamber on 15 May 2015. Copies of the media statement and ancillary documents which were discussed at the media conference are annexure "FA21" hereto. These indicate that as at the end of 2014, meaningful economic empowerment participation by HDSAs has been 38% on average, with meaningful economic value transfer of more than R159 billion. The Chamber submits that these documents demonstrate the industry's commitment to transformation and to the spirit of the Charters. I respectfully refer the honourable court to the highlights, summarised

HDSA ownership results, and assessment of Mining Charter 2014 targets, as comprehensively set forth in annexure FA21, which speak for themselves.

#### 4 Part 3: Legal disputes upon which declarators are sought

- 4.1 The Chamber emphasises that it remains committed to the principles of transformation. This is demonstrated, amongst others, by its media statement of 15 May 2015 (annexure FA21). However, the Chamber is concerned about the interpretation and implementation of the Charters by the Minister and the DMR. The Chamber and its members require a predictable and unambiguous regulatory environment in order to facilitate the successful implementation of the transformation objectives of the MPRDA. The principle of legality enshrined in the Constitution furthermore requires that transformation be achieved in a manner that is lawful, transparent and consistent with the requirements of the *Promotion of Administrative Justice Act, 2000*.
- 4.2 There exists a dispute between the Minister and his functionaries, on the one hand, and the Chamber and its members, on the other, about whether or not, once a party who applies for a mining right has satisfied the Minister that the granting of the right will be in accordance with the Charter contemplated by section 100 of the MPRDA, the party is obliged, after the right has been granted (therefore, as mining right holder), to "top up" the 26% HDSA ownership target, if for one reason or another it falls below that level.

4.3 The argument that an applicant for a mining right that has satisfied the requirements of section 23(1)(h) should not be required to continue to meet the Charter requirements after the grant of the mining right in question is often expressed by the maxim "*once empowered, always empowered*". The principle expressed by that maxim is quite different from the continuing consequences principle expressed in the Charters. As will appear from what is said below, the Chamber and its members take the view that the MPRDA does not place a duty of continuing compliance upon the holder of a mining right. Once an applicant for a mining right has satisfied the requirements of section 23(1)(h) or Item 7(2)(k) in Schedule II and been granted a mining right, it cannot be required thereafter to do so again, failing which its right will be placed in jeopardy. The Minister and his functionaries on the other hand take the view that a holder of a mining right has a continuing obligation to maintain a 26% HDSA ownership level and that a failure to do so constitutes a contravention of the Charters, of the terms of their mining rights and of the MPRDA.

4.4 Section 23(1)(h) of the MPRDA provides that the Minister must grant a mining right if:

*"(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the charter contemplated in section 100 and the prescribed social and labour plan."*

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- 4.5 Item 7(3) read with Item 7(2)(k) in Schedule II to the MPRDA provides that the Minister must convert an old order mining right into a converted mining right if the holder complies with Item 7(2) including Item 7(2)(k) which, from 7 June 2013, provides that the holder must lodge:

*"(k) documentary proof of the manner in which the holder of the right will give effect to the object referred to in section 2(d) and 2(f)."*

and which, prior to 7 June 2013, read:

*"(k) an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) and 2(f)."*

- 4.6 I am advised that the grant of a mining right by the Minister or his delegate is an administrative act. Once performed, the decision-maker is *functus officio* and may not revisit his decision, save where the MPRDA (and perhaps, in limited circumstances, the common law) permits him to do so. One such circumstance, recognised by section 47(1)(d) of the MPRDA, is where the holder "has submitted inaccurate, false, fraudulent, incorrect or misleading information for the purposes of the application" for the mining right in question. That section is not relevant to this application.
- 4.7 Before granting an application for or for conversion to a mining right, the Minister must satisfy himself that the grant of such right would further the objects referred to in section 2(d) and (f), and, in the case of a new

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mining right, would be in accordance with the Original or 2010 Charter (as the case may be) and the prescribed social and labour plan. I am advised that the requirements to be met by a successful applicant in applying for or a conversion to a mining right are those that prevailed at the time the application was made. Accordingly, a mining right once granted cannot be revoked or cancelled where the requirements have changed after the grant of the right, in the absence of a clear statutory power to do so. Quite apart from the presumption against retrospectively when interpreting ambiguous statutory provisions, there is nothing in the MPRDA which provides, either expressly or by necessary implication, that once a mining right has been granted to an applicant, the applicant will, in order to retain such right, have to meet new requirements set out in an 2010 Charter or the social and labour plan.

- 4.8 It was of course competent for Parliament to have provided in the MPRDA that, after the grant of a mining right, the holder of such right would be required not only to meet the requirements of the charter contemplated in section 100 of the MPRDA at the time of the granting of the mining right, but also to meet any additional requirements which might be introduced into the charter by way of amendment. The legislature did not, however, choose to do so. I am advised that there is nothing in the language of section 23, and in particular subsection (1)(h), or in Item 7, and in particular Item 7(2)(k) in Schedule II, which imposes such an obligation upon the successful applicant for, or for conversion to, a mining right.

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4.9 The Chamber's interpretation is not only in line with the language of the MPRDA, but is also in line with the objectives of the MPRDA, including the expansion of opportunities for HDSAs to invest in the mining industry, and the promotion of employment in that industry. That is so for the following reasons:

- (1) If HDSA shareholders or other economic participants in mining companies were to be subject to "perpetual lock-ins", it would reduce the value of their investment, materially impair the investment opportunities available to non-HDSAs and discourage investment by HDSAs.
- (2) If mining companies were not to subject HDSA owners to perpetual or lengthy lock-in arrangements and were required to continually replace departing HDSA investors, the resultant cost, uncertainty and administrative burden would provide a material disincentive to investment in the mining industry in general and mining companies in particular.
- (3) In other words, mining companies can only achieve meaningful empowerment if they allow the HDSA shareholding to be liquid and for the HDSA shareholders to eventually cash out. The consequence of cashing out will be that the HDSA shareholding diminishes, but there will

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not be a requirement for another empowerment transaction to be concluded because there has already been an empowerment transaction that has been given effect to.

- (4) It is submitted that where a mining right holder has complied with its HDSA obligations by meeting the 26% ownership target, it will, where the BEE transaction successfully led to empowerment, have empowered the HDSA participants in question even if such participants realise their investments and withdraw. The argument that the objects of sections 2(d) and (f) of the MPRDA are not fulfilled by a mining company if it does not continuously replace one HDSA investor with another, ignores entirely the empowerment and transformational benefits achieved by the departing HDSA investors. It confuses quotas with empowerment objectives.

- 4.10 The Chamber accordingly seeks an order declaring that once the Minister or his delegate is satisfied in terms of section 23(1)(h) or Item 7(2)(k) in Schedule II of the MPRDA that the grant the mining right applied for or the conversion of the old order mining right will further the objects referred to in sections 2(d) and (f), and in the case of a new mining right will be in accordance with the Charter, or the 2010 Charter and grants such right or conversion, the holder thereof is not legally obliged to take steps to further such objects or comply with the provisions

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of the Charter or the 2010 Charter. In particular, the holder is not legally obliged to restore the percentage ownership by HDSAs to the 26% target referred to in the Charter and 2010 Charter where such percentage falls below 26% after the grant of the holder's mining right.

4.11 The publication of the Original and 2010 Charters constituted administrative acts performed by or on behalf of the Minister. Although published by way of a General Notice in the Government Gazette, I am advised that they do not constitute regulations and do not, on the face of it, constitute legislation. Instead they constitute formal guidelines or statements of policy.

4.12 In other words, the Charters provide a formal indication of what the Minister will regard as satisfying the requirements of sections 2(c), (d), (e), (f) and (i) of the MPRDA, but do not preclude an applicant for a mining right from adopting other means of doing so. Section 100(2)(b) indeed requires that the Original Charter should set out how the objects referred to in those sections can be achieved. In this regard it is important to note that section 100(2)(b) does not require that the contemplated charter prescribe, on an exclusive basis, what must be done in order to achieve the objects of those provisions.

4.13 The Minister and his functionaries, including the DG, treat and seek to implement the Charters as if they were legislation and in particular, as if they formed part of the MPRDA. An argument which has been advanced in support of that view is that the Charters are encompassed within the

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definition of "this Act" in section 1 of the MPRDA so that a breach thereof constitutes a breach of the MPRDA. It is submitted that that reasoning is fundamentally flawed.

4.14 The fact that the Minister chose to publish the Charters by notices in the Government Gazette cannot elevate its status to that of legislation. The definition of "this Act" does not include the Charters, and even if it did, cannot transform them into statutes of Parliament. To do so would be to obliterate the constitutionally enshrined separation between the legislative and executive organs of state.

4.15 The Chamber accordingly seeks an order declaring that 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, and in particular a failure to maintain a 26% HDSA ownership level, does not constitute a contravention of "this Act" as defined in section 1 of the MPRDA, and in particular a contravention for the purposes of sections 47(1)(a) or 93(1)(a), and does not constitute an offence for the purposes of section 98(a)(viii).

4.16 As already indicated, the Minister and his Department take the view that the Original and 2010 Charters require that where the HDSA ownership level of the holder of a mining right falls below 26% after that target has been met, such holder is obliged to restore that ownership level. I have already pointed out that by virtue of the role the Charters play in the grant of mining rights and the conversion of old order mining rights, once the

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applicant has satisfied the requirements for such grant or conversion, the question of compliance with the Charters cannot, in that regard, be revisited. In any event however, the Charters do not in their own terms require that holders of mining rights "top-up" their HDSA ownership levels from time to time to make good reductions in such levels. The Chamber accordingly seeks an order in terms of paragraph 1.4 of its notice of motion.

- 4.17 I refer to what I have stated in paragraph 1 above with regard to the Charter principles, the continuing consequences principle and the continuing consequences limitation.
- 4.18 Both the Original Charter and the 2010 Charter make reference to the continuing consequences of empowerment deals. In the 2010 Charter, only empowerment deals concluded prior to the promulgation of the MPRDA are taken into account for the purposes of continuing consequences. In the Original Charter the term continuing consequences was used to describe how in practice previous deals would continue to be taken into account whenever a right holder's achievement of HDSA ownership is measured. Paragraph 2.1 of the 2010 Charter provides, however, that it is only the continuing consequences of deals concluded prior to the promulgation of the MPRDA which may be included in calculating credits or offsets in terms of market share as measured by attributable units of production.

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4.19 In the Original Charter, after it dealt with "Active involvement" and "Passive involvement", the following is stated:

"In order to measure progress on the broad transformation front, the following indicators are important:

- The currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.
- The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production."

4.20 It follows that in the Original Charter a mining company was entitled to take into account, for the purposes of meeting the HDSA ownership targets, previous empowerment deals to the extent to which a "credit" or "offset" arose which could be utilised to meet the HDSA requirements on a later occasion. That approach is explained further in the final bullet point under paragraph 4.7 of the Original Charter, which provides that in order to increase participation and ownership by HDSAs in the mining industry, mining companies agree:

- "That where a company has achieved HDSA participation in excess of any set target in a particular operation, then such excess may be utilised to offset any shortfall in its other operations."

4.21 In the 2010 Charter the ability of measured entities to offset in the manner contemplated by the Original Charter was materially limited. The

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second bullet point in paragraph 2.1 of the Amended Charter provides that:

- "The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework."

4.22 The continuing consequences principle was further restricted in paragraph 2.1 of the 2010 Charter, which provides at the end thereof that:

- "The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production." [emphasis added]

4.23 In the 2010 Charter therefore continuing consequences are limited not only to offsets or credits arising from the value of beneficiation, but are limited to deals concluded prior to the promulgation of the MPRDA.

4.24 It is submitted that the Minister was not entitled, under the guise of exercising the power conferred upon him by section 100(2)(a) of the MPRDA, to extinguish retrospectively the credits/offsets conferred by the Original Charter in respect of the continuing consequences of empowerment transactions. The Chamber's members relied upon those credits/offsets when entering into empowerment transactions and when entering into further commercial transactions and investing in new and ongoing mining operations. They would be severely prejudiced if these credits/offsets could be retrospectively withdrawn.

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4.25 Furthermore, the DMR cannot retrospectively introduce new requirements with which empowerment transactions have to comply. In particular, they cannot render compliant transactions non-compliant by requiring retrospectively that optional elements of the Charter included in the calculation of ownership should become prescribed elements. This is what the DMR's interpretation of the 2010 Charter purports to achieve by rendering compulsory the need for clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities.

4.26 The Chamber accordingly seeks an order declaring that paragraph 2.1 of the 2010 Charter is *ultra vires* the powers of the Minister and void, in that it purports retrospectively to deprive holders of mining rights of the benefits of the continuing consequences of empowerment transactions concluded by them prior to the coming into force of the MPRDA, which benefits were conferred by the Charter.

4.27 The Chamber and its members also contend that even if the Minister was empowered to develop the 2010 Charter (which is not conceded), paragraph 3 thereof is *ultra vires* and of no force or effect. Paragraph 3 of the 2010 Charter provides:

"Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of section 47 read in conjunction with sections 98 and 99 of the Act."

4.28 As already indicated, however, the 2010 Charter constitutes a document containing policy guidelines. It derives that status from the provisions of

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section 100(2) of the MPRDA, in terms of which it was developed. It is accordingly not competent for the drafter of the 2010 Charter to elevate its status beyond that of a guideline and to render breaches of the 2010 Charter subject to the provisions of section 47. The statement in paragraph 3 of the 2010 Charter is in any event ineffective, since it refers to a breach not only of the 2010 Charter but to a breach of the MPRDA as well. In other words, a mere breach of the 2010 Charter is without consequence. It is only where there is a breach of the Charter and the MPRDA that section 47 applies. Since however a breach of the MPRDA in itself would render section 47 applicable, paragraph 3 of the 2010 Charter constitutes an exercise in futility.

- 4.29 In the circumstances, the Chamber seeks an order declaring that paragraph 3 of the 2010 Charter is *ultra vires* the powers of the first respondent and void, in that it purports to render holders of mining rights, who fail to comply with the Original Charter and the 2010 Charter and the MPRDA, in breach of the MPRDA and subject to the provisions of section 47 thereof, in conjunction with sections 98 and 99.

## 5 Confirmatory affidavits

I annex confirmatory affidavits from **Mr Michael Solomon Teke** and **Ms Monique Roxane Mathys**, marked "FA22" and "FA23".

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Answer

WHEREFORE, the applicant seeks the relief set out in the notice of motion to which this affidavit is annexed.



AMBROSE VUSUMUZI RICHARD MABENA

I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to before me at Sandton on the 03 day of June 2015, the regulations contained in Government Notice No R1268 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Full Names:

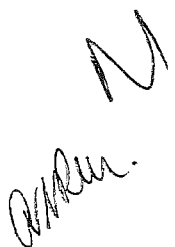
MAGDALENA FRANCINA MARGARETHA VAN DER WALT  
Commissioner of Oaths by Appointment  
Reference Number: 1/9/4 10.06.2010  
155 5th Street  
Sandton

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## LIST OF ANNEXURES

- 1 "FA1" - List of the Chamber's members
- 2 "FA2" - Copy of the Chamber's constitution
- 3 "FA3" - Original Charter
- 4 "FA4" - 2010 Charter
- 5 "FA5" - Business Day Article of 16 January 2015
- 6 "FA6" - Letter of 5 February 2015 from Mr Bheki Sibiya to the DDG
- 7 "FA7" - Letter of 22 February 2015 from the Chamber to the Minister
- 8 "FA8" - Chamber's Charter Reference Group Circular No 06/15 dated 4 March 2015
- 9 "FA9" - Email of 3 March 2015 from Heinrich Mundt, the Project Manager of the DMR Mining Charter project to industry stakeholders
- 10 "FA10"- Council circular 21/15 dated 4 March 2015
- 11 "FA11"- Council circular 22/15 dated 6 March 2015
- 12 "FA12" - Memorandum by the Chamber of 7 March 2015 on the impact on companies potentially affected by the exclusion of past empowerment transactions
- 13 "FA13" - Chamber Charter Reference Group Circular 08/15
- 14 "FA14" - Copy of presentation made by Ms Monique Mathys, Head of Economics of the Chamber on 13 March 2015
- 15 "FA15" - Ms Maseko's slide presentation of 24 March 2015
- 16 "FA16" - Slide of 26 March 2015
- 17 "FA17" - Minister's media statement of 31 March 2015
- 18 "FA18" - Chamber's media statement of 31 March 2015
- 19 "FA19" - Minister's media statement of 14 May 2015
- 20 "FA20" - Chamber's media statement of 14 May 2015
- 21 "FA21"- Chamber's media statement of 15 May 2015

- 22 "FA22" - Confirmatory affidavit of Mr Teke
- 23 "FA23" - Confirmatory affidavit of Ms Mathys

A handwritten signature in black ink, appearing to be "AMR", is located in the bottom right corner of the page.



## COMSA MEMBERS

These are mining companies in South Africa that identify themselves and members of the Chamber of Mines of South Africa.


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Putting South Africa First		HOME	ABOUT THE CHAMBER	INDUSTRY	MEDIA	CONTACT
			MISSION COUNCIL MANAGEMENT OUR WORK HISTORY CHAMBER MEMBERS	MINERALS IN SA GOLD COAL PLATINUM	MEDIA RELEASES PUBLICATIONS FACTS AND FIGURES IN THE MEDIA PHOTO GALLERY	FACEBOOK TWITTER EMAIL
		IN THE NEWS	CAREER GUIDE	INITIATIVES		NEWSLETTER SIGN UP
				HEALTH SERVICES SAFETY & SUSTAINABILITY THE LEARNING HUB STAKEHOLDER FORUM		WEEMAB
						CMS

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# CONSTITUTION OF CHAMBER OF MINES OF SOUTH AFRICA

## Name

1. The name of the Organisation shall be CHAMBER OF MINES OF SOUTH AFRICA (hereinafter referred to as the "Chamber").

## Status

2. The Chamber shall be a body corporate with perpetual succession capable of entering into contractual and other relations and of suing and being sued in its own name and shall be an association not for gain.

## Objects and powers

3. The objects and powers of the Chamber shall be:
  - a. to advance, promote and protect the mining and other interests of its members; to consider, discuss and make recommendations on matters connected therewith or incidental thereto; to collect, circulate and publish information, and to investigate and conduct research into matters concerning its members, their interests or activities; to represent its members and to act on their behalf or as their agent in matters affecting their common interests; and to assist technically, financially or otherwise in the prosecution or defence of actions involving questions the decision whereof is likely to affect the common interests of its members;
  - b. to regulate relations between its members and their employees; to represent its members and act on their behalf in matters connected with the regulation of such relations; to negotiate and conclude, on behalf of its members, agreements with any or all of their employees, or with any association, associations, trade union or trade unions representing any or all of such employees, relating to wages or other conditions of employment; to represent its members and act on their behalf in industrial disputes in which they or any of them are concerned and in all matters arising under or in connection with industrial legislation affecting them;
  - c. to petition or make representations or submit evidence to the President, Parliament, any Premier of a Province, any Provincial Legislature, any Municipality, any other legislative or administrative body or any commission on matters concerning its members, their interests or activities and to promote or oppose legislative measures affecting them;
  - d. to form, or participate in the formation of, and to support, or grant subsidies to associations, institutions, companies, committees and other organizations or bodies associated or connected with the mining industry or calculated to benefit the industry, gratuity funds, provident and pension funds, and medical aid and sick benefit funds for the benefit, wholly or partly, of persons employed in the mining industry; to provide scholarships and endowments; to provide facilities for the training in first aid, rescue operations and safety, of persons employed in the mining industry; to establish and maintain a mining exhibit or exhibits at any exhibition or public show; to subscribe money for charitable or benevolent objects, for exhibitions or for public, general or useful objects; and to guarantee the

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- payment of the liabilities or the fulfilment of the contracts or undertakings of any person, company, association or institution;
- e. to examine and report upon applications for patents or other monopolies which affect or may affect the interests of its members; to promote or oppose such applications and to acquire, hold and dispose of any patents or other monopolies for the purposes of the Chamber;
  - f. to establish, or participate in the establishment of pension, gratuity, medical aid or sick funds for the benefit, wholly or partly of the Chamber's employees and to contribute to any such fund;
  - g. to acquire and hold, to improve, sell, lend, let, hire, mortgage, donate, dispose of or deal in any other way with any property, movable or immovable, for the purposes of the Chamber;
  - h. to invest or lend any moneys of the Chamber with or without security and on such terms and conditions as may be decided from time to time and to realize or vary any such investment or loan;
  - i. to borrow or raise moneys for the purposes of the Chamber, whether by means of debenture bonds, mortgages or otherwise howsoever and to pledge as security for the repayment of such moneys all or any of the property or assets of the Chamber;
  - j. to open and operate a banking account and to make, draw, accept, endorse, discount, execute, issue or otherwise dispose of bills of exchange, promissory notes, bills of lading and other negotiable or transferable instruments or securities;
  - k. to employ or appoint and remunerate attorneys, advisers, agents and other persons for the purposes of the Chamber;
  - l. to establish and maintain a library and museum embracing collections of books and articles of interest to its members;
  - m. to act as secretaries or managers of associations, institutions, funds, companies, committees and other organizations or bodies associated or connected with the mining industry and to charge fees for so acting; and
  - n. generally to do all such other things as are necessary, conducive or incidental to the attainment of the above objects.

## Membership

- 4. The following may be admitted as ordinary members of the Chamber:
  - a. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of mining;
  - b. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of promoting or financing mining ventures or in the business of providing administrative, secretarial, technical or other services to companies engaged in the business of mining;
  - c. any company registered in South Africa in accordance with the prevailing South African legislation and engaged in the Republic of South Africa in the business of extracting any mineral (as defined in the prevailing South African legislation regulating the extraction of minerals) from any tailings, slimes, waste rock or other residues produced in the course of mining if such company is provided with

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- administrative, secretarial, technical or other services by a member of the Chamber; and
- d. any association whose members include a significant number of companies contemplated in paragraph (a), (b) or (c) of this Article 4.

For the purposes of this Article "mining" means the operation of any mine as defined in the prevailing South African legislation regulating the extraction of minerals.

5. Any company desirous of becoming an ordinary member of the Chamber shall lodge with the Chief Executive a written application to the Council for admission as such; and, for the purposes of the application, the company concerned shall provide the Council with the company's full name or names and registered address and such further information as the Council may require. The application shall be considered at the next ordinary meeting of the Council or, if the President so directs, at a special meeting of the Council convened for the purpose and the Council shall then decide whether or not the applicant shall be admitted and the terms and conditions upon which it shall be admitted which shall not be subject to review in terms of this Article; provided that such an application, if received less than fourteen days before the next ordinary meeting of the Council, shall be considered at that meeting, or at the meeting following, as the President may direct.

After the meeting of the Council at which such an application is considered, the applicant shall be notified, in writing, by the Chief Executive whether or not the applicant has been admitted and of the terms and conditions imposed by the Council. If within thirty days of the date of a notification from the Chief Executive that an application for admission as an ordinary member has been refused, the applicant lodges with the Chief Executive a request, in writing, that the Council's decision be reviewed by the Chamber, in general meeting, the application shall be considered at the next annual general meeting of the Chamber, or if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and if the meeting then decides to admit the applicant by a two-thirds majority of the representatives present and entitled to vote, the applicant shall be admitted to ordinary membership, but not otherwise.

6. Any person may be elected by the Council, on such terms and conditions as the Council may decide, as an honorary member of the Chamber.
7. The liability of ordinary members shall be limited to the amount, if any, payable by way of subscription or otherwise to the Chamber by such members. Any such liability may be waived in whole or in part by resolution of the Council on behalf of the Chamber.
8. The Council may establish two or more classes of ordinary members according to the nature or extent of the business carried on by members of the Chamber or according to any other criterion as may be determined by the Council and in such event the Council shall allocate every ordinary member to one or more of such classes. In making such allocation the Council shall be guided, but not bound, by the member's principal business or businesses. The Council may at any time re-allocate an ordinary member to any class or classes.

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### Appointment of representatives

9. Within fourteen days of admission to membership of the Chamber, each ordinary member shall appoint a representative, by notice, in writing, lodged with the Chief Executive. Such notice shall contain the full names, occupation and address of the representative concerned.
10. An ordinary member may, at any time, appoint an alternate representative, by notice, in writing, lodged with the Chief Executive. Such notice shall contain the full names, occupation and address of the alternate representative concerned.
11. An ordinary member may withdraw the appointment of a representative or alternate representative, by notice in writing, lodged with the Chief Executive and, in the case of the withdrawal of the appointment of an alternate representative, may then or at any time thereafter appoint, in the manner prescribed by Article 10, another in such alternate representative's place. If the appointment of a representative is so withdrawn or if a representative ceases for any other reason, to be such, the ordinary member concerned shall appoint, within fourteen days thereafter and in the manner prescribed by Article 8, another in such representative's place.
12. The representative or alternate representative of an ordinary member shall cease to be such:
  - a. if such representative or alternate representative resigns;
  - b. if the member who appointed such representative or alternate representative withdraws the relevant appointment; or
  - c. if the member who appointed such representative or alternate representative ceases to be a member.

### General provisions applicable to members

13. Six months' notice in writing (or such lesser period of notice as may be allowed by resolution of the Council) shall be given to the Chief Executive of any ordinary member's intention to withdraw from the Chamber. Upon expiry of the financial year of the Chamber in which the period of such notice expires, the member concerned shall cease to be a member.
14. Any ordinary member who ceases to be eligible, in terms of Article 4, for ordinary membership, shall withdraw from the Chamber within three months of ceasing to be eligible for membership. One month's notice, in writing, shall be given to the Chief Executive of such member's intention so to withdraw from the Chamber, and, upon the expiry of the notice, the member concerned shall cease to be a member. Any member who, having ceased to be eligible for ordinary membership, does not so withdraw from the Chamber may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member.
15. Any member who, having been given notice, in writing, by the Chief Executive of the amount of any subscription due by such member and of the date on which such subscription is payable, fails to pay the amount concerned within six months of that date, may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member; provided that the provisions of this Article shall not apply to any ordinary member who has failed to pay the amount of any such

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subscription by reason of the fact that a request, lodged in terms of Article 72, that the basis on which such subscription has been calculated or the amount of such subscription, be reviewed, has not yet been considered and disposed of by the Chamber in general meeting.

16. Any member who has been placed in liquidation or is under judicial management, may be excluded from the Chamber by resolution of the Council and shall thereupon cease to be a member.
17. Any member who has infringed the provisions of these Articles or of any by-laws passed in terms of Article 32, or being, in the opinion of the Council, guilty of any practice or proceeding likely to bring discredit upon the Chamber, may be excluded from the Chamber by resolution of the Council.
18. Any member who has been excluded from the Chamber by resolution of the Council, in terms of Articles 14, 15, 16 or 17, shall be notified immediately by the Chief Executive, in writing, of the Council's decision and the ground, with such particularity as the Chairperson shall decide, on which such member has been excluded.
19. If a member who has been excluded from the Chamber by resolution of the Council, in terms of Article 17 lodges, with the Chief Executive, within fourteen days of the date of the notification referred to in Article 18, a request, in writing, that the decision of the Council be reviewed by the Chamber, in general meeting, the matter shall be considered at the next annual general meeting of the Chamber or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and the member concerned shall not be excluded from the Chamber if the meeting then decides accordingly by a majority of not less than two-thirds of the representatives present and entitled to vote. Unless it is so decided that the member concerned shall not be excluded from the Chamber, such member shall cease to be a member at the conclusion of the meeting. If such a written request that the Council's decision to exclude a member, in terms of Article 17, be so reviewed, is not received by the Chief Executive within fourteen days of the date of the notification referred to in Article 18, the member concerned shall thereupon cease to be a member.
20. Cessation of membership in terms of these Articles shall not release the member concerned from liability for any subscription or other amount due by the member to the Chamber or from any other obligation to the Chamber.

### **Register of members**

21. There shall be kept a register of members in which there shall be recorded:
  - a. the full name or names and the address of each member and a statement whether the member is an ordinary member or an honorary member;
  - b. the full names of the representative and alternate representative, if any, of each ordinary member; and
  - c. the date on which each member is admitted to membership of the Chamber, the class or classes to which each ordinary member has been allocated or re-allocated in terms of Article 8 together with the date of such allocation or re-allocation, and the date on which any member ceases to be a member and the reason therefor.

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## Constitution and powers of the Council

22. There shall be a Council of the Chamber which shall consist of such number of persons as may be determined from time to time at a general meeting of the Chamber.
23. The members of the Council shall be elected at each annual general meeting of the Chamber by the representatives of ordinary members present and entitled to vote. Each member of the Council shall hold office until the next annual general meeting after such member's election when such member shall retire but be eligible for re-election. Each candidate for election to the Council other than a retiring member shall be nominated by the representative of an ordinary member and such nomination shall be lodged with the Chief Executive at least fourteen days prior to the date on which the election is to take place. The representatives of ordinary members shall be the only persons eligible for election to the Council. Notwithstanding anything to the contrary contained in this Article, the Chief Executive appointed in terms of Article 70 shall ex officio be a member of the Council. Article 29 shall not apply to such ex officio membership.
24. The President shall be the Chairperson of the Council and shall take the chair at all meetings of the Council. If the President is not present at any such meeting the members present shall elect one of their number to be Chairperson of that meeting.
25. Any member of the Council shall have the power at any time to appoint, by notice in writing to the Chief Executive, any person to act as alternate member in such member's place at any meeting of the Council at which such member shall not be present and to act on such member's behalf for the purpose of signing any resolution contemplated in Article 31. Any alternate member so appointed shall, whilst so acting in the place of a member of the Council, hold office as a member of the Council. The appointment of any alternate member by the President shall not entitle the person so appointed to act as Chairperson at any meeting of the Council and the Chairperson of such meeting shall be elected in accordance with Article 24. If a member who appointed an alternate member ceases to be a member of the Council or gives notice in writing to the Chief Executive of the withdrawal of the appointment of such alternate member, the appointment of such alternate member shall cease.
26. Half of the number of members of the Council from time to time (and if half the number equals a fraction, it must be rounded up to the next round number) plus one, or such other number of members of the Council as may be determined from time to time at a general meeting of the Chamber shall form a quorum at any meeting of the Council.
27. The Council shall meet as soon as practicable after each annual general meeting of the Chamber and thereafter shall meet at least once every three months on such dates and at such times as may be determined by the Council. At least three days' notice in writing of each meeting of the Council or such shorter period of notice as the President or the Council itself may decide shall be given to members thereof by the Chief Executive provided that such shorter period of notice, if given, shall not be

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less than is reasonably necessary to permit the members to attend the meeting concerned.

The President may convene a meeting of the Council at any time and the Chief Executive shall convene a meeting of the Council if requested in writing to do so by at least five members thereof. The Council may act notwithstanding any vacancy or vacancies in its number, but if and so long as the number of continuing members of the Council is reduced below the number fixed as the quorum, such continuing members of the Council may act for the purpose of increasing the number of members to that number, but for no other purpose.

Notwithstanding Articles 22 and 23, the Council may at any time and from time to time in its discretion, appoint any representative of an ordinary member as an additional member of the Council provided that the maximum number of additional members of the Council so appointed at any one time shall not exceed three. Each member so appointed to the Council shall hold office until the next annual general meeting after such member's appointment when such member shall retire but be eligible for re-election or re-appointment.

The Council may at any time co-opt the services of the representative or the alternate representative of any ordinary member to such extent and for such purposes as the Council may decide. Such a representative or alternate representative may attend, by invitation, any meeting of the Council and may take part in discussion, but may not vote.

28. The Council shall have power to appoint at any time a representative of an ordinary member to fill a casual vacancy in the Council. Any representative so appointed shall hold office as a member of the Council until the next annual general meeting of the Chamber when such representative shall retire but shall then be eligible for re-election.
29. If a member of the Council resigns by giving notice in writing to the Chief Executive of such resignation or if a member of the Council ceases to be a representative of an ordinary member, such member shall cease to hold office as a member of the Council. A member of the Council may be removed from office by the President upon being absent without leave of absence from three consecutive meetings of the Council.
30. At any meeting of the Council a decision shall be taken by a majority of the members present voting by a show of hands. The Chairperson shall have a deliberative vote but no casting vote. The conduct of a meeting of the Council shall be the responsibility of the Chairperson who, subject to the provisions of these Articles, shall determine the procedure to be followed at the meeting.
31. A resolution in writing signed by members of the Council and being not fewer in number than are sufficient to form a quorum shall be as valid as if it had been passed at a meeting of the Council duly called and constituted. Such resolution may consist of several documents in like form each signed by one or more members of the Council.

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32. The general administration and management of the Chamber shall be vested in the Council which in addition to the powers expressly conferred upon it by these Articles may exercise all such powers and do all such acts and things in the name of and on behalf of the Chamber as may be exercised or done by the Chamber.

Without prejudice to its general powers or to the powers, acts and things which by these Articles it may exercise or is required to do, the Council shall have power:

- a. to enter into such contracts in the name and on behalf of the Chamber as it thinks expedient for the purpose of the Chamber;
- b. to pass by-laws for the regulation of the business of the Chamber not inconsistent with the provisions of these Articles or of any law;
- c. to appoint at such remuneration and on such terms as the Council may decide and to remove employees or agents of the Chamber;
- d. to acquire and hold, to improve, sell, rent, let, hire, mortgage, donate, dispose of or deal with in any other way, any property, movable or immovable for the purposes of the Chamber;
- e. to determine and change at its discretion, the place at which the head office of the Chamber shall be situated;
- f. to appoint representatives on any bargaining or statutory council in which the Chamber or any member is concerned;
- g. to institute, conduct, defend, compound or abandon any proceedings by or against the Chamber in any court of law or before any arbitrator, wage board or other body constituted according to law and, without prejudice to any other provision contained herein, to recover by legal proceedings or otherwise any amount due to the Chamber;
- h. to appoint sub-committees to act in an advisory and/or specialist capacity and any other standing committees, ad-hoc committees or ad-hoc working parties which the Council in its discretion deems necessary, and to regulate the number of such committees or working parties, the nature of the business to be conducted by each of them and their composition, to establish procedural rules and guidelines to be followed by them, and for the purposes of any such appointment, to authorize the co-option of the services of any person; and
- i. to delegate any of its functions or powers to any member of the Council or to any principal committee established by the Council, or to any employee of the Chamber upon such terms and conditions as the Council may decide.

### **President and vice-presidents**

33. At each annual general meeting one of the members of the Council then elected in terms of Article 23 shall be elected President and one representative of an ordinary member (whether or not a member of the Council) shall be elected Vice-President of the Chamber by the representatives of ordinary members present at the meeting and entitled to vote. Such representatives of ordinary members may, in addition, elect one or more than one Vice-President from the representatives of ordinary members (whether or not members of the Council). The President and any Vice-President so elected shall hold office until the next annual general meeting when they shall retire, but shall be eligible for re-election.

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34. If the President or any Vice-President resigns from that office or ceases to be a representative of an ordinary member, such President or Vice-President shall cease to hold office as such.
35. Any President, Vice-President or member of the Council who, in the opinion of the Council, is guilty of any practice or proceeding likely to bring discredit upon the Chamber, may be removed from office by resolution of the Council. The provisions of Articles 18 and 19 shall apply, mutatis mutandis, for the purpose of an appeal to the Chamber in general meeting against the decision of the Council.
36. If the office of the President or a Vice-President becomes vacant for any reason such vacancy shall be filled for the unexpired term of the current period of office by the Council, or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose.

### **Constitution and powers of the Council**

37. The Council may establish one or more principal committees of the Chamber specifically to promote the interests of and to deal with matters concerning any class of members established by the Council in terms of Article 8. Every principal committee shall consist of such number of members as the Council shall determine, who shall be appointed by the Council from the representatives of members of the class for which the principal committee has been established. Each member of a principal committee shall hold office until the first meeting of the Council held after the annual general meeting next following the appointment of such member. The Council shall appoint a member of each principal committee as Chairperson and shall fix a quorum for each such committee. If the Chairperson of a principal committee is not present at a meeting of the committee, the members present shall elect one of their number to be Chairperson of that meeting.
38. Subject to the direction and control of the Council every principal committee appointed by the Council shall be empowered to deal with all matters concerning members of the Chamber of the class in respect of which the committee was appointed and with all matters arising within the mining industry which affect their interests and to that end may exercise all such powers and do all such acts and things in the name and on behalf of the Chamber as may be done by the Chamber by virtue of paragraphs (a), (b), (c), (d), (e) and (n) of Article 3; and, without prejudice to such general powers and such further powers that may be delegated to it by the Council, a principal committee shall have power:
  - a. to appoint representatives on any bargaining or statutory council in which any member of the class for which the committee has been established or the Chamber acting on behalf of any or all of such members, is concerned; and
  - b. to appoint sub-committees to act in an advisory and/or specialist capacity, and any other standing committees, ad-hoc committees, or ad-hoc working parties which such principal committee may in its discretion deem necessary, and to regulate the number of such committees or working parties, the nature of the business to be conducted by each of them and their composition, to establish procedural rules and guidelines to be followed by them, and for the purposes of any such appointment, to authorize the co-option of the services of any person.

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## Transitional provisions

39. (Deleted)

## General provisions applicable to committees

40. Every principal committee shall each meet at least once every three months on such dates and at such times as shall be decided by the committee concerned. All matters on which a decision has to be taken at any meeting of any such committee (including the election of Chairperson where necessary) shall be decided by the majority of members present voting by a show of hands.
41. The Chairperson of a meeting of a principal committee shall have a deliberative vote but not a casting vote.
42. Subject to the provisions of Article 44 any principal committee of the Chamber may make such regulations as it thinks appropriate as to the summoning and holding of its meetings and the transaction of business thereat; provided that the Chairperson of such committee may convene a special meeting of such committee at any time. No business may be transacted at any meeting of any such committee unless a quorum is present. Each such committee may also at any time co-opt the services of the representative or the alternate representative of any ordinary member to such extent and for such purposes as the committee concerned may decide. Such a representative or alternate representative may attend by invitation any meeting of the committee by which such representative or alternate representative was co-opted and may take part in discussion but may not vote.
43. Any member of any principal committee shall have the power at any time to appoint, by notice in writing to the Chief Executive, any person to act as alternate member in such member's place at any meeting of the committee concerned at which such member shall not be present and to act on such member's behalf for the purpose of signing any resolution contemplated in Article 47. Any alternate member so appointed shall, whilst so acting in the place of a member of any principal committee, hold office as a member of the committee concerned. The appointment of any alternate member by the Chairperson of any principal committee shall not entitle the person so appointed to act as Chairperson at any meeting of the committee concerned and the Chairperson of such meeting shall be elected in accordance with Article 37. If a member who appointed an alternate member ceases to be a member of the committee concerned or gives notice in writing to the Chief Executive of the withdrawal of the appointment of such alternate member, the appointment of such alternate member shall cease.
44. At least three days' notice in writing of each meeting of a principal committee or such shorter period of notice as the Chairperson of the committee concerned, or the committee itself shall decide, shall be given to the members thereof by the Chief Executive, provided that such shorter period of notice, if given, shall not be less than is reasonably necessary to permit the members to attend the meeting concerned.
45. The Council shall have power to appoint at any time a member of the Council or a representative of an ordinary member in the appropriate class, as the case may be, to

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fill a casual vacancy in a principal committee. Any person so appointed shall hold office as a member of the committee concerned until the first meeting of the Council held after the annual general meeting next following such person's appointment.

46. The Chairperson of any meeting of a principal committee shall be responsible for the conduct of the meeting and shall, subject to the provisions of these Articles, determine the procedure to be followed at the meeting.
47. A resolution in writing signed by members of a principal committee and being not fewer in number than are sufficient to form a quorum shall be as valid as if it had been passed at a meeting of the committee concerned duly called and constituted. Such resolution may consist of several documents in like form each signed by one or more members of the committee concerned.
48. A member of a principal committee shall be entitled to resign at any time from membership of the committee concerned upon written notice to the Chief Executive.
49. A member of a principal committee shall cease to hold office as a member of the committee concerned:
  - a. upon resignation;
  - b. upon ceasing to hold the qualification necessary in terms of these Articles for appointment to the committee concerned; or
  - c. upon being absent without leave of absence duly granted by the relevant committee concerned from three consecutive meetings of the committee concerned.

### **Annual general meetings**

50. The annual general meeting of the Chamber shall be held in each calendar year before the first day of December, on such day and at such time and place as the Council shall decide. The Chief Executive shall give at least thirty days' notice, in writing, of such meeting to each member.
51. At each annual general meeting the Chairperson shall review the activities of the Chamber and refer to any other matters which the Chairperson considers to be relevant to the occasion and the Council shall submit an audited statement of income and expenditure for the past financial year, an audited balance sheet as at the date to which such statement is made up, and the report of the Chamber's auditors thereon.
52. At least fourteen days before the date for which each annual general meeting is originally called, the Chief Executive shall send to each member true copies of the audited statement of income and expenditure, the audited balance sheet and the report of the Chamber's auditor or auditors thereon, which are to be submitted to the meeting in terms of Article 51.

### **Special general meetings**

53. The Council may convene a special general meeting of the Chamber, at any time, for the consideration of special business and shall do so within thirty days of the date on which a request, in writing, by the representatives of at least seven ordinary members, that a special general meeting be convened, is lodged with the Chief

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Executive. Subject to the provisions of Articles 89 and 90, the Chief Executive shall give to each member at least seven days' notice, in writing, of each special general meeting or such shorter period of notice as the Council may decide; provided such shorter period of notice, if given, shall not be less than is reasonably necessary to permit the representatives of members to attend the meeting concerned.

### **General provisions applicable to general meetings**

54. Each ordinary member shall be represented at general meetings of the Chamber by the representative of such member or, in the absence of such representative, by the alternate representative of such member, duly appointed in terms of these Articles.
55. An honorary member may be present, in person, at general meetings of the Chamber.
56. The representative or, in the absence of such representative, the alternate representative of any ordinary member, and any honorary member shall be entitled to take part in the discussions at all general meetings of the Chamber. If the representative of an ordinary member is present at any general meeting, the alternate representative of that member may also be present and may take part in the discussions, but shall not vote at the meeting on behalf of the member concerned. An alternate representative of an ordinary member, while acting in the place of the representative of that member, shall exercise all the duties, powers and functions of such representative.
57. Any person who has been invited by the Council to be present and take part in the discussion at any general meeting, may do so, but shall have no right of voting.
58. The President shall take the Chair at all general meetings of the Chamber. If the President is not present at any general meeting, the representatives of ordinary members present and entitled to vote shall elect one or other of the Vice-Presidents to be Chairperson of that meeting. If neither the President nor a Vice-President is present at a general meeting, the representatives of ordinary members present and entitled to vote shall elect one of their number to be Chairperson of the meeting. The Chairperson of a general meeting shall be responsible for the conduct of the meeting.
59. The representatives of seven ordinary members shall form a quorum at any general meeting of the Chamber. If a quorum is not present ten minutes after the time for which any such meeting is called, the meeting shall stand adjourned until the same day in the next week at the same time and place, or if such day is a public holiday, until the day following, and the representatives then present shall constitute a quorum and may transact the business for which the meeting was originally called.
60. If any ordinary member, having been given notice, in writing, by the Chief Executive of the amount of any subscription due by such member and the date on which such subscription is payable, has failed to pay the amount concerned within six months of that date and the subscription is still outstanding on the date for which any general meeting of the Chamber is originally called, the representative of that member shall not be entitled to be present at or take part in the proceedings of the meeting or any adjournment thereof nor to vote thereat; provided that the provisions

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of this Article shall not apply to any representative of any ordinary member who has failed to pay the amount of any such subscription by reason of the fact that a request, lodged in terms of Article 72, that the basis on which such subscription has been calculated or the amount of such subscription be reviewed, has not yet been considered and disposed of by the Chamber in general meeting.

61. If any member has been excluded from the Chamber by resolution of the Council in terms of Articles 14, 15, 16 or 17, neither the member concerned nor any representative of that member shall be entitled to be present at or to take part in the proceedings of any general meeting of the Chamber or any adjournment thereof or, in the case of an ordinary member, to vote thereat, except for the purposes of the review of such member's exclusion in terms of Article 19. 62. The representative or, in the absence of such representative, the alternate representative of each ordinary member present at a general meeting shall be entitled on a show of hands, to one vote on behalf of the member concerned. On a ballot other than a ballot on a lock-out referred to in Article 67, the representative or, in the absence of such representative, the alternate representative of each ordinary member present at a general meeting shall be entitled, on behalf of the member concerned, to one vote in respect of each one hundred rand (R100) or part thereof paid by such member by way of subscription in respect of the immediately preceding financial year, provided that such representative or, in the absence of such representative, such alternate representative shall be entitled to at least one vote.
62. An honorary member shall not be entitled to vote any general meeting of the Chamber.
63. All matters on which a decision has to be taken at any general meeting (including the election of Chairperson, where necessary, the election of the President and the Vice-Presidents, and the election of members of the Council) shall be decided on a show of hands, unless a ballot is required to be taken by virtue of this or any other Article, and, unless a ballot is so required to be taken, a declaration by the Chairperson that a resolution has or has not been carried, on a show of hands, shall be final.

At any general meeting, the Chairperson or the representatives of seven ordinary members present and entitled to vote may demand a ballot on any matter, on which a decision has to be taken either before or on a declaration of the result of a show of hands, except on the matter of the election of a Chairperson or of the appointment of scrutineers or of the adjournment of the meeting. If a ballot is so demanded, it shall be taken at once or at such other time during the meeting as the Chairperson shall decide.

A ballot which is required to be taken by virtue of this or any other Article, shall be conducted in accordance with and shall be governed by the following provisions:

- a. two scrutineers shall be appointed by the Chairperson to supervise the taking of the ballot at the meeting;
- b. the representative of each ordinary member present at the meeting shall be given, in the presence of the scrutineers, one ballot paper which such representative shall thereupon complete, fold and deposit in a container provided for the purpose;

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- c. a ballot paper shall not be endorsed or marked in any way apart from any endorsement required to show the number of votes to which a representative is entitled and the mark or marks required to be made by a representative in recording such representative's vote or votes. Papers bearing any other endorsements or marks shall be regarded as spoiled and shall not be counted;
  - d. on completion of the taking of the ballot the result of the voting thereat shall be ascertained by the scrutineers and communicated to the Chairperson, by whom the outcome of the ballot shall be declared to the meeting;
  - e. in computing the majority on a ballot, regard shall be had to the number of votes to which the representative of each ordinary member present at the meeting is entitled;
  - f. for the purposes of ascertaining the representatives who are entitled to vote, on a ballot, at any general meeting and the votes to which they are or any of them is entitled, the scrutineers shall have a right of access to the register of members and to the books of account and other records of the Chamber;
  - g. for the purposes of enabling the scrutineers to ascertain the result of the voting at any ballot and to communicate such result to the Chairperson, the Chairperson may adjourn the meeting and shall fix a place, date and time for such adjourned meeting, in which case the outcome of the ballot shall be declared at such adjourned meeting;
  - h. the result of a ballot shall be deemed to be the decision of the meeting at which the ballot was required to be taken on the matter concerned;
  - i. a demand for a ballot shall not prevent the continuance of the meeting for the transaction of any business, other than the matter on which the ballot was demanded;
  - j. the decision of the Chairperson on any matter arising in connection with the taking of a ballot shall be final.
64. At the instance and on the direction of the Chairperson of any general meeting of the Chamber, any question which, in the opinion of the Chairperson, directly affects one class of ordinary members shall be dealt with, at the meeting, by the representatives present of the ordinary members within the class affected and entitled to vote and, for such purpose, the Chairperson shall confine the proceedings on the question concerned at the meeting to the representatives of that class; and all the provisions of these Articles shall apply, mutatis mutandis, for the purpose of ascertaining the decision of such class on that question.
65. Members wishing to bring business before the Chamber at any annual general meeting shall lodge notice in writing, with the Chief Executive of intention to move the discussion of such business, at least fourteen days before the date of the meeting at which such business is proposed to be brought forward. The only business which shall be dealt with at a special general meeting shall be the business for the consideration of which the meeting was convened.
66. The Chairperson of a general meeting, may, with the consent of the meeting, adjourn the same from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

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## Ballots on lock-outs

67. A ballot shall be taken on a proposal by any ordinary member that the Chamber should call a lock-out as defined in the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof. Such ballot shall be a ballot of those ordinary members of the Chamber in respect of whom it is intended to call the lock-out. Should the President, or in the absence of the President, one of the Vice-Presidents, decide that the proposal shall be considered at a general meeting of the Chamber, the ballot thereon shall be conducted in accordance with the provisions of Article 63; provided that the representative or, in the absence of such representative, the alternate representative of each such ordinary member present and entitled to vote shall have only one vote and the proposal shall be deemed to have been carried if a majority of all the members concerned have voted in favour of it.
68. In the event that it is decided that a proposal referred to in Article 67 should not be considered at a general meeting, the following procedure shall apply:
- a. the Chief Executive shall forthwith submit the proposal to the Council, which shall determine which members or class or classes of members are directly affected by the proposal. Voting in the ballot shall be confined to such members or class or classes of members;
  - b. after the Council has determined who shall participate in the ballot the Chief Executive shall give written notice of the ballot to the members concerned in good standing;
  - c. such notice shall be given at least three days before the ballot is to be conducted or within such shorter period as the Council may decide; provided that such shorter period of notice shall not be less than is reasonably necessary to permit the members concerned to vote in the ballot. The notice shall specify the date, place and time for voting in the ballot;
  - d. a ballot paper shall be sent with each notice and each ordinary member concerned shall have one vote;
  - e. before voting in the ballot commences, the Chief Executive shall appoint two scrutineers to supervise the taking of the ballot and to ascertain the result thereof;
  - f. a ballot paper shall not be marked in any way apart from the mark or marks required to be made by a member in recording its vote. Papers bearing any other marks shall be regarded as spoiled and shall not be counted;
  - g. voting shall take place by a representative of a member, such representative's alternate or another person authorized by the member depositing the marked and folded ballot paper in a container provided for this purpose;
  - h. upon the expiry of the time fixed for voting in the ballot the scrutineers shall ascertain the result thereof and inform the Chief Executive who shall make it known to all ordinary members;
  - i. the proposal shall be deemed to have been carried if the majority of all the members concerned have voted in favour of it.
69. Notwithstanding anything to the contrary contained in these Articles, a member shall not be disciplined or have its membership terminated for failure or refusal to participate in a lock-out if:
- a. no ballot was held about the lock-out; or

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- b. a ballot was held but a majority of the members who voted did not vote in favour of the lock-out.

### **Chief executive**

- 70. There shall be a Chief Executive of the Chamber who shall be appointed by the Council on such terms and conditions as the Council shall decide; provided that such appointment shall at all times be subject to the condition that it may be terminated at any time by the Council or the Chief Executive on giving not less than one month's notice, in writing, of the Council's or the Chief Executive's intention to do so or may be terminated summarily by the Council on any ground which at common law justifies summary dismissal.

Upon termination by the Council of the appointment of the Chief Executive, the Chief Executive may lodge with the Council, within fourteen days of the date of notification of such termination, a request, in writing, that the decision of the Council be reviewed by the Chamber in general meeting at a special general meeting convened for that purpose and the appointment of the Chief Executive shall not be terminated if the meeting then decides accordingly. Unless it is so decided that the appointment of the Chief Executive shall not be terminated, the appointment of the Chief Executive shall be terminated at the conclusion of the meeting. If a written request to review the termination of the Chief Executive's appointment is not received by the Council within fourteen days of the date of the notification of such termination, the appointment of the Chief Executive shall thereupon be terminated.

Subject to the direction and control of the Council, it shall be the duty of the Chief Executive:

- a. to keep or cause to be kept the register of members for which provision is made in Article 21;
- b. to keep or cause to be kept the records and accounts for which provision is made in Article 75;
- c. to keep or cause to be kept the minutes and records for which provision is made in Article 82;
- d. to compile annually or at such other interval as the Council may decide, a report on the activities of the Chamber, for the information of its members; and
- e. to perform such other duties and functions as may be entrusted to the Chief Executive by these Articles or by the Council in accordance with the terms and conditions of the Chief Executive's appointment.

### **Subscriptions**

- 71. The aggregate subscriptions payable for each financial year by each class of members established in terms of Article 8 shall be determined by the Council from time to time. Such aggregate subscriptions shall be allocated amongst the members of each particular class by the principal committee established in terms of Article 37 to deal with matters concerning each class or in the absence of such a committee, by the Council. The subscriptions payable by ordinary members in respect of each financial year shall be paid in advance or in arrear at such time or times or in such

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amount or amounts as the Council in its discretion may decide. An ordinary member admitted after the commencement of a financial year shall pay as a subscription for such year such amount, not exceeding the subscription that would have been payable by such member for the whole year, as the Council may decide.

72. Within thirty days of the date of any notice, in writing, from the Chief Executive giving the amount of any subscription due by any ordinary member and the date on which such subscription is payable, the ordinary member concerned may lodge with the Chief Executive a request, in writing, that the basis on which such subscription has been calculated and/or the amount of such subscription be reviewed by the Chamber, in general meeting. Such a request, if lodged within the period prescribed by this Article but not otherwise, shall be considered at the next annual general meeting of the Chamber or, if the Council so decides, at a special general meeting of the Chamber convened for the purpose; and the meeting shall then either confirm or determine anew the basis on which the subscription concerned shall be fixed and/or the amount of the subscription which the ordinary member concerned shall be required to pay, as the case may be. Any decision taken by the Chamber, in general meeting, in terms of this Article, shall be final in respect of the subscription which is the subject of such decision.

73. No subscription shall be payable by honorary members.

### **Financial year, funds and accounts**

74. The financial year of the Chamber shall be the period from 1 January to 31 December.
75. A record shall be kept of the subscriptions, if any, due by each member of the Chamber and the periods to which such subscriptions relate as also the subscriptions paid by each such member and the periods to which such payments relate. Proper accounts shall be kept of all moneys received and expended by the Chamber, of all the matters in respect of which such receipts and expenditure take place and of the assets, credits and balances of the Chamber.
76. All moneys received by the Chamber, from time to time, shall be banked in the name of the Chamber, within seven ordinary business days of receipt, with such bank as the Council shall, from time to time, appoint.
77. All cheques and other negotiable instruments drawn in the name of the Chamber shall be signed by one or more employees of the Chamber duly appointed for the purpose either by the Council or by such employee or employees of the Chamber as the Council shall decide.
78. All expenditure incurred by or on behalf of the Chamber shall be duly authorized by the Council or a principal committee as the case may be, acting in terms of the powers conferred upon such committee by these Articles, or by the Chief Executive or such other employee of the Chamber, acting in terms of such authority as shall have been conferred upon the Chief Executive or such other employee by any of such committees.

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79. Any profits or gains which may accrue to the Chamber shall not be distributed to any person, but shall be employed solely for the purpose of investment or for the carrying out of the Chamber's objects.
80. The Chamber's accounts shall be audited annually and reported upon by the auditor or auditors appointed in terms of Article 81.

### **Auditors**

81. An auditor or auditors shall be appointed to the Chamber at each annual general meeting, when the remuneration for the past year's audit shall also be fixed; provided that, if so authorized by resolution of the meeting, such remuneration may be fixed by the Council. The auditor or auditors appointed at each annual general meeting shall hold office until the next annual general meeting, when such auditor or auditors shall retire, but shall be eligible for re-appointment. Casual vacancies in the office of auditor shall be filled by the Council and any person so appointed shall hold office until the next annual general meeting, when such person shall retire, but shall be eligible for re-appointment.

### **Minutes and records**

82. Minutes shall be kept of proceedings of general meetings of the Chamber and of the meetings of the Council and the principal committees of the Chamber, as also records of the correspondence and transactions of the Chamber.

### **Proceedings**

83. All legal or other proceedings by or against the Chamber shall be instituted, conducted or defended in its name.

### **Property**

84. All movable property belonging to or acquired by the Chamber shall vest in the Chamber and all immovable property belonging to or acquired by the Chamber shall be registered in its name.

### **Signature of documents**

85. All powers of attorney, bonds, deeds and other similar instruments shall be signed and executed on behalf of the Chamber by such member or members of the Council or by such employee or employees of the Chamber as the Council shall decide; provided that any such instrument which may be signed and executed on behalf of the Chamber by a principal committee in pursuance of the powers conferred in terms of these Articles on any such principal committee may be signed and executed by such member or members of the principal committee concerned and by such employee or employees of the Chamber as the principal committee concerned shall decide.

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## Notices

86. Any notice, written notification or document required by these Articles to be given or sent to any member shall be deemed to have been given or sent if it has been delivered, by hand, at such member's registered address or has been sent through the post addressed to such member at the member's registered address. The date on which any such notice, written notification or document is so delivered or is so posted shall be deemed to be the date on which it was given or sent.
87. The notice convening any general meeting of the Chamber shall state the date, time and place of the meeting and the general nature of the business to be transacted; provided that, in the case of a notice convening a special general meeting at which any amendment or alteration of or any addition to these Articles is to be considered, the notice shall be accompanied by a copy of the proposed amendment, alteration or addition.

## Indemnity

88. The office-bearers and employees of the Chamber shall be indemnified by the Chamber against all costs, losses and expenses they may incur or become liable to by reason of any contract entered into or act or deed done by them in their capacity as such or in any way in the discharge of their duties.

## Alteration of articles

89. These Articles shall not be amended, altered or added to except by resolution of a majority of not less than two-thirds of the representatives of ordinary members present and entitled to vote at a special general meeting of the Chamber called for that purpose, of which at least fourteen days' notice, in writing, has been given by the Chief Executive to each member.

Upon any such alteration, amendment or addition being made in terms of this Article, the same shall be deemed to be incorporated in and form part of these Articles, in the same manner in all respects as though originally inserted herein, and shall be binding upon all members of the Chamber without any further act of assent thereto, subject, however, to the provisions of the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof.

## Winding up

90. Subject to the provisions of the Labour Relations Act, No. 66 of 1995, or any law in substitution thereof and any order of the Labour Court, the Chamber shall be wound up if, at a special general meeting of the Chamber of which at least thirty days' notice, in writing, has been given by the Chief Executive to each member and at which voting has taken place by ballot, a resolution to wind up the Chamber has been passed by a majority of two-thirds of the representatives of ordinary members present and entitled to vote. Upon the passing of such a resolution, the liquidator or liquidators shall, subject to any order of the Labour Court, realize the assets of the Chamber, in such manner as deemed fit, liquidate the debts and liabilities of the Chamber and distribute any surplus assets among the then ordinary members,

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proportionately to the subscriptions payable by such members for the financial year immediately preceding the year in which the decision to wind up the Chamber was taken; but subject at all times and in all respects to such directions as may be given to the liquidator or liquidators by the Chamber, in general meeting, either at the time the decision to wind up the Chamber is taken or thereafter.

AvA/com/Chamber Constitution

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**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case No 41661/

In the matter between:

**THE CHAMBER OF MINES OF SOUTH AFRICA**

Applicant

and

**MINISTER OF MINERAL RESOURCES**

First respondent

and

**DIRECTOR-GENERAL, DEPARTMENT OF MINERAL  
RESOURCES**

Second respondent

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Signed at **Sandton** on the 4<sup>th</sup> of June 2015

  
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To:  
The Registrar of the above  
Honourable Court  
**Pretoria**

And to:

**The Minister of Mineral  
Resources  
Department of Mineral  
Resources**  
First Respondent  
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Travenna Campus  
71 Meintjies Street  
Cnr Meintjies and Frances Baard  
(formerly Schoeman) Streets  
Sunnyside, Pretoria  
**c/o The State Attorney**  
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Tel: 012 309 1500  
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Received on \_\_\_\_\_ 2015

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**For: First Respondent**

And to:

**Director-General: Department of Mineral Resources**

Second Respondent

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**For: Second Respondent**

# Scorecard for the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry (including the Charter)

GNR 1639 OF 13 AUGUST 2004

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## Introduction

- The proposed scorecard gives effect to the provisions contained in the Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry.
- The scorecard is designed to facilitate the application of the Charter in terms of the Mineral and Petroleum Resources Development Act requirements for the conversion of all the "old order rights" into new rights within a five-year conversion window period, but recognising the full 10-year period.
- In adjudicating the scorecard the Minister of Minerals and Energy will need to take into account the entire scorecard in decision making.
- The scorecard is intended to reflect the "spirit" of the Broad Based Socio-Economic Empowerment Charter for the Mining Industry.
- Progress by stakeholders in achieving the aims of the Charter as enunciated in the Scorecard can be measured in two ways:
  - The specific targets set in the Charter.
  - The targets set by companies.

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ANNEXURE A  
SCORECARD FOR THE BROAD BASED SOCIO-ECONOMIC EMPOWERMENT  
CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

Notes	Description	5-year target		10-year target	
1	Human Resource Development				
	• Has the company offered every employee the opportunity to be functionally literate and numerate by the year 2005 and are employees being trained?	Yes	No		
	• Has the company implemented career paths for HDSA employees including skills development plans?	Yes	No		
	• Has the company developed systems through which empowerment groups can be mentored?	Yes	No		
2	Employment Equity				
	• Has the company published its employment equity plan and reported on its annual progress in meeting the plan?	Yes	No		
	• Has the company established a plan to achieve a target for HDSA participation in management of 40% within five years and is implementing the plan?				
	• Has the company identified a talent pool and is it fast tracking it?	Yes	No		
	• Has the company established a plan to achieve the target for woman participation in mining of 10% within the five years and is implementing the plan?				
3	Migrant Labour				
	• Has the company subscribed to government and industry agreements to ensure non-discrimination against foreign migrant labour?	Yes	No		
4	Mine Community and Rural Development				
	• Has the company co-operated in the formulation of integrated development plans and is the company co-operating with the government in the implementation of these plans for communities where mining takes place and for major labour sending areas? Has there been effort on the side of the company to engage the local mine community and major labour sending area communities? (Companies will be required to cite a pattern of consultation, indicate money expenditures and show a plan.)	Yes	No		

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## Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry

Notes	Description	5-year target		10-year target	
5	Housing and Living Conditions				
	<ul style="list-style-type: none"> <li>For company provided housing has the mine, in consultation with stakeholders established measures for improving the standard of housing, including the upgrading of the hostels, conversion of hostels to family units and promoted home ownership options for mine employees? Companies will be required to indicate what they have done to improve housing and show a plan to progress the issue over time and is implementing the plan?</li> </ul>	Yes	No		
	<ul style="list-style-type: none"> <li>For company provided nutrition has the mine established measures for improving the nutrition of mine employees? Companies will be required to indicate what they have done to improve nutrition and show a plan to progress the issue over time and is implementing the plan?</li> </ul>	Yes	No		
6	Procurement				
	<ul style="list-style-type: none"> <li>Has the mining company given HDSA's preferred supplier status?</li> </ul>	Yes	No		
	<ul style="list-style-type: none"> <li>Has the mining company identified current level of procurement from HDSA companies in terms of capital goods, consumables and services?</li> </ul>	Yes	No		
	<ul style="list-style-type: none"> <li>Has the mining company indicated a commitment to a progression of procurement from HDSA companies over a 3 – 5 year time frame in terms of capital goods, consumables and services and to what extent has the commitment been implemented?</li> </ul>	Yes	No		
7	Ownership & Joint Ventures				
	<ul style="list-style-type: none"> <li>Has the mining company achieved HDSA participation in terms of ownership for equity or attributable units of production of 15 percent in HDSA hands within 5-years and 26 percent on 10-years?</li> </ul>	15%		26%	
8	Beneficiation				
	<ul style="list-style-type: none"> <li>Has the mining company identified its current level of beneficiation?</li> </ul>	Yes	No		
	<ul style="list-style-type: none"> <li>Has the mining company established its base line level of beneficiation and indicated the extent that this will have to be grown in order to qualify for an offset?</li> </ul>	Yes	No		
9	Reporting				
	<ul style="list-style-type: none"> <li>Has the company reported on an annual basis its progress towards achieving its commitments in its annual report?</li> </ul>	Yes	No		

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## Notes

1. The commitment of the mining companies is to have offered each employee the opportunity to become functionally literate and numerate. The critical test is if a human resource development system has been established and resourced so that people are being trained.
2. The mentoring of empowerment groups refers to that mining company's HDSA employees and HDSA linked partners at the levels of ownership and procurement. It does not preclude mining companies being involved in mentoring programmes outside of its own operations.
3. The aspirational target for HDSA participation in management is a 5-year target. If companies want to convert to licenses within a much shorter time frame, then a phase in approach will be adopted with the companies committing to a 40 percent by the fifth year. The key decision point here is whether the company has established a plan to achieve the target and is implementing the plan.
4. The aspirational target for women participation in mining is a five-year target and the phase in approach will be used. The key decision point here is whether the company has established a plan to achieve the target and is implementing the plan.
5. The commitment of stakeholders to ensure non-discrimination against foreign migrant labour can be approached from the perspective that each company subscribes to industry and government agreements on the matter.
6. In terms of companies establishing measures for improving the standard of housing – the company will be required to indicate what it has done to improve housing and show a plan to progress the issue over time and are implementing the plan.
7. In terms of companies establishing measures for improving the standard of nutrition – the company will be required to indicate what it has done to improve nutrition and show a plan to progress the issue over time and are implementing the plan.
8. In terms of procurement the mining company should commit to an increase of procurement from HDSA companies over the 3-5 year time frame and agree to a monitoring system.
9. The Scorecard represents the 5-year targets and it has been agreed that within 10-years the level of HDSA participation will rise to 26 percent.
10. In terms of beneficiation commitments and the offset option the key issue is to capture the actual beneficiation activities of a company and to convert it to the same unit of measurement of ownership e.g. attributable units of production/or % measure of value as the case may be and offset accordingly. The attributable ounces that are benefited above the base state may be offset against HDSA ownership targets. *Considering that some 59 different minerals are mined in South Africa – the detailed discussions on the base state for each mineral are ongoing.*

BROAD BASED SOCIO-ECONOMIC EMPOWERMENT CHARTER FOR THE SOUTH  
AFRICAN MINING INDUSTRY

VISION

All the actions and commitments set out below are in the pursuit of a shared vision of a globally competitive mining industry that draws on the human and financial resources of all South Africa's people and offers real benefits to all South Africans. The goal of the empowerment charter is to create an industry that will proudly reflect the promise of a non-racial South Africa.

PREAMBLE

*Recognising:*

- The history of South Africa, which resulted in blacks, mining communities and women largely being excluded from participating in the mainstream of the economy, and the

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*Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry*

formal mining industry's stated intention to adopt a proactive strategy of change to foster and encourage black economic empowerment (BEE) and transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development;

- The imperative of redressing historical and social inequalities as stated by the Constitution of the Republic of South Africa, in *inter alia* section 9 on equality (and unfair discrimination) in the Bill of Rights;
- The policy objective stated in the Mineral and Petroleum Resources Development Act to expand opportunities for historically disadvantaged persons to enter the mining and minerals industry or benefit from the exploitation of the nation's mineral resources;
- The scarcity of relevant skills has been identified as one of the barriers to entry into the mining sector by historically disadvantaged South Africans (HDSA's);
- The slow progress made with employment equity in the mining industry compared to other industries.

*Noting that*

- It is government's stated policy that whilst playing a facilitating role in the transformation of the ownership profile of the mining industry it will allow the market to play a key role in achieving this end and it is not the government's intention to nationalise the mining industry.
- The key objectives of the Mineral and Petroleum Resources Development Act and that of the Charter will be realised only when South Africa's mining industry succeeds in the international market place where it must seek a large part of its investment and where it overwhelmingly sells its product and when the socio-economic challenges facing the industry are addressed in a significant and meaningful way.
- The transfer of ownership in the industry must take place in a transparent manner and for fair market value.
- That the following laws would also assist socio-economic empowerment:
  - The Preferential Procurement Framework Act (No. 5 of 2000);
  - The Employment Equity Act (No. 55 of 1998);
  - The Competition Act (No. 89 of 1998) (Also ref. To the Amendment Act No. 35 of 1999 and subsequent amendments);
  - The Skills Development Act (No. 97 of 1998).

*Therefore*

The signatories have developed this Charter to provide a framework for progressing the empowerment of historically disadvantaged South Africans in the Mining and Minerals Industry. The signatories of this Charter acknowledge:

Section 100 (2) (a) of the Mineral and Petroleum Resources Development Act, which states that, to insure the attainment of Government's objectives of redressing historical social and economic inequalities as stated in the Constitution, the Minister of Minerals and Energy must within six months from the date on which this Act takes effect develop a Broad Based Socio-Economic Empowerment (BBSEE) Charter.

1. **Scope of application.**—This Charter applies to the South African mining industry.
2. **Interpretation.**—For the purposes of interpretation, the following terms apply:  
**Broad Based Socio-Economic Empowerment (BBSEE)** refers to a social or economic strategy, plan, principle, approach or act, which is aimed at:
  - Redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and

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- Transforming such industries so as to assist in, provide for, initiate, facilitate or benefit from the:
  - Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
  - Participation in or control of management of such operations;
  - Development of management, scientific, engineering or other skills of HDSA's;
  - Involvement of or participation in the procurement chains of operations;
  - Integrated Socio-economic development for host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilising all stakeholder resources.

The term Historically Disadvantaged South Africans (HDSA) refers to any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation.

HDSA Companies are those companies that are owned or controlled by historically disadvantaged South Africans.

Major labour sending areas refer to areas from where a significant number of mine-workers are or have been recruited.

Ghost towns refer to areas whose economies were dependent on mining and therefore could not survive beyond the closure or significant downsizing of mining activities.

Ownership of a business entity can be achieved in a number of ways:

- a majority shareholding position, i.e. 50% + 1 share;
- Joint ventures or partnerships (25% equity plus one share);
- Broad based ownership (such as HDSA dedicated mining unit trusts, or employee share ownership schemes).

### 3. Objectives.—The objectives of this charter are to:

- Promote equitable access to the nation's mineral resources to all the people of South Africa;
- Substantially and meaningfully expand opportunities for HDSA's including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- Utilise the existing skills base for the empowerment of HDSA's;
- Expand the skills base of HDSA's in order to serve the community;
- Promote employment and advance the social and economic welfare of mining communities and the major labour sending areas; and
- Promote beneficiation of South Africa's mineral commodities.

### 4. Undertakings.—All stakeholders undertake to create an enabling environment for the empowerment of HDSA's by subscribing to the following:

#### 4.1 Human Resource Development

The South African labour market does not produce enough of the skills required by the mining industry. Stakeholders shall work together in addressing this skills gap in the following manner:

- Through the standing consultative arrangements they will interface with statutory bodies such as the Mines Qualifications Authority (MQA), in the formulation of comprehensive skills development strategies that include a skills audit;
- By interfacing with the education authorities and providing scholarships to promote mining related educational advancement, especially in the fields of mathematics and science at the school level;

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- By undertaking to ensure provision of scholarships and that the number of registered learnerships in the mining industry will rise from the current level of some 1200 learners to not less than 5000 learners by March 2005; and
- Through the MQA shall undertake to provide skills training opportunities to miners during their employment in order to improve their income earning capacity after mine closure.

Government undertakes that:

- In its bi-lateral relations with relevant countries, undertakes to secure training opportunities for HDSA companies' staff, as well as exchange opportunities with mining companies operating outside of South Africa;
- Through the MQA and in collaboration with academic institutions, DME associated institutions, NGO's, and the Gender Commission, shall provide training courses in mining entrepreneur's skills.

Companies undertake:

- To offer every employee the opportunity to become functionally literate and numerate by the year 2005 in consultation with labour;
- To implement career paths to provide opportunities to their HDSA employees to progress in their chosen careers; and
- To develop systems through which empowerment groups can be mentored as a means of capacity building.

#### 4.2 Employment Equity

Companies shall publish their employment equity plans and achievements and subscribe to the following:

- Establish targets for employment equity, particularly in the junior and senior management categories. Companies agree to spell out their plans for employment equity at the management level. The stakeholders aspire to a baseline of 40 percent HDSA participation in management within 5-years;
- South African subsidiaries of multinational companies and South African companies, where possible, will focus their overseas placement and/or training programmes on historically disadvantaged South Africans;
- Identification of a talent pool and fast tracking it. This fast tracking should include high quality operational exposure;
- Ensuring higher levels of inclusiveness and advancement of women. The stakeholders aspire to a baseline of 10 percent of women participation in the mining industry within 5-years; and
- Setting and publishing targets and achievements.

#### 4.3 Migrant Labour

Stakeholders undertake to:

- Ensure non-discrimination against foreign migrant labour.

#### 4.4 Mine Community and Rural Development

Stakeholders, in partnership with all spheres of government, undertake to:

- Co-operate in the formulation of integrated development plans for communities where mining takes place and for major labour-sending areas, with special emphasis on development of infrastructure.

#### 4.5 Housing and Living Conditions

Stakeholders, in consultation with the Mine Health and Safety Council, the Department of Housing and organised labour, undertake to:

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- Establish measures for improving the standard of housing including the upgrading of hostels, conversion of hostels to family units and the promotion of home ownership options for mine employees; and
- Establish measures for improving of nutrition of mine employees.

#### 4.6 Procurement

Procurement can be broken down into three levels, namely: capital goods; services; and consumables.

Stakeholders undertake to give HDSAs a preferred supplier status, where possible, in all three levels of procurement. To this end stakeholders undertake to:

- Identify current levels of procurement from HDSA companies;
- Commit to a progression of procurement from HDSA companies over a 3 to 5-year time frame reflecting the genuine value added by the HDSA provider;
- Encourage existing suppliers to form partnerships with HDSA companies, where no HDSA Company tenders to supply goods or services; and
- Stakeholders commit to help develop HDSA procurement capacity and access Department of Trade and Industry (DTI) assistance programmes to achieve this.

List of suppliers: It is envisaged that information on all HDSA companies wishing to participate in the industry will be collected and published. All participants in the industry will assist the DTI in compiling such a list that will *inter alia* be published by government on the Internet and updated regularly.

#### 4.7 Ownership and Joint Ventures

Government and industry recognise that one of the means of effecting the entry of HDSA's into the mining industry and of allowing HDSA's to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSA's. Ownership and participation by HDSA's can be divided into active or passive involvement as follows:

##### *Active involvement:*

- HDSA controlled companies (50 per cent plus 1 vote), which includes management control.
- Strategic joint ventures or partnerships (25 per cent plus 1 vote). These would include a Management Agreement that provides for joint management and control and which would also provide for dispute resolution.
- Collective investment, through ESOPS and mining dedicated unit trusts. The majority ownership of these would need to be HDSA based. Such empowerment vehicles would allow the HDSA participants to vote collectively.

##### *Passive involvement:*

- Greater than 0 percent and up to 100 percent ownership with no involvement in management, particularly broad based ownership like ESOPs.

In order to measure progress on the broad transformation front the following indicators are important:

- The currency of measure of transformation and ownership could, *inter alia*, be market share as measured by attributable units of South African production controlled by HDSA's.
- That there would be capacity for offsets which would entail credits/offsets to allow for flexibility.

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- The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.
- Government will consider special incentives to encourage HDSA companies to hold on to newly acquired equity for a reasonable period.

In order to increase participation and ownership by HDSA's in the mining industry, mining companies agree:

- To achieve 26% HDSA ownership of the mining industry assets in 10 years by each mining company; and
- That where a company has achieved HDSA participation in excess of any set target in a particular operation then such excess may be utilised to offset any shortfall in its other operations.

All stakeholders accept that transactions will take place in a transparent manner and for fair market value. Stakeholders agree to meet after 5-years to review the progress and to determine what further steps, if any, need to be made to achieve the 26% target.

#### 4.8 Beneficiation

This Charter will apply to mining companies in respect of their involvement in beneficiation activities, specifically activities beyond mining and processing. These include production of final consumer products.

Mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments.

Mining companies agree to:

- Identify their current levels of beneficiation.
- Indicate to what extent they can grow the baseline level of beneficiation.

#### 4.9 Exploration and Prospecting

Government will support HDSA companies in exploration and prospecting endeavours by, *inter alia*, providing institutional support.

#### 4.10 State Assets

Government will ensure compliance with the provisions of this Charter and be exemplary in the way in which it deals with state assets.

#### 4.11 Licensing

To facilitate the processing of licence conversions there will be a scorecard approach to the different facets of promoting broad based socio-economic empowerment in the mining industry. This scorecard approach would recognise commitments of the stakeholders at the levels of ownership, management, employment equity, human resource development, procurement and beneficiation. These commitments have been spelt out in sections 4.1 to 4.9 above.

The HDSA participation required to achieve conversion within the five year period on a company specific basis will be specified in the score-card, hereto attached as Annexure A.

#### 4.12 Financing Mechanism

The industry agrees to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5-years. Participants agree that beyond the R100 billion-industry commitment and in pursuance of the 26 per cent target, on a willing seller – willing buyer basis, at fair market value, where the mining companies are not at risk, HDSA participation will be increased.

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**4.13 Regulatory Framework and Industry Agreement**

Government's regulatory framework and industry agreements shall strive to facilitate the objectives of this Charter.

**4.14 Consultation, Monitoring, Evaluation and Reporting**

It is recognised that the achievement of the objectives set out herein entails an ongoing process.

Companies undertake to report on an annual basis their progress towards achieving their commitments, with these annual reports verified by their external auditors. A review mechanism will be established which again provides flexibility to the company commitments.

Parties hereto agree to participate in annual forums for the following purposes:

- Monitoring progress in the implementation of plans;
- Developing new strategies as needs are identified;
- Ongoing government/industry interaction in respect of these objectives;
- Developing strategies for intervention where hurdles are encountered;
- Exchanging experiences, problems and creative solutions;
- Arriving at joint decisions;
- Reviewing this Charter if required.

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# Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry

[GN 838 of 20 September 2010]

[Date of Commencement 13 September 2010]

## Preamble

Publication of the amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry  
(Government Gazette No. 33573)

The Minister of Minerals and Energy has in terms of section 100 (1) (b) of the Mineral and Petroleum Resources Development Act, 2002, (Act 28 of 2002), developed the Codes of Good practice for the minerals industry as set out below.

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## Preamble

The systematic marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented Historically Disadvantaged South Africans (HDSAs) from owning the means of production and from meaningful participation in the mainstream economy. To redress these historic inequalities, and thus give effect to section 9 (equality clause) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution), the democratic government has enacted, *inter alia*, the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

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The objective of the MPRDA is to facilitate meaningful participation of HDSAs in the mining and minerals industry. In particular, section 100 (2) (a) of the MPRDA provides for the development of the Mining Charter as an instrument to effect transformation with specific targets. Embedded in the Mining Charter of 2002 is the provision to review the progress and determine what further steps, if any, need to be made to achieve its objectives.

In line with this provision, the DMR has concluded a comprehensive assessment to ascertain the progress of transformation of industry against the objectives of the Charter in the mining industry. The findings of the assessment identified a number of shortcomings in the manner in which the mining industry has implemented the various elements of the Charter, viz. ownership, procurement, employment equity, beneficiation, human resource development, mine community development, housing and living conditions, all of which have not embraced the spirit of the Charter to the latter. To overcome these inadequacies, amendments are made to the Mining Charter of 2002 in order to streamline and expedite attainment of its objectives. Additionally, the review of the Charter introduces an element of sustainable growth of the mining industry, which seeks to ensure sustainable transformation and growth of the mining industry.

#### VISION

To facilitate sustainable transformation, growth and development of the mining industry.

#### MISSION

To give effect to section 100 (2) (a) of the MPRDA and section 9 of the Constitution.

#### Definitions

"BEE entity" means an entity of which a minimum of 25% + 1 vote of share capital is directly owned by HDSA as measured in accordance with flow through principle;

"Beneficiation" means the transformation of a mineral (or a combination of minerals) to a higher value product, which can either be consumed locally or exported. The term "beneficiation" is often used interchangeably with mineral "value-addition" or "downstream beneficiation";

"Broad-Based Socio-Economic Empowerment (BBSEE)" means a socio-economic strategy, plan, principle, approach or act, which is aimed at—

- (a) Redressing the results of past or present discrimination based on race, sex and disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries; and
- (b) Transforming such industries so as to assist in, provide for, initiate, facilitate or benefit from the—
  - Ownership participation in existing or future mining, prospecting, exploration and beneficiation operations;
  - Participation in or control of management of such operations;
  - Development of management, scientific, engineering or other skills of HDSA's;
  - Involvement of or participation in the procurement chains of operations;
  - Integrated socio-economic development for mine workers, host communities, major labour sending areas and areas that due to unintended consequences of mining are becoming ghost towns by mobilising all stakeholder resources;

"Calendar year" is defined as the one year period that begins on January 1st and ends on December 31st;

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*Broad-Based Socio-Economic Empowerment Charter for the South African Mining*

"Community" means a coherent, social group of persons with interest of rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;

"Demographics" means the numerical characteristics of a population (e.g. population size, age, structure, sex/ gender, race, etc.)

"Effective ownership" means the meaningful participation of HDSAs in the ownership, voting rights, economic interest and management control of mining entities;

"EMP" means an approved environmental programme contemplated in section 39 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);

"Enterprise development" means monetary and non-monetary support for existing or fostering of new HDSA companies in the mining sector of the economy, with the objective of contributing to their development, sustainability as well as financial and operational independence;

"ESOPs" mean Employees Share Ownership Schemes;

"Historically Disadvantaged South Africans" ("HDSA") refers to South African citizens, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) came into operation which should be representative of the demographics of the country;

"Labour sending area" areas from which a majority of mineworkers, both historical and current are or have been sourced;

"Level of management" refers to line of demarcation between various managerial positions;

"Life of Mine" means the number of years that a particular mine will be operational;

"Meaningful economic participation" includes, inter alia, the following key attributes—

- BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities;
- Barring any unfavourable market conditions, some of the cash flow should flow to the BEE partner throughout the term of the investment, and for this purpose, stakeholders will engage the financing entities in order to structure the BEE financing in a manner where a percentage of the cash-flow is used to service the funding of the structure, while the remaining amount is paid to the BEE beneficiaries. Accordingly, BEE entities are enabled to leverage equity henceforth in proportion to vested interest over the life of the transaction in order to facilitate sustainable growth of BEE entities;
- BEE shall have full shareholder rights such as being entitled to full participation at annual general meetings and exercising of voting rights, regardless of the legal form of the instruments used;
- Ownership shall vest within the timeframes agreed with the BEE entity, taking into account market conditions;

"Mining Charter" means the broad-based socio-economic empowerment Charter for the South African Mining and Minerals Industry;

"Mine Community" refers to communities where mining takes place and labour sending areas;

"Non-discretionary procurement expenditure" means expenditure that cannot be influenced by a mining company, such as procurement from the public sector and public enterprises;

"Shareholder" shall mean a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached;

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"Social Fund" refers to a trust fund that provides financing for investments targeted at meeting the needs of poor and vulnerable communities as informed by commitments made by companies in terms of their social and labour plans;

"Stakeholder" refers to a person, group, organisation, or system which affects or can be affected by an organisation's actions which may relate to policies intended to allow the aforementioned to participate in decision making in which all may have a stake;

"Sustainable development" means the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that the mineral and petroleum resources development serves present and future generations.

## 1. Objectives

The Broad Based Socio-Economic Empowerment Charter for the South African Industry, hereafter referred to as "the Mining Charter", is a Government instrument designed to effect sustainable growth and meaningful transformation of the mining industry. The Mining Charter seeks to achieve the following objectives:

- (a) To promote equitable access to the nation's mineral resources to all the people of South Africa;
- (b) To substantially and meaningfully expand opportunities for HDSA to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- (c) To utilise and expand the existing skills base for the empowerment of HDSA and to serve the community;
- (d) To promote employment and advance the social and economic welfare of mine communities and major labour sending areas;
- (e) To promote beneficiation of South Africa's mineral commodities; and
- (f) Promote sustainable development and growth of the mining industry.

## 2. Elements of the Mining Charter

### 2.1 Ownership

Effective ownership is a requisite instrument to effect meaningful integration of HDSA into the mainstream economy. In order to achieve a substantial change in racial and gender disparities prevalent in ownership of mining assets, and thus pave the way for meaningful participation of HDSA for attainment of sustainable growth of the mining industry, stakeholders commit to—

- Achieve a minimum target of 26 percent ownership to enable meaningful economic participation of HDSA by 2014;
- The only offsetting permissible under the ownership element is against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework.

The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.

### 2.2 Procurement and Enterprise Development

Local procurement is attributable to competitiveness and transformation, captures economic value, presents opportunities to expand economic growth that allows for creation of decent jobs and widens scope for market access of South African capital goods and services. In order to achieve this, the mining industry must procure from BEE entities in accordance with the following criteria, subject to the provisions of clause 2.9—

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- Procure a minimum of 40% of capital goods from BEE entities by 2014;
- Ensure that multinational suppliers of capital goods annually contribute a minimum of 0.5% of annual income generated from local mining companies towards socio-economic development of local communities into a social development fund from 2010;
- Procure 70% of services and 50% of consumer goods from BEE entities by 2014.

The targets above are exclusive of non-discretionary procurement expenditure.

### 2.3 Beneficiation

Beneficiation seeks to translate comparative advantage in mineral resources endowment into competitive advantage as fulcrum to enhance industrialisation in line with State developmental priorities. In this regard, mining companies must facilitate local beneficiation of mineral commodities by adhering to the provision of Section 26 of the MPRDA and the mineral beneficiation strategy—

- Mining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11 percent.

### 2.4 Employment Equity

Workplace diversity and equitable representation at all levels are catalysts for social cohesion, transformation and competitiveness of the mining industry. In order to create a conducive environment to ensure diversity as well as participation of HDSA at all decision-making positions and core occupational categories in the mining industry, every mining company must achieve a minimum of 40% HDSA demographic representation at—

- Executive Management (Board) level by 2014;
- Senior management (EXCO) level by 2014;
- Core and Critical skills by 2014;
- Middle management level by 2014;
- Junior management level by 2014.

In addition, mining companies must identify and fast-track their existing talent pools to ensure high level operational exposure in terms of career path programmes.

### 2.5 Human Resource Development

The mining industry is knowledge based and thus hinges on human resource development, constituting an integral part of social transformation at workplace and sustainable growth. To achieve this objective, the mining industry must—

- Invest a percentage of annual payroll (as per relevant legislation) in essential skills development activities reflective of the demographics, but excluding the mandatory skills levy, including support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation; as follows—
  - Target for 2010 = 3%;
  - Target for 2011 = 3.5%;
  - Target for 2012 = 4%;
  - Target for 2013 = 4.5%;
  - Target for 2014 = 5%.

*Amman M*

## 2.6 Mine Community Development

Mine communities form an integral part of mining development, there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate. Stakeholders must adhere to the following—

- Consistent with international best practices in terms of rules of engagement and guidelines, mining companies must invest in ethnographic community consultative and collaborative processes prior to the implementation/development of mining projects;
- Mining companies must conduct an assessment to determine the developmental needs in collaboration with mining communities and identify projects within the needs analysis for their contribution to community development in line with Integrated Development Plans (IDPs), the cost of which should be proportionate to the size of investment.

## 2.7 Housing and Living Conditions

Human dignity and privacy for mineworkers are the hallmarks to enhance productivity and expedite transformation in the mining industry in terms of housing and living conditions. In this regard mining companies must implement measures to improve the standards of housing and living conditions for mineworkers as follows—

- Convert or upgrade hostels into family units by 2014;
- Attain the occupancy rate of one person per room by 2014;
- Facilitate home ownership options for all mine employees in consultation with organised labour by 2014.

## 2.8 Sustainable Development and Growth of the Mining Industry

Mineral resources are non-renewable in nature, forthwith exploitation of such resources must emphasise the importance of balancing concomitant economic benefits with social and environmental needs without compromising future generations, in line with Constitutional provisions for ecological, sustainable development and use of natural resources. To this end, with consideration to clause 2.9, every mining company must implement elements of sustainable development commitments included in the *"Stakeholders' Declaration on Strategy for the sustainable growth and meaningful transformation of South Africa's Mining Industry of 30 June 2010 and in compliance with all relevant legislation"*, as follows—

- Improvement of the industry's environmental management by—
  - Implementing environmental management systems that focus on continuous improvement to review, prevent, mitigate adverse environmental impact;
  - Undertake continuous rehabilitation on land disturbed or occupied by mining operations in accordance with appropriate regulatory commitments;
  - Provide for the safe storage and disposal of residual waste and process residues;

(Editorial Note: Wording as per original *Government Gazette*. It is suggested that the phrase "Provide for the safe storage" is intended to be "Provide for the safe storage".)

- Design and plan all operations so that adequate resources are available to meet the closure requirements of all operations.
- Improvement of the industry's health and safety performance by—
  - Implementing a management systems focused on continuous improvement of all aspects of operations that have a significant impact on the health and safety of employees, contractors and communities where mining takes place;

*Amended*

*Broad-Based Socio-Economic Empowerment Charter for the South African Mining*

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- Providing all employees with health and safety training and require employees of contractors to have undergone such training;
- Implement regular health surveillance and risk-based monitoring of employees.
- Stakeholders undertake to enhance the capacity and skills in relevant South African research and development facilities in order to ensure quality, quick turn around, cost effectiveness and integrity of such facilities. To this extent, mining companies are required to utilise South African based facilities for the analysis of samples across the mining value chain.

**2.9 Reporting (Monitoring and Evaluation)**

Every mining company must report its level of compliance with the Mining Charter annually, as provided for by section 28 (2) (c) of the MPRDA.

The Department shall monitor and evaluate, taking into account the impact of material constraints which may result in not achieving set targets.

**3. Non-compliance**

Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with sections 98 and 99 of the Act.

**4. Amendments**

The Minister of the Department of Mineral Resources may amend the Mining Charter as and when the need arises.

AMEN M



**SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT  
CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY**

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
1 Reporting	Has the company reported the level of compliance with the Charter for the calendar year	Documentary proof of receipt from the department	Annually	March 2011	March 2012	March 2013	March 2014	March 2015	Y/N
2 Ownership	Minimum target for effective HDSA ownership	Meaningful economic participation	26%	15%				26%	Y/N
		Full shareholder rights	26%	15%				26%	Y/N
3 Housing and living conditions	Conversion and upgrading of hostels to attain the occupancy rate of one person per room	Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room	Base-line	25%	50%	75%	100%	Y/N
	Conversion and upgrading of hostels into family units	Percentage conversion of hostels into family units	Family units established	Base-line	25%	50%	75%	100%	Y/N
4 Procurement & Enterprise Development	Procurement spent from BEB entity	Capital goods	40%	5%	10%	20%	30%	40%	5%
		Services	70%	30%	40%	50%	60%	70%	5%
		Consumable goods	50%	10%	15%	25%	40%	50%	2%
	Multinational suppliers contribution to the social fund	Annual spend on procurement from multinational suppliers	0.5% of procurement value	0.50%	0.50%	0.50%	0.50%	0.50%	3%
5 Employment Equity	Diversification of the workplace to reflect the country's demographics to attain competitiveness	Top Management (Board)	40%	20%	25%	30%	35%	40%	3%
		Senior Management (EXCO)	40%	20%	25%	30%	35%	40%	4%
		Middle Management	40%	30%	35%	40%	40%	40%	3%
		Junior Management	40%	40%	40%	40%	40%	40%	1%
		Core Skills	40%	15%	20%	30%	35%	40%	5%

continued

## Broad-Based Socio-Economic Empowerment Charter for the South African Mining

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting	
				2010	2011	2012	2013	2014		
Human Resource Development	Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	5%	3%	3.5%	4.0%	4.5%	5.0%	25%	
Mine community development	Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	Implement approved community projects	Up-to-date project implementation	Implementation of projects will serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects					15%	
Sustainable development & growth	Improvement of the industry's environmental management	Implementation of approved EMPs	100%	Annual progress achieved against approved EMP's					12%	
	Improvement of the industry's mine health and safety performance	Implementation of the tripartite action plan on health and safety	100%	Annual progress achieved against commitments in the tripartite action plan on health and safety					12%	
	Utilisation of South African based research facilities for analysis of samples across the mining value chain	Percentage of samples in South African facilities	100%	establish baseline	25%	50%	75%	100%	5%	
Beneficiation	Contribution of a mining company towards beneficiation (this measure is effective from 2012)	Additional production volume contributory to local value addition beyond the base-line	Section 26 of the MPRDA (percentage above baseline)	The beneficiation strategy and its modalities of implementation outline the beneficiation requirements per commodity extracted in South Africa					—	
TOTAL SCORE										100%

Y/N applies to pillars that are ring-fenced.

Legend



WARM. M

**SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT  
CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY:  
REPORTING TEMPLATE**

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
1 Reporting	Has the company reported the level of compliance with the Charter for the calendar year	Documentary proof of receipt from the department	Annually						Y/N
2 Ownership	Minimum target for effective HDSA ownership	Meaningful economic participation	26%						Y/N
		Full shareholder rights	26%						
3 Housing and living conditions	Conversion and upgrading of hostels to attain the occupancy rate of one person per room	Percentage reduction of occupancy rate towards 2014 target	Occupancy rate of one person per room						Y/N
	Conversion and upgrading of hostels into family units	Percentage conversion of hostels into family units	Family units established						
4 Procurement & Enterprise Development	Procurement spent from BEB entity	Capital goods	40%						5%
		Services	70%						5%
		Consumable goods	50%						2%
	Multinational suppliers contribution to the social fund	Annual spend on procurement from multinational suppliers	0.5% of procurement value						3%

continued

## Broad-Based Socio-Economic Empowerment Charter for the South African Mining

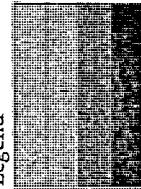
ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
5 Employment Equity	Diversification of the workplace to reflect the country's demographics to attain competitiveness	Top Management (Board) level	40%						3%
		Senior Management (Exco)	40%						4%
		Middle Management	40%						3%
		Junior Management	40%						1%
		Core Skills	40%						5%
6 Human Resource Development	Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	5%						25%
7 Mine community development	Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	Implement approved community projects	Up-to-date project implementation	Implementation of projects will serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects					15%

continued

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting
				2010	2011	2012	2013	2014	
Sustainable development & growth	Improvement of the industry's environmental management	Implementation of approved EMPs	100%	Annual progress achieved against approved EMPs					12%
	Improvement of the Industry's mine health and safety performance	Implementation of the tripartite action plan on health and safety	100%	Annual progress achieved against commitments in the tripartite action plan on health and safety					12%
	Utilisation of South African based research facilities for analysis of samples across the mining value chain	Percentage of samples in South African facilities	100%						5%
Beneficiation	Contribution of a mining company towards beneficiation (this measure is effective from 2012)	Additional production volume contributory to local value addition beyond the base-line	Section 26 of the MPRDA (percentage above baseline)	The beneficiation strategy and its modalities of implementation outline the beneficiation requirements per commodity extracted in South Africa					—
TOTAL SCORE									100%

Y/N applies to pillars that are ring-fenced.

Legend



0-25% (Gross non-compliance)  
 25-50% (Non-compliance)  
 50-75% (Marginal to acceptable performance)  
 75-100% (Excellent performance)

amam  
 12/

*Broad-Based Socio-Economic Empowerment Charter for the South African Mining*

**SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT  
CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY  
CATEGORY: HUMAN RESOURCE DEVELOPMENT**

DESCRIPTION	MEASURES	SPREAD OF MEASURE CATEGORY	REPORTING TEMPLATE									
			YEAR:									
			African		Coloured		Indian		White		Total	
			Male	Female	Male	Female	Male	Female	Male	Female		
Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in mining, processing and exploration technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation.	Learnership and Bursaries (of core and critical skills)  Artisans  ABET training (level I, II, III, IV and NQF 1)  Other training initiatives (school support & post matric programmes)  Support for South African based research and development initiatives											

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**SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWERMENT  
CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY  
CATEGORY: EMPLOYMENT EQUITY**

DESCRIPTION (ACTION)	MEASURE	REPORTING TEMPLATE									
		YEAR: .....									
		African		Coloured		Indian		White		Total	
		Male	Female	Male	Female	Male	Female	Male	Female		
Diversification of the workplace to reflect the country's demographics to attain competitiveness	Top management (Board level)										
	Senior Management (EXCO)										
	Middle Management										
	Junior Management										
	Core Skills										

*QNRM*  
*21*

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## Mining minister warns of 'implications' for failing empowerment audit

by Marvin Meintjies, 16 January 2015, 05:51

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Mineral Resources Minister Ngoako Ramathodi. Picture: SUNDAY WORLD

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MINERAL Resources Minister Ngoako Ramathodi has warned of "implications" for companies that fall short in the audit of black economic empowerment (BEE) targets set out in the Mining Charter.

He said on Thursday he would not accept the "once empowered, always empowered" principle for those whose BEE deals have ended.

The charter required that 26% of the industry be in black hands by December 2014. The audit would be finalised by March 31, he said.

principle of "once empowered, always empowered" — meaning companies carry the benefit of BEE transactions irrespective of whether their partners have sold their shares — has been a sticking point.

Speaking to Business Day in London, where he is drumming up support for the International Geological Congress to be held in SA in August, Mr Ramathodi said he would hold companies to the spirit of the charter. "There's a debate around that (principle) but my view is that we should hold everybody, those who have been empowered and those who are empowering or have been empowering, to the spirit of empowerment itself.

"It has to do with making sure that blacks are seen to be part of the economy, that's the essence, so whatever we do we must not lose sight of that."

He said: "The minerals belong to the people of the republic and they are harvested under licence. There are implications from that. So if you fight government, who has given you a licence, there might be implications."

He also sees opportunity in the restructuring taking place in the mining sector and is mulling the creation of a "national champion" out of the assets mining companies want to discard.

At an earlier briefing Mr Ramathodi said: "I want to see a situation where we have an indigenous company along the lines of Anglo American, but broad based, becoming big in SA with one leg in communities...."

"It's early stages, but I think the elements are there (for a company with) strong community participation, strong broad-based ownership by black people in SA. And you can't only start with fresh ones (people new to the sector); you've got to include those ... who bring experience, knowledge and commitment. Those elements are there in my mind.

"We're working on it in collaboration with the guys who are pulling out, who are restructuring."

He mentioned BHP Billiton and Anglo American, "particularly with their coal assets and platinum in Rustenburg and other places".

But he stressed that what he envisioned was "not a national company in the sense of state mining".

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"We've got state mining and that will grow. Parallel to that I want a champion that is privately owned that is run by South Africans and is a successful enterprise. It must be broad-based but run as a business, not a charity."

Mr Ramatlhodi's other priority is finalising regulations for oil and gas.

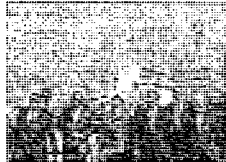
Despite the downturn in oil and gas prices, he believes extracting SA's potential gas reserves could be a game changer. "We then become an oil and gas producing country, and we know what that does to countries ... you see villages turning into cities. And we're building on the back of ... a developed economy with a very strong stock exchange. I think our growth will be tripled and we'll move faster than anyone who started from scratch. So the implications are really exciting."

Mr Ramatlhodi also had meetings with Anglo American, Rio Tinto and others with operations in SA. "So far, my impression is that people here understand what we're all about."

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mavusoa 125 days ago

Mnxx

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TheTurnip 125 days ago

2 issues:

If BEE holders want to sell, if they can only sell to other BEE, it is unfair to the seller.

This will create a 2-tier pricing structure for share where BEE share would trade at a discount.

If no BEE buyers can be found, and there is a willing non-BEE buyer willing to pay more, it is unfair for the BEE seller not to be able to sell if he is willing or needs to sell.

Mining shares have underperformed and will continue to under-perform for some time due to the commodity collapse - so if a mining BEE shareholder want to switch to another sector, like tech, or retail, he cannot do so if he cant find a BEE buyer for his shares.

[Reply](#)

3 0 0



TheTurnip 125 days ago

Same for the property issue - most want to settle for cash, because farming is a loss making exercise.....

[Reply](#)

3 0 0

Answer  
M



CHAMBER OF MINES OF SOUTH AFRICA

Putting South Africa First

"FA6"



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5 February 2015

Mr Mosa Mabuza  
Deputy Director General: Mineral Policy and Promotion  
Department of Mineral Resources  
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C/o Meintjes and Francis Baard streets  
SUNNYSIDE  
Pretoria

e-mail: [mosa.mabuza@dmr.gov.za](mailto:mosa.mabuza@dmr.gov.za)

Dear DDG Mabuza,

**RE: CHAMBER'S SIGNIFICANT CONCERN ABOUT THE OWNERSHIP ELEMENT OF THE CHARTER REPORTING TEMPLATE PROPOSED BY THE DMR**

The Chamber's Office Bearers and Council are in unanimous agreement that the ownership element of the Charter template produced by the DMR will not fairly reflect the industry's compliance with the Mining Charter or the significant effort that the industry has invested in creating meaningful transformation in South Africa over the past twelve years. In particular, the DMR's move to exclude the continuing consequences of previous deals is an issue that will materially prejudice the mining sector. The fact that the mining industry has concluded a significant number of black economic empowerment transactions (more than any other sector) and now will be penalised if the historically disadvantaged partner has exited the transaction, will mean an under reporting of the industry's effort.

The Chamber and its members are deeply concerned that the template's current ownership component will deliver inaccurate and misleading results, which industry will not be able to support.

The Chamber and its full membership believe that the DMR needs to address the following critical issues in the template, before the template is released for completion by the mining companies.

**A. Continuing consequences – the exclusion of past transactions**

The Chamber strongly disagrees with the exclusion of previous transactions concluded post the implementation of the MPRDA in which HDSA shareholders exited for value, as this amounted to empowerment. Even though BEE companies have sold out, or ESOPS have vested, the exiting of

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COUNCIL OF THE CHAMBER: M Teke (President), Ms KT Kweyama (Vice President), G Briggs (Vice President),  
A Bam, M Cutifani, P Dunne, J Evans, N Froneman, T Goodlace, C Griffith, G Heale, N Holland, MJ Houston, B Magara, N Mbazima,  
T Mkhwanazi, X Mkhwanazi(Dr), D Matlou, R Moodley, M Mothoa, SA Nkosi, M O'Hare, B Petersen, S Phiri, N Plenaar,  
N Pretorius, A Sangqu, MP Schmidt, B'Sibiya, PW Steenkamp, S Venkatakrishnan.

*Handwritten signature/initials*

those empowerment partner was not within the control of the mining companies and so companies should not be prejudiced in the assessment process. Its exclusion represents incomplete information capture and would result in misleading results. *We are strongly of the view that companies must be allowed to include these transactions, on the basis that they complied with the requirements of the Mining Charter as approved by the DMR (or DME) at the time.*

#### **B. Timing of % reported on: at point of transaction and current %**

Linked to the previous area of disagreement, companies should be afforded the space to indicate value at the point of the transaction, not only current value. Mining rights were granted on the basis that the BEE transactions would lead to certain envisaged beneficial outcomes as contemplated at the time the rights were granted. Where the actual outcomes of the transactions were different to those originally envisaged due to no fault on the part of the mining company, the company should not be prejudiced. Presentation of these results should indicate both outcomes, to ensure all aspects of the efforts of companies to achieve meaningful empowerment is appropriately captured.

Original price: This is not available in all instances (e.g. sometimes the BEE entity contributed mineral resources which were not valued or the parties merely did a JV without an original purchase price). Should one include capital expenditure by the BEE company into the mine? A volume based measurement approach may be instructive.

*We recommend the template should capture value of empowerment at the time of the transaction as this represents the economic value transferred.*

#### **C. Transparency of the process of collation**

Companies need to know how the collation process occurred and the methodology employed. Where companies disagree with the DMR interpretation of their information, they need to be given an opportunity to engage with the DMR on the matter. Given the inter-related issues of asset sales, and how the internal company structures/transactions feed into company total is critical to the outcome. E.g. JV assets, with multiple owners and BEE partners, BEE partners owning equity of SA and non-SA assets. To ensure issues pertaining to double counting or under counting is avoided. *We request that the methodology be disclosed and that companies receive individual (private) feedback on application of the methodology to itself and be given an opportunity to engage the DMR if they disagree with the DMR evaluation, prior to release of results.*

#### **D. Outstanding debt and Net value**

The mining companies who have sold assets to BEE partners and community trusts cannot demand information relating to their (the BEE partner) balance sheet situation. BEE companies should provide this. It is not possible to allocate present debt to original transactions where the BEE company has multiple assets and debt facilities. Some BEE companies did not use their dividends for debt repayment – should the dividends taken be deducted from the debt outstanding? The DMR itself encouraged mining companies to flow dividends back to HDSA partners outside of repaying debt.

*Answer  
M*

Even in the instance where the mining company has provided guarantees, the relationship lies between the BEE company and the banks and it is not always possible for the mining company to access that information. Furthermore, BEE partners have independent businesses, with varying interests and the mining companies have no say nor knowledge on how that is utilized. This is effectively requesting information pertaining to Net Value and is not information required to measure compliance with the Mining Charter. *We recommend it be removed.*


#### E. Principles applied to Assessment

Assessing companies only based on the flow through principle does not take account of the modified flow-through principle. In addition, certain BEE transactions were concluded prior to the introduction of the Amended Charter in 2010 and the Mining Codes and the DMR endorsed these transactions based on the principle of HDSA majority ownership and control. This principle should continue to apply in respect of transactions concluded at that point in time. In addition, the BEE companies' decision to adopt a certain controlling stake, to allow themselves to partner with others that may add value to their company, are not in the control of mining companies. It is often the result of funding mechanisms, which ensure the effectiveness of the transaction and allow for transfer of skills. *We recommend use of the word economic interest.*

The Chamber did submit a more detailed list of comments to the DMR template designer before the deadline yesterday evening.

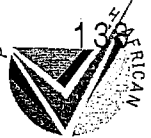
We urge you not to distributing the template until these issues are resolved. The Chamber's Office Bearers are ready to engage on these issues on a critical urgency basis – given their importance.

Yours Sincerely



BHEKI SIBIYA  
Chief Executive Officer  
Chamber of Mines





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22 February 2015

Advocate Ngoako Ramatlhodi  
Minister of Mineral Resources  
Building 2 C  
Trevenna Campus  
Cnr Meintjies and Francis Baard streets  
Sunnyside  
Pretoria

Dear Minister Ramatlhodi,

**RE: THE CRITICAL IMPORTANCE OF INCLUDING THE CONTINUING  
CONSEQUENCES OF PREVIOUS BEE DEALS IN MEASURING PROGRESS ON THE  
MINING CHARTER OWNERSHIP ELEMENT**

I hope you are well and that your preparations for your Canadian trip are proceeding smoothly? Following the meeting between yourself and the Chamber's Office Bearers held in Cape Town on the 8<sup>th</sup> February 2015, it is now clear to us that we need to engage you regarding the ownership element of the Mining Charter, and in particular regarding the continuing consequences of previous BEE deals concluded post 2004 where the BEE partner has since exited the deal. This is a critically important issue for many mining companies that embarked on BEE deals to meet the spirit and intent of the Mining Charter and to give historically disadvantaged South African access to ownership in the mining industry. The fact that deals have been done and a critical mass of black economic empowerment has been created, even though some of the BEE partners have exited the mining sector, is true to the spirit of the Charter. In essence, the format of the template that has emerged has confirmed our concern that the DMR is excluding the benefits of these previous deals.

In essence, this is a critical issue because:

- Excluding previous deals (done post 2004 where the BEE partner has exited) will mean a material misrepresentation of the mining industry's material contribution to creating access to ownership and creating a critical mass of black economic empowerment in the economy. To illustrate the scale of the problem, in gold and platinum there are some companies that have achieved or exceeded the 26% target when the continuing consequences are included, but which may only achieve a 16% level of BEE ownership if these deals are excluded.

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N Pretorius, A Sangqu, MP Schmidt, B Sibiya, PW Steenkamp, S Venkatakrishnan.

*Amber*  
*N*

- The exclusion of the specific previous deals will lead to reputational and regulatory risks to companies with potentially significant negative risks to shareholder value. This will force companies (or the Chamber on their behalf) to take legal action to preserve the benefits of the said previous deals being included in their ownership element progress assessment. Mining companies have reported consistently to shareholders that the continuing consequences are included in their progress reports. The DMR template driven progress report that excludes the said previous deals then triggers the necessity for companies to report to shareholders and then to immediately take the necessary legal steps to protect their rights.

It is clear to the Chamber's leadership that we need to engage you to try and achieve urgent resolution on this matter. Let me elucidate further on the ownership element challenge. The purpose of doing so is to try and provide some context to this issue with the focus on looking at developing a mutually acceptable outcome.

The DMR asserts that the exclusion of the continuing consequences of previous BEE deals post 2004 where the BEE partner has exited was inserted into the 2010 revised Charter by mutual consent of the stakeholders. Industry is not in agreement that the clause inserted in the 2010 revised Mining Charter, was agreed by industry, nor does it preclude past transactions.

It is important, at this point, to highlight how the relevant changes to the 2010 Mining Charter came about. The original (2002) Mining Charter contained the following wording under the ownership section: "The continuing consequences of all previous deals would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production." During the negotiations on the 2010 Mining Charter, the final draft of the Charter presented to the Chamber very shortly before it was to be made public by the DMR did not contain this clause. The Chamber had an urgent meeting on 9 September 2010 with the then DG on this matter (and on some other remaining industry concerns) and the DG agreed that the wording in the 2002 Mining Charter would be re-instated in the 2010 Mining Charter. However, in the final revised Charter the 2002 wording referred to above had been re-introduced, but some additions had been made which had not been discussed with the Chamber before and to which the industry had not agreed, i.e. the clause had been amended to read: "The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production." (The underlined words had been added.)

The first concern about these developments is that "the goalposts" were unilaterally changed in 2010. The second is that the change is being applied retrospectively, as it also affects transactions that had been done in good faith (and had been agreed to by the DMR) between 2004 and 2010.

The Chamber has obtained Senior Counsel's opinion on the Mining Charter and some related matters. Some of the conclusions of counsel are:

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1. There is nothing in the MPRDA which provides, either expressly or by necessary implication, that once a mining right has been granted, the applicant will, in order to retain the right, have to meet new requirements set out in an amended Charter or SLP.
2. The MPRDA in its current form does not impose a requirement on the holder of a mining right to ensure that its percentage HDSA ownership does not drop below the 26% target stipulated in the Charter.

Let me reiterate that the Chamber and its members fully support the Mining Charter as an instrument to achieve the objects of sections 2(d) and (f) of the MPRDA, which are to --

- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
- (f) promote employment and advance the social and economic welfare of all South Africans.

There seems to be a difference of opinion between the Chamber and the DMR regarding at which stage the effect (or envisaged effect) of the empowerment transaction(s) should be measured. The Chamber proposes that a practical way forward would be to separate the two issues that up to now seems to may have been combined, i.e. compliance with the ownership element of the Mining Charter and whether or not the aims of sections 2(d) and (f) have been achieved by the conversion of old order rights and the granting of new rights.

Where the industry is able to demonstrate compliance with the Mining Charter, in terms of the mining right approvals received, this should be clearly communicated. Where it is perceived that the objectives of the MPRDA have not been achieved, due to unforeseen circumstances or outcomes apart from Mining Charter compliance, this should be addressed separately. The exclusion of past transactions and the use of net value in the compliance assessment we believe are misplaced and should form part of a separate/broader discussion around whether objectives of the MPRDA have been achieved.

Should the DMR feel that this matter cannot be resolved without obtaining clarity on the area of a difference of opinion (at which stage the effect or envisaged effect of the empowerment transaction(s) should be measured), the Chamber is prepared to consider a joint approach with the DMR to court for a declaratory order. While the Chamber feels such an approach is unnecessary to resolve the matter, it would be willing to explore this possibility further with the DMR, if required.

The Chamber would like to stress the materiality of this issue for mining companies: the exclusion of past HDSA transactions, would result in material misrepresentation of empowerment transactions, leading to reputational and regulatory risks to companies, and with potentially significant negative consequences to shareholder value. Mining companies (or the Chamber on their behalf) would be forced to take legal action to protect their rights should this matter not be resolved.

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Furthermore, in the light of JSE disclosure regulations, companies will have to go public on the matter aimed at informing the public and all shareholders of the material risk the industry is presented with as a result of the exclusion of past transactions, should we not be able to resolve the matter.

The Mining Charter compliance process currently being undertaken by the DMR is of utmost importance to the industry. As such, we are actively engaged in populating the templates and co-operating with the DMR. We wish to acknowledge, with appreciation, the revised ownership template, which incorporates many of our concerns listed in the letter to the DDG sent on the 5<sup>th</sup> February 2015. The Chamber members have therefore agreed that they will submit information in relation to the ownership component of the template. In addition, companies will be submitting supplementary HDSA ownership information with the template submission, to clarify additional information requirements including the measurement of the continuing consequences of previous deals but excluding net value.

At the previous MIGDETT Principals meeting, a commitment was made by you that Mining Charter assessment results would first be presented to the Principals to interrogate before being released publically. Confirmation that this process will be followed, including fixing dates and reasonable timelines beforehand, is requested to ensure a credible process for the Chamber to engage the DMR and the unions robustly on the assessment results before they are made public. In addition, since the Moloto audit of 2012/2013, mining companies have received no feedback on their audit results. The Chamber would appreciate feedback to companies individually, prior to the MIGDETT process and the public release of the results.

Given the importance of this matter to the Chamber and its members and the urgency created by the Mining Charter assessment results release date publicly announced by the DMR, the Chamber would sincerely appreciate resolution of the matter as soon as is practically possible (within the next week). As you are aware many of the mining companies are in results reporting periods and they are likely to be asked how companies will manage the apparent compliance risks of previous deals not being included. It is unfortunate, but disagreement on this matter will trigger a disclosure event.

I look forward to resolution of this matter and the continued constructive engagement with the DMR

Yours sincerely



Mike Teke  
President  
Chamber of Mines

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CHAMBER OF MINES OF SOUTH AFRICA

Putting South Africa First

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04 March 2015

## **CHARTER REFERENCE GROUP CIRCULAR NO. 06/15**

*(For noting)*

### **UPDATE ON THE DMR MINING CHARTER ASSESSMENT**

The Chamber met with the DMR yesterday to discuss the progress on the Charter assessments as well as the challenges that were experienced by companies in the process.

It would seem that there was miscommunication from the DMR on the due date for submission of the 2014 information. The Chamber was under the impression that the due date of 28 February 2015 was for 2012 and 2013 information and that 2014 information was only due on 31 March 2015. As a way forward to address the challenge caused by this miscommunication it was agreed that the DMR should proceed to prepare the industry Charter compliance report from the 2012 and 2013 information which it had already received whilst waiting for the outstanding 2014 information from some companies. The DMR has extended the submission date of 2012 & 2013 information to 07 March 2015. Companies are encouraged to make all efforts to submit the 2014 information as soon as they can.

In the light that the assessment scope include 2014 information the Chamber requested that companies be exempted from the customary submission of their 2014 Charter reports to the DMR on 31 March 2015 given that they would have already submitted this information in the current assessment. The DMR did not object to the principle but undertook to consult the DG on our request.

The Chamber requested clarity on the procedure to follow should companies require to revise/change already submitted information. In this instance the company should contact the DMR to request that the system be unlocked for it to make necessary changes/corrections on its information. Once the company has finalised changes it should ensure that these are saved to enable the system to override the initially submitted information. Only after saving can companies re-submit its information to the DMR.

The DMR reaffirmed its commitment to involve all stakeholders in the review of the draft final industry Charter compliance report through the MIGDETT process prior to publicising it. The industry report will not necessarily present aggregate industry results but will instead highlight results per commodity; per region and per company.

The Chamber raised all challenges that companies experienced on the various templates (particularly on the ownership and OHS templates). The DMR clarified all queries and undertook to address those that it had not already resolved.

**LERATO TSELE**

**ACTING DEPUTY HEAD: SAFETY AND SUSTAINABLE DEVELOPMENT**

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From: MCharter Project <MCharter.Project@dmr.gov.za>  
Date: 03 March 2015 at 09:29:26 SAST  
To: Undisclosed recipients;  
Subject: Extension of Mining Charter Compliance Assessment Due Date

Dear Stakeholder,

The Department of Mineral Resources (DMR) launched a web-based Mining Charter Management Information System on 9 February 2015 which allows the mining companies to capture data in regard to the level of compliance with the Mining Charter.

The due date as communicated by the Department for the submission of the Mining Charter assessment questionnaires for the reporting period 2012, 2013 and 2014, to the Department was Saturday, 28 February 2015.

The Department has however received requests from numerous mining companies for the extension of the due date, which will allow mining companies whom have not yet submitted mining charter assessment questionnaires to comply.

The Department has therefore extended the due date for the submission of the Mining Charter assessment questionnaires for the reporting period 2012, 2013 and 2014 to Saturday, 7 March 2015.

You are therefore directed in terms of Section 29 of the Mineral and Petroleum Resources Development Act to make available the required information as directed by the Department in the Web-based Mineral Resources Management Information System.

Companies are required to submit information which is accurate, correct and truthful. Failure to do so amounts to a contravention of the provisions contained in the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002).

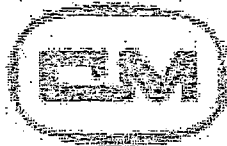
Finally the Department commends and thank all stakeholders whom have already submitted their Mining Charter assessment questionnaires online for the valuable contribution made to the Mining Charter compliance assessment process.

Your cooperation in this regard is highly appreciated.

Kind Regards,

Heinrich Mundt  
Project Manager  
DMR Mining Charter

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**STRICTLY CONFIDENTIAL**

4 March 2015

**COUNCIL CIRCULAR NO. 21/15**

*(For consideration by Council)*

**CONFIDENTIAL: FEEDBACK FROM PRESIDENT TEKE ON CONVERSATION HELD  
ON 4 MARCH 2015 WITH DMR MINISTER RAMATLHODI REGARDING THE  
OWNERSHIP ELEMENT OF THE MINING CHARTER**

**Synopsis:**

*Chamber President Mr Teke received a call from Minister Ramatlhodi today from Canada. The summary of the conversation is listed below. The Minister has recommended an urgent meeting between the Chamber President and the DG to resolve the matter. This meeting is taking place on Saturday 7 March 2015. The Minister also indicated that further submissions may be necessary from the companies that are the most affected. It is recommended that the Chamber waits for the outcomes of this meeting before any next steps agreed in the Council meeting are actioned.*

**Brief Report**

The Chamber President Mr Teke received a call from Minister Ramatlhodi today to provide an initial response to the issues raised in the Chamber's letter to the Minister on the industry's concern about the exclusion of the continuing consequences of previous deals in measuring progress on the ownership element of the Charter. The following are the key points to emerge from the discussion:

- The Minister is now aware that this is a problem, and expressed concern about the Chamber's disagreement on the clause about continuing consequences.
- The Minister proposed that the Chamber's President meet urgently with the DMR DG in the next few days to have a proper thrash out conversation on the matter.
- Companies that are materially affected by the exclusion of continuing consequences may be requested to make separate submissions to the DMR in a process to be agreed with the DMR.

COUNCIL OF THE CHAMBER: M Teke (President), Ms KT Kweyama (Vice President), G Briggs (Vice President), A Bam, M Cutifani, P Dunne, J Evans, N Froneman, T Goodlace, C Griffith, G Heale, N Holland, MJ Houston, B Magara, N Mbazima, T Mkhwanazi, X Mkhwanazi(Dr), D Matlou, R Moodley, M Mothoa, SA Nkosi, M O'Hare, B Petersen, S Phiri, N Pienaar, N Pretorius, A Sangqu, MP Schmidt, B Sibiya, PW Steenkamp, S Venkatakrishnan.

So the Minister has provided his preliminary response to the issue. Mr Teke has subsequently discussed the matter with DG Ramontja and a leadership meeting has been set-up to engage on the Chamber's concerns on Saturday 7 March 2015. As soon as this meeting is concluded the Chamber will revert with a report-back note to Council members.

**Conclusion and recommendation**

Given these unfolding developments, it is recommended that the CoM-DMR meetings be held first before any further course of action is taken. Depending on the outcomes from the CoM-DMR meeting a further special Council meeting may need to be called.

**ROGER BAXTER**

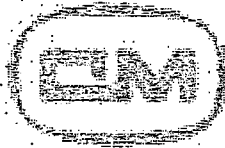
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**STRICTLY CONFIDENTIAL**

6 March 2015

**COUNCIL CIRCULAR NO. 22/15**

*(For consideration by Council on a round-robin basis)*

**CONFIDENTIAL: FEEDBACK FROM MEETING HELD BETWEEN THE CHAMBER AND DMR HELD ON 6 MARCH 2015 REGARDING THE CHAMBER'S CONCERNS ON THE OWNERSHIP ELEMENT OF THE MINING CHARTER**

**Synopsis:** *The purpose of this note is to provide Council members with a brief report-back on the meeting held between the Chamber and the DMR regarding the Chamber's concerns on the exclusion of the continuing consequences of previous deals from measurement of progress in the Mining Charter. A constructive meeting was held. It has been agreed that the Chamber will provide a document to the DMR DG by lunchtime on Saturday 7 March 2015 providing a summary of the scale of the impact of leaving out the consequences of previous deals including a list of the companies most affected. The CEOs of these companies will be contacted for permission for their details to be provided. This matter is for consideration by Council on a round-robin basis.*

**Brief Report**

The Chamber President Mr Teke, AngloGold Ashanti CEO Mr Srinivasan and Chamber COO Mr Baxter of the Chamber met with DMR Director General Dr Ramontja and Deputy Director General Mr Raphela in Johannesburg on 6 March 2015. The purpose of the meeting was to discuss the Chamber's concerns regarding the DMR exclusion of the continuing consequences of previous deals BEE deals from the measurement of progress in the ownership pillar of the Mining Charter.

The following are the key points to emerge from the discussion:

- The meeting started on a challenging note with the DG Ramontja expressing his serious concerns at his being by-passed by the letter sent to the DDG Mabuza on 5 February 2015. He indicated that the MIGDETT process had been established to deal with stakeholder

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issues and that he had worked tirelessly to address stakeholder concerns. The DG was also concerned that he was not copied on the letter to the Minister dated 23 February 2015. The DG expressed his concern that this was not the normal manner in which the DMR and Chamber do business and that the normal protocols had not been followed. The Chamber delegation recognised the DG's concerns and undertook to discuss the matter in Council.

- The Chamber delegation, led by the President then provided the DMR DG and DDG with a clear picture of the concerns regarding the impact of the exclusion of the continuing consequences on different commodities. Particular emphasis was placed on elucidating on the contents of the letter sent to the DMR Minister, that the Chamber had not agreed to the full clause inserted into the 2010 revised Mining Charter (on excluding continuing consequences after 2004), provided examples of the impact of the exclusion and then highlighted the significant risks for the companies and the events that may be triggered if a resolution is not found. The fact that the altered continuing consequences clause was retrospective was not agreed by the Chamber and companies had acted in good faith to achieve the Charter targets both prior and post 2004.
- The Chamber emphasised the need to separate legal compliance away from the questions whether the objectives of the Charter and the Act had been achieved. The Chamber emphasised that the companies had complied when their mining rights were granted (as the DMR agreed with their Charter plans) and that companies had focused on meeting the spirit and objective of the Act by creating a critical mass of BEE that could become self-perpetuating. The fact that some of the BEE players had existed the mining BEE deals to go into other sectors should not be held against the mining companies.
- The Chamber indicated that the impact of excluding the continuing consequences of previous deals was so material that it would undermine the reputation of the companies and trigger a set of events that would not be in the interests of the mining industry. It was critically important that the continuing consequences must be recognised by the DMR.
- The Chamber also highlighted that the Chamber and its member companies had fully supported the template process and companies were doing their best to provide the necessary data. It was in the template process that the Chamber had concluded that the DMR was going to exclude the continuing consequences of previous deals hence the letters sent to the DDG and Minister.
- The DG asked the question of whether the 26% BEE ownership objective has been achieved by 2014. The Chamber responded that the DMR in issuing mining rights had agreed with the transformation plans of the companies. In addition, the industry had met the original spirit and intent of the Charter by broadening ownership and creating a critical mass of BEE. The fact that various BEE companies had sold their assets in mining, or that the global financial crisis had materially impacted on the share price performance of companies should not be used to penalise the efforts of the mining companies to meet the objectives of the Charter.
- The DG focused on trying to understand the extent of the problem and he asked if the Chamber could provide him with a list of companies that are materially affected by the exclusion of the continuing consequences of previous deals. He indicated that this would be

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kept strictly confidential and only used for a discussion with the Minister, DG and two DDGs.

- The DG indicated that there might need to be a process where the most affected companies come and present to the DMR to ensure a fuller picture is provided.
- There was then some discussion on the template. The Chamber noted that most companies had provided the 2012-2013 data although the 2014 data had been a challenge for some companies. The DG noted that he would be cancelling all his meetings for next week and would only be focused on the Charter template process. Where there are gaps in submissions the DMR would engage the companies and the Chamber. The Chamber reiterated the fact that companies have cooperated in the template process.
- The Chamber also emphasised the need for there to be feedback to the companies on the audited results.

The following points were then agreed at the meeting:

- That the Chamber would revert with a summarised document showing the scale of the problem (i.e. the exclusion of the consequences) by lunchtime on Saturday 7 March 2015. The DG wanted the names of the individual companies and the scale of the continuing consequences challenge. This is to enable a proper assessment of the problem by the DG and Minister. The DG gave the undertaking that this would be kept confidential and only used in the discussion between the DG, the Minister and the two DDGs. The reason for the urgency is that the DG would be engaging the DMR Minister that afternoon.
- The DG indicated that the DMR may need to engage each affected company within the next week, as the template process was due to be completed within this timeframe.
- That the Chamber would encourage members to continue populating the templates and engaging with the DMR.

The meeting finished on a constructive note with the DG indicating that it was important to try and find workable solutions to these types of challenges.

### Conclusion and recommendation

Given these unfolding developments, it is recommended that the Chamber prepare the note detailing the scale of the problem for submission to the DMR DG on a confidential basis. The Chamber will need to get permission from each affected company to list them in the document and to indicate how much the company is off the 26% target if the continuing consequences of post-2004 deals is excluded. The undersigned with contact the affected company CEOs and request this permission.

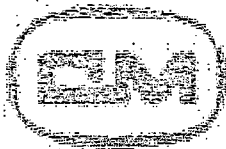
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## STRICTLY CONFIDENTIAL

7 March 2015

### Note to DMR Director General Dr Thibedi Ramontja

#### CONFIDENTIAL: DESCRIPTION OF THE IMPACT ON COMPANIES POTENTIALLY AFFECTED BY THE EXCLUSION OF PAST EMPOWERMENT TRANSACTIONS (IN RELATION TO UPCOMING MINING CHARTER ASSESSMENT AND ITS NEGATIVE IMPACT ON THE OWNERSHIP ELEMENT MEASUREMENT)

##### Synopsis:

*The purpose of this note is to provide the DG and Minister with a description of the size of the challenge facing the mining industry, if the continuing consequences of certain previous BEE deals are excluded. At the core of the Chamber's submission to the Minister and DG is that the continuing consequences of all previous deals should be included in the measurement of compliance with the ownership element of the Charter discussion. This follows the letter sent to the Minister on the 23<sup>rd</sup> February 2015, which set out the industry's position and the significant implications of excluding previous deals. The Chamber shares this confidential information to forge a way to a workable solution for the DMR and industry together. The Chamber and its members remain fully committed to the Mining Charter and transformation in the South African economy.*

##### Introduction

The Chamber appreciates the opportunity to engage the DMR leadership on this key issue. It is very much in our collective interests that a resolution is found to the matter in the interest of promoting stability, investment and transformation in the mining sector.

The purpose of this document is to reiterate the Chamber's input to the Minister and DG that the continuing consequences of previous deals should be included in the measurement of compliance of the mining companies with the ownership element of the Mining Charter. There needs to be a separation of legal compliance away from the questions on whether the objectives of the Charter and the Act had been achieved. The fact that the companies had complied when their mining rights

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were granted (as the DMR agreed with their Charter plans) and that companies had focused on meeting the spirit and objective of the Act by creating a critical mass of BEE that could become self-perpetuating. The fact that some of the BEE players had existed the mining BEE deals to go into other sectors should not be held against the mining companies.

This document highlights the significant number of mining companies that have in good faith done BEE transactions in the post 2004 period that would be materially prejudiced if the continuing consequences of previous transactions are excluded from the measurement exercise. This was included in the letter sent to the Minister on 23 February 2015.

This is a matter of critical importance to the mining industry as the Chamber and its members believe that companies have met the spirit and intent of the Charter and that the continuing consequences should be included. Companies have complied with the Charter requirements and the DMR, in issuing companies with mining rights, has agreed with the companies' transformation plans. The fact that some of the BEE companies have sold out of their equity stakes (and so empowerment has been created in other areas of the economy due to mining) or that equity prices have fallen so as to challenge BEE deals does not take away the significant effort the industry has invested in meeting the requirements on transformation.

As elucidated in the letter to the Minister on 23 February 2015, the Chamber never agreed to the insertion of the underlined wording in the following section that was inserted into the revised Mining Charter. "*The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.*" To, in 2010, retrospectively exclude the consequences of previous BEE deals concluded between 2004 and 2010, would be exceptionally unfair and counterproductive given the industry's significant commitment to doing BEE deals in that period without necessarily locking in their BEE partners.

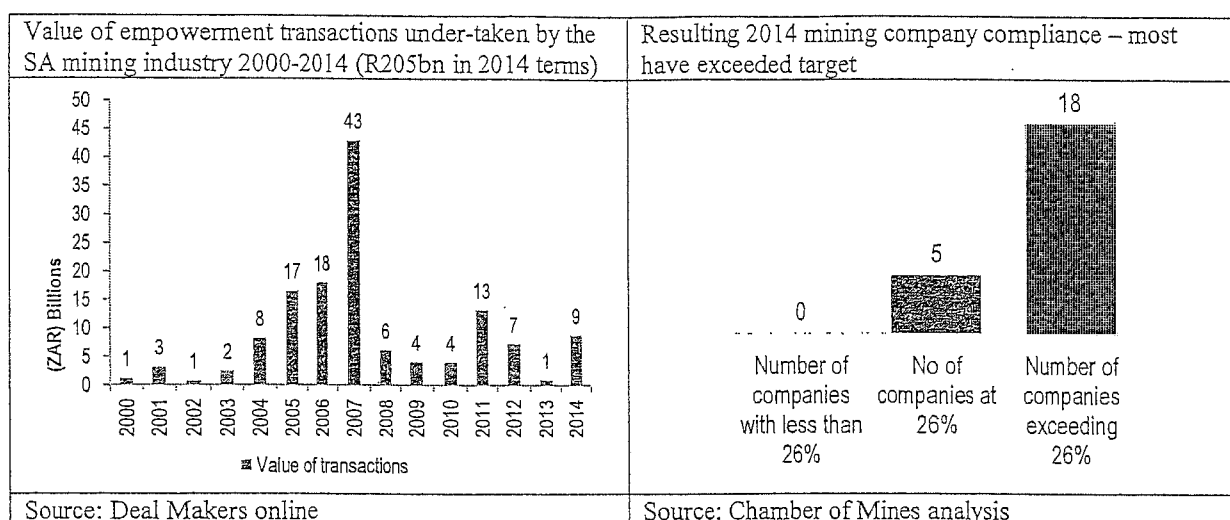
### Overview

The Chamber has undertaken to assess the potential impact on the industry and Chamber members, given the significant risks it poses to shareholder value, stakeholder relations and investment prospects for the industry. The Chamber's study encapsulates a significant portion of the industry, providing an impact assessment of 80 – 90% of the value of the mining industry. The information is based on confidential discussions with companies' combined with publically available information per the company disclosures.

### Impact assessment on the mining industry

The Chamber has considered 23 mining companies, across 6 of the largest mining sectors. All of the companies, based on the representations made to Chamber, have met or exceeded the industry target of 26% HDSA by 2014. This is supported by the value of empowerment transactions undertaken by the industry since 2000, which equates to R205bn (in 2014 money terms). A significant number of the transactions were done between 2004 and 2010.

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At a sectoral level, the table below summarises the levels of empowerment, in relation to both the past transactions and current BEE ownership of the sector. At an industry level, the Chamber estimates the empowerment level to range from 26% to 50%. The past transactions component of that we estimate to be from 0% to 17% across the sectors. (The weighting applied is based on a combination of volumes and values).

#### Sector level summary of industry empowerment

SA assets only	Number of companies	Target: Attained vs exceeded	Total HDSA ownership level (percentage points)	Past transactions (percentage points)	Excluding previous deals (percentage points)
COAL	7	Exceeded	50%	17%	33%
IRON ORE	2	Exceeded	35%	2%	32%
MANGANESE ORE	2	Exceeded	32%	0%	32%
DIAMONDS	1	Attained	26%	0%	26%
PGM	6	Exceeded	30%	5%	25%
GOLD	5	Exceeded	30%	16%	14%

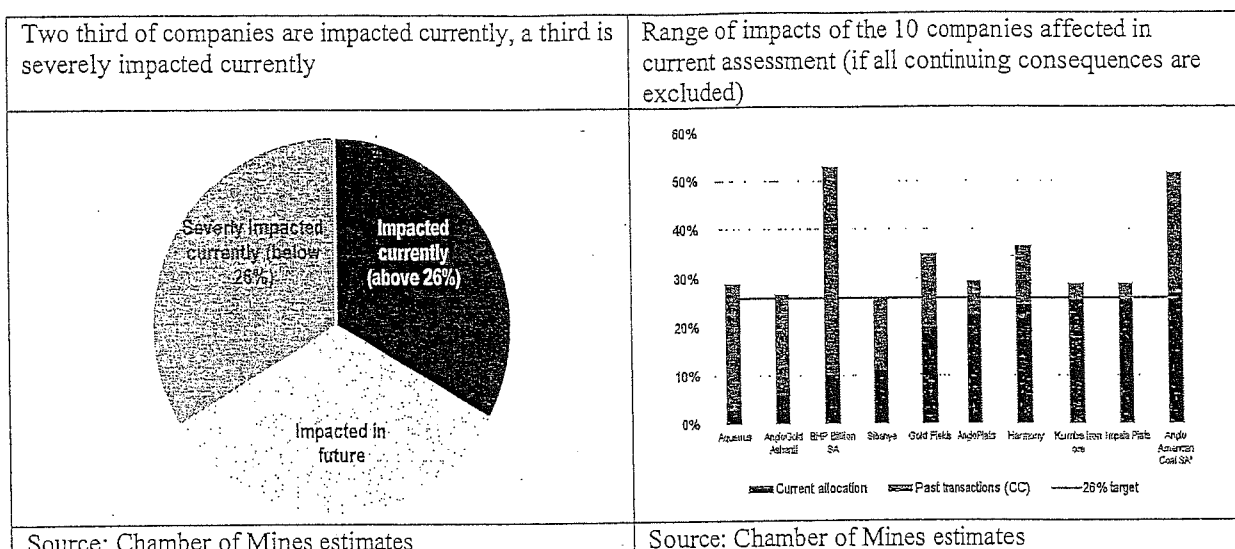
Source: Chamber of mines estimates

#### Impact of excluding the continuing consequences of previous deals

Of the total 23 companies which have attained and exceeded the ownership requirements, two thirds will have a negative impact on their ownership scores during the current assessment if the continuing consequences of previous deals are excluded. Of this component, about one third of the total companies will be at risk of having their ownership score move below the 26% target. The remaining third is at risk of future assessments being negatively impacted as BEE companies may decide to exit their investment to realise value. In other words this is not just about the period up to 2014 but also into the future.

If the continuing consequences of any previous deal was excluded (in an extreme scenario) this would result in seven major companies having BEE ownership levels of less than 26% (Anglo American Platinum, Gold Fields, Harmony, Sibanye Gold, AngloGold Ashanti, BHP Billiton Coal and Aquarius Platinum) with three companies just making the 26% target (Kumba Iron Ore, Impala Platinum and Anglo American Coal SA).

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In a scenario where pre-2004 transactions are accepted but transactions post 2004 are excluded the 33% of companies severely impacted would fall to 24%. This represents 5 major companies. (Anglo American Platinum, Gold Fields, Sibanye Gold, AngloGold Ashanti (their Izingwe and ESOP) and Aquarius Platinum).

The Chamber wishes to highlight that these estimates may provide emphasis on the current dilemma facing companies, however, the read through implications have far reaching implications for every company. These companies completed transactions in good faith in the 2004-2014 period to meet the spirit and intent of the Charter. The exclusion of the continuing consequences of these deals has significant reputational risks for the mining companies and for investment in the mining sector.

All the HDSA empowerment partners in mining will want, and should be entitled, to monetise value at some stage and mining companies are at risk of their empowerment levels declining, through the process of BEE partners exiting or decreasing their shareholding. This is a normal outcome of transformation whereby BEE partners want to realise value from mining transactions (or any other investment) and therefore sell their shares. The fact that the BEE shareholders may not necessarily want to stay in mining, does not mean significant transformation has not taken place or that the mining companies should be penalised for allowing the BEE partners to exit. If the consequences of these deals are not included and the DMR insists that companies have to retain a 26% BEE level, this will force mining companies to perpetually dilute other shareholders if the required BEE partners cannot be found in the open market. The consequences will be a shareholder revolt, significant divestment from mining companies and a significant constraint on companies to raise capital in the future.

### Conclusion and recommendation

As demonstrated in this document a significant portion of the mining industry (33%) will be impacted if the continuing consequences of the previous deals are excluded, with 24% of the industry by value falling below the 26% ownership target. The exclusion of the continuing consequences of previous deals post 2004 will have a devastating impact on a number of companies, negatively affecting their shareholders and potentially their mining rights.

The Chamber remains firmly of the view that the continuing consequences of previous BEE deals should be taken into account in measuring the performance of the mining companies in terms of the

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ownership pillar of the mining industry. In this regard it is recommended that DMR takes on board this critical issue and that it is resolved expeditiously.

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Summary of industry empowerment levels and past transactions component

SA assets only	Target	Diff	Total empowerment	Past transactions (Continuing consequences)	Equity and asset level
<b>COAL</b>	26%	24%	50%	17%	33%
Anglo American Coal SA*	26%	26%	52%	25%*	27%
BHP Billiton Coal SA	26%	27%	53%	43%*	10%
<b>IRON ORE</b>	26%	9%	35%	2%	32%
Kumba Iron ore	26%	3%	29%	3%	26%
<b>PGM</b>	26%	4%	30%	5%	25%
AngloPlats	26%	4%	30%	7%*	23%
Impala Plats	26%	3%	29%	3%	26%
Aquarius	26%	3%	29%	26%*	3%
<b>GOLD</b>	26%	4%	30%	16%	14%
AngloGold Ashanti	26%	1%	27%	21%#	6%^
Gold Fields	26%	9%	35%	15%	20%
Harmony	26%	11%	37%	12%*	24.5%
Sibanye	26%	0%	26%	15%	11%

Note \* for Anglo American SA and BHP Billiton all or significant part of historic BEE deals done before 2004.

Note #^ for AGA 21% of past transactions done before 2004 and 6%^ is ESOP and Inzingwe deal done post 2004.

Source: Chamber of Mines estimates

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13 March 2015

**CHAMBER CHARTER REFERENCE GOUP CIRCULAR NO. 08/15**

*(For Noting)*

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**UPDATE ON THE MIGDETT TASK TEAM MEETING ON THE MINING CHARTER**

**Synopsis:** *The DMR called a special MIGDETT Task Team meeting on the 13 March to give an update on progress made on the data collection process of the Mining Charter reports by the industry. This circular serves to provide notes on this meeting.*

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**Background**

The Minister promised the MIGDETT Principals that the data collection process of Mining Charter reports from the companies will be inclusive and that the final report will be shared with the Principals before it is released to the public. The DG is playing a hands-on oversight over the data collection process and has committed to give regular feedback to MIGDETT Task Team on the progress that the DMR is making in collating the information. The purpose the meeting on the 13 March was to provide the Task Team members with an update on the number of companies who had submitted as well as the challenges experienced by the DMR and the companies when submitting the web based template. The meeting paid special attention to the Ownership Template especially the continuing consequences issue.

Prior to this meeting the Chamber had successfully convinced the DG that the companies who had been seriously affected by the consideration of the benefits of continuing consequences beyond 2014 should have bilateral sessions with the DMR to present their Ownership status and the structure of their deals. These companies had also met with the DG and DMR also wanted to present their observations on the presentations by each company.

**The DMR Feedback**

The DMR re-iterated the deadline of 14 March as the final date for all Mining Charter submissions and emphasized that these submissions must be made electronically via the web based template. No other forms of submissions must be made to any other office.

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The DG and DMR officials have met some companies on a bilateral to allow these companies to present their Ownership status and address their specific issues on the "once empowered always empowered" principle. It was noted that companies in general had senior (CEO representation which shows commitment on the part of industry. The DG further commented that there were companies who presented honestly revealing all information through well prepared presentations. He raised his concern about the level of information and openness of some of the companies. The companies who have presented to the DMR were listed as follows: AngloGold Ashanti; Sibanye Gold; Harmony; Impala Platinum; Anglo Platinum; De Beers; Gold Fields; BECSA; Aquarius Platinum and Glencore.

Key issues for the DMR arising from the presentations include:

- Treatment of assets sold to HDSA prior to 2004,
- Treatment of assets sold to HDSA which has since exited the mining industry after 2004,
- The notion of once empowered always empowered,
- The impact company restructuring or unbundling has had on their empowerment credits and
- Transactions "under water".

There is recognition of the complexities of ownership transactions and the need for further company engagements, especially with BEE companies. As such, companies may be approached to provide clarity or further information where gaps are identified. It seems the biggest issue the DMR is grappling with is what they phrase as "double dipping", where more than one company claims credits over the same asset or BEE company. The DG will be inviting more companies to do presentations on their ownership structures and where possible these companies should bring their partners with them.

The DMR will be collecting data and presenting findings as they are. The DG confirmed that at one stage companies will be given feedback on how the DMR has assessed them as they "need to know where they stand". He mentioned that even legally through court papers they would need to know but he was not encouraging that the legal route should be used.

### **Chamber Presentation**

AS agreed at the previous MIGDETT Task Team meeting the Chamber was allowed to do the attached special generic present on the ownership element. There was limited response to the presentation where a DMR official cautioned that the Chamber cannot claim that companies are compliant on the ownership element and that it is the DMR that will make that ruling. The Chamber responded that this assertion is based on the submissions made by companies with acknowledgement that the ruling will be made by the DMR.

A question was asked why the DMR was Chamber was only raising this issue now at this late stage. The Chamber responded that when the case was raised, it was indicated that companies would be considered on a case by case basis on the spirit meaning empowerment. The template blanket exclusion of past transactions which have been exited post 2004, changed that understanding for industry in the treatment of the ownership scoring. The Chamber therefore felt it necessary that the concerns of its members are clearly communicated as this is a bigger principle issue that goes beyond the template.

*(See attached file: MIGDETT – Transformation committee – past transactions – 13 Mar 2015.pptx)*

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It is important that the DG made a suggestion that the MIGDETT Principals' meeting may be brought forward to **next week Friday the 20<sup>th</sup> March** from the currently scheduled date (27 March). The DG is yet to confirm this change after consulting with the Minister. It is possible that the Mining Charter results are then prepared for presentation and discussion at this meeting. The next MIGDETT Task Team is set for the 19 March, to finalize all agenda items for the Principals' meeting. It was also indicated that on the 19 March the report on the Mining Charter Assessment may be presented to the Task Team.

#### **SAMDA COMPLAINT**

Mr. Sipho Dube of SAMDA made a range of accusations on the Chamber of attempting to discredit SAMDA outside formal structures. Accusation was made that the Chamber and its members have no legitimate right to even operate in South Africa, and using their size to effectively bully smaller players in the industry. The Chamber responded by stating that everyone has equal right to state their views and participate but the appeal is that all stakeholders must operate within the rules and follow due process for the sake of harmonious relationships amongst all stakeholders.

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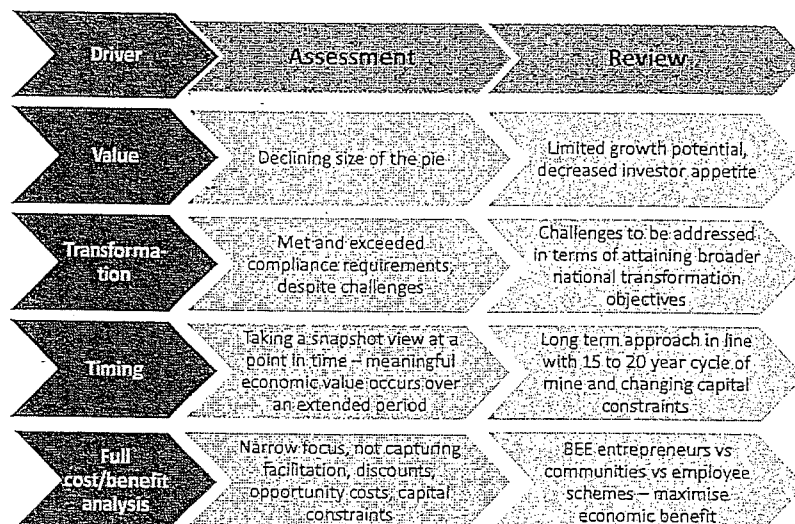


## Challenge regarding the Ownership Element of the Mining Charter

MIGDETT  
transformation committee  
13 March 2015

### Drivers of current ownership dilemma

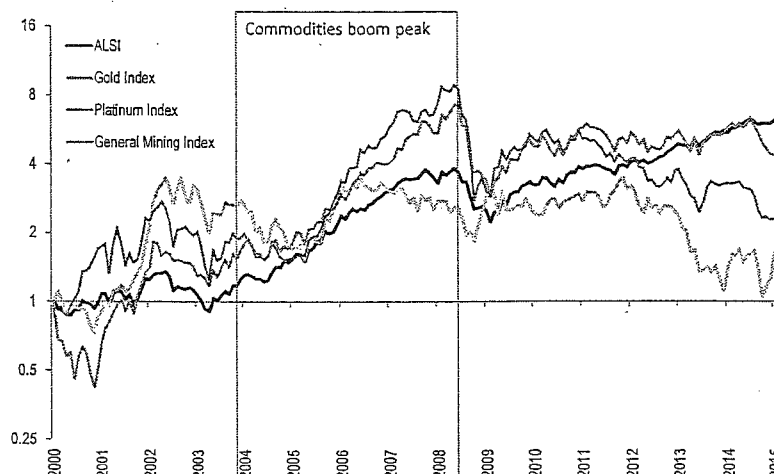
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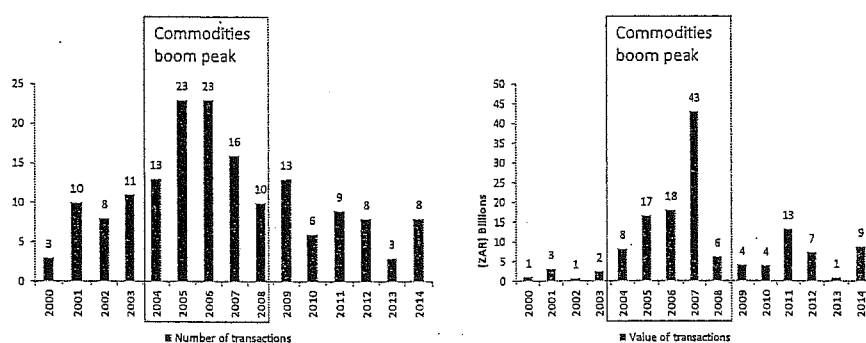
Putting South Africa First

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Mining sector performance currently is struggling and impacting all shareholders' value



BEE transactions in mining sector 2000 to 2014  
- R205bn over 15yrs (in 2014 money terms)



The majority of shareholders have suffered losses over the last 5 to 8 years, yet mining companies have continued to support and facilitate HDSA ownership.



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## Implications of excluding past transactions

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Destroy  
Investor  
confidence

- Perpetual 26% requirement
- Perpetual lock-ins for BEE partners imply no value realisation proposition
- All obligations for compliance on companies, no reciprocal requirements for BEE companies

Ignores  
transfer of  
ownership

- More than R205 bn worth of BEE transactions concluded
- Despite collapse of mining equities and constrained capital markets
- Significant momentum created in HDSA ownership, beyond just mining sector

Compliance

- Mining right issued only with agreed HDSA ownership plan
- Companies have complied and exceeded compliance targets, based on plans agreed with regulator
- HDSA structures, participation and exit done in conjunction with regulator



Putting South Africa First

## Challenge regarding the Ownership Element of the Mining Charter

MIGDETT

transformation committee

13 March 2015



CHAMBER OF MINES OF SOUTH AFRICA

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# Reporting framework

## Element

## Scoring principle

### 1. Reporting

Calculation of percentage of companies that have reported over the years to regional offices. Scoring is yes if the company has reported and No if the company has not reported.

### 2. Ownership

Assessment is based on reaching the target of minimum of 25% ownership to enable meaningful economic participation by HDSE.

Assessment of beneficiaries in the form of beneficiaries, ESOPs and communities. Cash flow to beneficiaries and economic participation by HDSE.

Participation by HDSE

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# Reporting framework

Element	Scoring principle
Reporting	Determination of percentage of companies that have reported. Scoring is Yes if the company has reported and No if the company has not reported.
Ownership	Measured through Meaningful Economic Participation and Full Shareholder Rights using the following categories:  Category 1 : Continuing consequence of previous deals concluded pre- charter will be considered (2004). Category 2 : 26% HDSA but not broad-base (identifiable beneficiaries i.e. Entrepreneurs, ESOPS & Communities) Category 3 : Broad-based but no cash flow to HDSA. Category 3+: Broad-based with cash flow to HDSA. Category 4: Data incomplete.



**Statement by Mineral Resources Minister Advocate Ngoako Ramatlhodi on the assessment of compliance with the Mining Charter**

31<sup>st</sup> March 2015

Ladies and gentlemen of the media, I welcome you to today's briefing.

As you well know, the mining industry is one of South Africa's oldest, most reliable sectors, dating back well over a hundred years, and has made an unprecedented contribution to the growth and industrialisation of the country.

South Africa remains a significant player in the mining space. The country accounts for a significant proportion of known global resources of platinum group metals; chromium, manganese, vanadium and gold.

Nonetheless, South Africa's history of colonisation and apartheid has meant that the benefits flowing from the mining of these significant resources has been enjoyed only

by a select few, with the majority of South Africans, particularly its black citizens, having to content themselves with the role of suppliers of cheap labour to the mining industry.

Since the advent of democracy in 1994, the South African government has prioritized a transformational agenda, not only for the mining industry, but more broadly for the South African economy as a whole. Meaningful participation in the broader economy by the country's historically disadvantaged remains critical for the sustainability of our democratic ideals and freedoms. This is why Government has developed legislation and policies whose common objective is to reverse the debilitating legacies of the past.

The Mineral and Petroleum Resources Development Act is one such piece of legislation. It reiterates the fundamental truth that the minerals beneath our soil belong to the people of South Africa, and that the State's duty is to act as the custodian of these resources. In short, the Act aims to promote equitable access to the nation's mineral and petroleum resources, especially among historically disadvantaged South Africans.

### **Assessment of performance of the sector in respect of the Mining Charter**

In June 2010, mining industry stakeholders represented in MIGDETT at that time: the Department of Mineral Resources, the Chamber of Mines, SAMDA, NUM, UASA and Solidarity - reaffirmed their commitment by signing a Declaration on the Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry.

The Declaration formed the basis for the Mining Charter review and amendment. The Amended Charter was published in September 2010. The results presented today are the outcome of an assessment for the reporting period ending December 2014 which were discussed by MIGDETT principals today.

As part of the assessment process, a dedicated Project Management Office, including a Call Centre, was created. An online Mining Charter reporting system was

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developed and through MIGDETT, a Technical Task Team was set up, to create a platform for engagement. Certain stakeholders who expressed concerns had an opportunity to present those to the Department of Mineral Resources, ensuring that the assessment takes the views of all stakeholders into account. Beyond these, workshops were held with industry in the various provinces with a view of popularizing and assisting mining companies to complete the templates.

However, despite this process the MIGDETT stakeholders are not of the same mind on the principles applicable to assessing the ownership element. We have agreed to approach the courts for a declaratory order to guide us on the correct interpretation of the afore stated applicable principles. This is a step to promote regulatory certainty.

I am aware that the final submission date is the 31<sup>st</sup> March 2015, however the data I am about to present, represents more than 80,% in terms of employment numbers in the industry.

#### **Assessment results: Highlights**

These are some of the highlights from the assessment report as of 29 March 2015:

- ❖ **Ownership:**As stated earlier, there's no consensus on the applicable principle and the courts are being approached to resolve the matter on an urgent basis
- ❖ **Housing and living conditions:** 63% of right holders with hostels have converted hostels to either family and/or single units.. The drive to improve the living standard of mineworkers has not fully been realised. More needs to be done to address the broader objective of ensuring that mineworkers live in decent accommodation.



- **Employment Equity:** The percentage of right holders that met the 40% target for each category are:
  - ❖ Top management (Board) – 73%
  - ❖ Senior management (EXCO) – 50%
  - ❖ Middle management – 56%
    - Junior management – 68%
  - ❖ Core and critical skills – 79%
- **Procurement and Enterprise Development:**
  - ❖ 42% met the target of procuring capital goods from HDSAs.
  - ❖ 33% met the target of procuring services from HDSAs
  - ❖ 62 % met the target of procuring consumables from HDSAs.
- **Human Resource Development**
  - ❖ 36.8% of companies have HRD spent the targeted 5% of total annual payroll on training.
- **Mine Community Development:**
  - ❖ 47% of mine community development projects are between 75% and 100% completion
- **Sustainable Development:**

Except for the analysis of samples in South Africa, the performance on sustainable development has not met expectations.

Having said that, we would like to thank those companies who have embraced the Charter and the MPRDA, and who continue to be sensitive to their obligations, and for whom implementing their undertakings is not merely a box-ticking exercise. To

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current investors and potential investors, we value your investment in our country, and your understanding that for mining to be sustainable into the future, meaningful transformation must take place.

The Department would like to thank all MIGDETT stakeholders for their active participation in the process, and for their willingness to assist in ensuring it was concluded timeously.

The Department will further strengthen the efficacy of the Mining Charter through a review process to accelerate the transformation imperative in the mining sector and create a conducive environment for the sustainable growth of the sector. Furthermore, the Department will, following this assessment, continue to engage the industry and other stakeholders on addressing compliance matters both through the tripartite forum and on an individual basis.

To reiterate, government values the contribution of the mining industry to the South African economy. However, we expect investors in the industry to behave in a responsible manner, and to abide by the laws and policies of the country. From these statistics it is clear that there is still some way to go before we can truly transform the industry, and fully realise the objectives set out in the Charter and the MPRDA. We appeal to industry and labour to continue to work with us through MIGDETT and other structures to achieve this aim.

I believe we all can and should do better in this regard.

I thank you.

For enquiries, contact Adv. Mahlodi Muofhe, (Special Advisor to Minister Ramatlhodi)

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## MEDIA STATEMENT

EMBARGO 12H00, 31 MARCH 2015

31 March 2015

### CHAMBER WELCOMES DMR INTERIM MINING CHARTER PROGRESS STATEMENT AND AGREEMENT TO SEEK A DECLARATORY ORDER ON THE INTERPRETATION OF THE OWNERSHIP ELEMENT

The Chamber of Mines of South Africa ("the Chamber") and its members welcome the interim statement on the state of progress in transformation in the mining sector which has been released today by Department of Mineral Resources ("DMR") Minister Advocate Ngoako Ramatlhodi. The Chamber and its members fully support the transformation objectives encapsulated in the Mineral and Petroleum Resources Development Act ("MPRDA") and have taken meaningful steps to give effect to them.

The year 2014 was the year by which companies in the mining industry were to aim to reach the targets set in the 2010 Amended Mining Charter. In order to conduct an assessment of levels of attainment of these targets by mining companies, the DMR embarked on an inclusive process with key stakeholders, where a template was designed and stakeholders were consulted to make inputs on it before it was finally released by the DMR for companies to start providing the necessary information required for the purpose of assessing the state of progress. The Chamber's members have cooperated fully with the process and with other stakeholders.

The Chamber's members have made considerable progress on all elements of the Mining Charter including: creating access to ownership, procurement and enterprise development, employment equity, human resource development, mine community development, improving living and housing conditions, and creating sustainable development in the mining industry by improving the environmental safety and health performance of the mining industry. The extent of change is profound and irreversible.

However, an area where the DMR and the Chamber have a difference of opinion is the understanding of the ownership element. The DMR's understanding of the ownership element indicates that empowerment transactions concluded after 2004 where the Black Economic Empowerment (BEE) ownership level has fallen due to BEE disposal of assets or for other reasons, should not be included in the calculation of progress made. This means that the DMR may find certain components of the mining sector not to have achieved the ownership target as per its definition.

The Chamber on the other hand believes that previous deals should be included in the ownership calculation, as it represents meaningful economic participation by Historically Disadvantaged South Africans (HDSA) beneficiaries since before 2002. The industry believes the Mining Charter does not require of mining companies to maintain a 26% HDSA ownership once it has been achieved. The exclusion of past HDSA transactions would result in a material misrepresentation of all the meaningful economic HDSA participation facilitated by mining companies in good faith

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and with the approval of the DMR. The DMR in issuing mining rights had agreed with the transformation plans of the companies. In addition, the industry had met the original spirit and intent of the Mining Charter by broadening ownership and transferring significant value to BEE groups. The fact that various BEE companies had sold their assets in mining, or that the global financial crisis had materially impacted on the share price performance of companies should not be used to penalise the efforts of the mining companies to meet the objectives of the Mining Charter. From the Chamber's perspective, the mining industry has achieved the Mining charter ownership targets, having provided meaningful economic participation for HDSAs represented through identifiable beneficiaries, substantial cash flow and full shareholder rights.

In order to break the impasse, and to avert any confusion that may be damaging to investor perceptions, the DMR and the Chamber have jointly agreed that the court be approached to seek clarity on this matter. This will be done through a declaratory order which will provide a ruling on the relevant legislation pertaining to the continuing consequences matter. This is a proactive and necessary step to promote regulatory certainty for the mining industry and shows that both the DMR and Chamber recognise the need for the court to provide certainty. The Chamber fully supports the declaratory order process and will work with the DMR to get the court process underway as soon as possible.

The Chamber and its members have invested significantly in transforming the sector as agreed in the Mining Charter process that started in 2002. It is our view that the transformational change has been both profound and substantial, and that the process towards normalizing the country's economic landscape is now irreversible.

ENDS

Issued by

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## mineral resources

Department:  
Mineral Resources  
REPUBLIC OF SOUTH AFRICA

### Statement by Mineral Resources Minister Advocate Ngoako Ramatlhodi on the outcomes of the MIGDETT meeting of 14<sup>th</sup> May 2015

Members of the media

Ladies and gentlemen

The leadership of the mining industry met this morning to deliberate on matters currently facing the sector, with a view to finding sustainable solutions that will further advance this important sector of the economy.

The Mining Industry Growth Development and Employment Task Team (MIG-DETT) meeting of principals, chaired by myself and attended by leadership of business (the Chamber of Mines and the South African Mining Development Association) and labour (represented by the National Union of Mineworkers, Solidarity and UASA), deliberated on three main issues: the upcoming Mining Phakisa, retrenchments in the industry, and the final Mining Charter Report.

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## **Mining Phakisa**

As announced by the President in his State of the Nation Address earlier this year, Government will convene all stakeholders in the industry in a lab process whose main objective is to develop implementable results that will transform the mining industry and increase investment, in line with the goals of the National Development Plan.

Currently scheduled to take place at the beginning of August 2015, Mining Phakisa will identify key constraints to investment and growth of the industry, and develop a shared vision and growth strategy for the long-term development and transformation of the sector. The Mining Phakisa will also focus on finding "win-win" solutions in dealing with the role and contribution of the mining industry to beneficiation and industrialisation. MIGDETT stakeholders have expressed support for the process, and we are eagerly anticipating the fruitful engagements that will ensure that indeed we move the mining industry forward.

## **Retrenchments in the industry**

As the Regulator of the mining industry, we are alarmed at the rate at which retrenchments have been taking place in the industry. As stakeholders, we understand well the impact of job losses on the economy.

The meeting agreed on adherence to due legal processes dealing with retrenchments, including s52 of the MPRDA. A sub-committee will be tasked to deal with the matter and report to MIG-DETT.

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## Final Mining Charter Report

Stakeholders also deliberated on the Final Mining Charter Report which was presented. As members of the media would be aware, the Mining Charter was first implemented in 2004, and amended in 2010 to introduce, amongst other things, the element of Effective HDSA ownership through Meaningful Economic Participation and full shareholder rights (broad-based). It also introduced the concepts of ring fenced elements (i.e. Reporting, Ownership and Housing and Living Conditions) and weighted elements.

The results to be presented are subject to verification and interrogation by individual right holders, and there will be room for engagement with individual right holders.

The assessment of implementation by 2014 is summarised as follows, in line with the elements of the Charter:

### 1. Reporting

- Out of 962 mining right holders eligible for assessment, 442 mining right holders have submitted the relevant information.
- A population of 442 is representative of approximately 95 percent of employment in the mining sector, confirming the significance of the assessment.

### 2. Ownership

At face value, 79% unweighted (90% weighted) of submissions of the industry have reportedly met and exceeded the target of 26% HDSA shareholding with a total industry simple average HDSA ownership of 30.6% unweighted (32.5% weighted).

However, further analysis reveals the following:

The majority of mining right holders (69% weighted) concluded empowerment transactions (and 71% unweighted) inclusive of the once empowered, always empowered notion) with one or two of the identifiable beneficiaries, which is not in accordance with the prescript of the Mining Charter, as amended. Of these right holders, only 6.3% unweighted (20% weighted) of mining right holders have fulfilled the full requirements of meaningful economic participation as inscribed in the Charter.

The reported information was analysed for ownership distribution in line with meaningful economic participation by identifiable beneficiaries. This shows that 67% (22% weighted), 49% (28% weighted) and 38% (44% weighted) of mining right holders did not consider mineworkers (ESOPs), communities and BEE entrepreneurs respectively as their empowerment beneficiaries.

### **3. Housing and Living conditions**

To achieve the target for 2014, right holders with hostels are required to achieve reduction in occupancy rates and conversion of hostels to family units.

The reported data showed that overall, 45% of mining right holders did not meet the target for improving the living conditions of the mineworkers by either reducing occupancy rate to one person per room or converting hostels to family units.

### **4. Procurement and enterprise development**

#### **Capital Goods**

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Against a 2014 target of 40% expenditure of capital goods from BEE Entities, 60.4% (17.9% weighted) did not meet the target.

### **Services**

With respect to procurement of services from BEE entities, 66.8% (35.1%) of the industry did not meet the 2014 target of 70%.

### **Consumable Goods**

On procuring consumables from BEE entities, 40% (14.8% weighted) of the industry did not meet the 2014 target of 50%.

### **Contribution of Multi-National supplier companies towards a Social Fund**

Against a 2014 target of contribution of 0.5% of revenue generated by multi-national suppliers from procurement of goods and services from South Africa's mining industry, 96.7% (85.1% weighted) of the industry failed to make necessary provisions to meet this target.

## **5. Employment Equity**

Analysis of the reported aggregated information shows that the mining industry exceeded the 40% target set to be achieved by 2014 in the different functional categories.

However, the industry remains dominated by White males in key management and strategic levels of the industry.

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Prior to the introduction of the Mining Charter, female representation in the mining industry was insignificant. The 2004 Mining Charter set a target of 10% for women in mining by 2009, and the actual representation of women in mining achieved 6% at that time. The overall representation of women across all functional categories has increased to 14.7% by 2014.

#### **6. Human Resources Development**

The 2014 target of skills development investment is 5% of payroll (exclusive of the statutory skills development levy). In this regard, the reported data shows that 61.9% (43.1% weighted) of the right holders did not meet this target.

#### **7. Mine Community Development**

The data shows that nationally, only 36% of mining right holders have met their set target on mine community development (MCD).

#### **8. Sustainable Development**

Regarding implementation of approved Environmental Management Plans: 55.5% (51.4% weighted) of the right holders did not meet the target for implementation of EMPs as stipulated in the Charter.

On the implementation of Tripartite Action Plans (Health and Safety): 97.2% (98.4% weighted) of right-holders failed to fully meet the requisite levels of implementation.

A majority (65.5% unweighted; 84.2% weighted) of the right holders met and exceeded the target of utilising South African based research facilities, in line with the requirement for Sample Analysis in SA based research facilities.

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The Department has commenced its engagements with individual right holders who have failed to comply with the laws, and in terms of section 47 of the MPRDA, the necessary remedial steps must be taken.

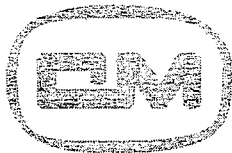
Furthermore, the Department will communicate the assessment scores with all individual right holders.

The process of the declaratory order which was announced during the previous briefing will still proceed as previously determined, to allow the courts to pronounce on issues on which stakeholders did not agree – namely, the matter relating to ownership.

The Mining Charter will be amended this year, taking into account lessons learnt and the country's long-term socio economic objectives.

I thank you.

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CHAMBER OF MINES OF SOUTH AFRICA

*Putting South Africa First*

"FA20"



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**FOR IMMEDIATE RELEASE  
TO ALL MEDIA**

**14 MAY 2015**

### **MEDIA STATEMENT**

The Chamber of Mines and its members are fully committed to the growth and transformation of the South African mining industry. Despite turbulent global conditions, the South African mining industry (specifically Chamber members), has made significant progress on all elements of the Mining Charter – including meeting and exceeding the ownership target. The Chamber and its members are committed to building the mining industry and helping to achieve the strategic objectives of the National Development Plan.

The MIGDETT Principals were called at late notice to a meeting at the DMR in Pretoria on 14 May 2015, to consider, inter alia, the DMR's Mining Charter audit process, the viability challenges facing large parts of the mining sector and the relevant potential job losses and the Project Phakisa process.

At the last MIGDETT meeting held on 31 March 2015, the Minister announced that the parties had agreed to jointly approach the courts for a declaratory order to clear up differences of interpretation on the ownership element of the Mining Charter. In the interim the parties also agreed not to release the DMR's ownership data pending the outcome of the declaratory order process. The Chamber itself committed not to release its ownership data, compiled by independent credible external companies, to remain faithful to the agreed declaratory order process. The legal teams of both the DMR and Chamber have been meeting to progress the declaratory order process.

At the urgent MIGDETT Principals meeting on 14 May 2015 the DMR and stakeholders has insisted on releasing the findings of their DMR Mining Charter report, including the ownership section. This is contrary to the agreement reached in the last MIGDETT meeting on the non-release of ownership data. The results presented by the DMR show both simple and employment weighted averages. The DMR has emphasized Mining Charter definitional interpretations, such as the meaningful economic participation of historically disadvantaged South Africans,

COUNCIL OF THE CHAMBER: M Teke (President), Ms KT Kweyama (Vice President), G Briggs (Vice President),  
A Bam, M Cutifani, P Dunne, J Evans, N Froneman, T Goodlace, C Griffith, G Heale, N Holland, MJ Houston, B Magara, N Mbazima,  
T Mkhwanazi, X Mkhwanazi(Dr), D Matlou, R Moodley, M Mothoa, SA Nkosi, M O'Hare, B Petersen, S Phiri, N Pienaar,  
N Pretorius, A Sangqu, MP Schmidt, B Sibiya, PW Steenkamp, S Venkatakrishnan.

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which undermine the measurement of the progress made. The Chamber and its members do not agree with this DMR interpretation, which suggests that only 20% (on a weighted basis) of mining right holders have met the definition in terms of meaningful economic participation.

Nevertheless, on the basis of the DMR releasing its report – we have no option but to make sure that the correct facts, based on our interpretation are on the table. Based on independently completed research covering 85% of the value of the mining sector, (work completed by Rand Merchant Bank, and audit firm SizweGobodoNtsaluba with the Chamber), the mining sector has achieved a weighted ownership target of 38.5%, which significantly exceeds the 26% targeted level and demonstrated meaningful economic participation by HDSAs.

We note the differences in the DMR report which seeks to cast the industry as not having met its obligations. The DMR states that 90% of the companies achieved the 26% target on an employment weighted basis with an average of 32.5% HDSA ownership. However, the DMR in its own interpretation of meaningful economic participation is now of the view that mining companies have to not only do narrow based empowerment transactions, but have to also include community and employee ownership schemes, which they say on a weighted basis that only 20% of the transactions comply. The Chamber does not share this interpretation and is firmly of the view that 100% of Chamber members have achieved the 26% ownership target. These interpretational differences is the reason why a declaratory order process is necessary (and was agreed between the stakeholders) in order to provide certainty on the matter. This in addition to the continuing consequences limitation.

On the challenges facing the mining sector the stakeholders briefly discussed the viability risks facing the gold, platinum and coal sectors, and the potential job losses in these sectors. The stakeholders discussed the matter and agreed that all legal processes should be followed by companies. The Chamber did not agree to any MIGDETT task team regarding job losses. The Chamber urges all stakeholders to play their role in managing the viability crisis, to reduce cost pressures and to manage the viability challenges the sector is facing.

The Chamber states unequivocally that it is unhappy with the rushed MIGDETT process on the DMR's Mining Charter Progress report. The Chamber has not been given the opportunity to properly interrogate the DMR's Progress Report and has not even been given a copy of the report. The MIGDETT process has been rushed and does not adequately cover the key principles of fairness, transparency and effective stakeholder engagement, which are the traditional hallmarks of the MIGDETT

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process. What the Chamber has seen is a truncated presentation – and this was also not shared with the Chamber in electronic or hard copy format

It is important to highlight that the Chamber will continue to engage government on all issues that are inhibiting the growth and transformation of the mining sector. However, for the government to be shifting the goal posts mid-stream and for stakeholders to continue to incorrectly accuse the industry of non-compliance is both damaging to trust and investment in the mining sector.

**The Chamber will be holding a media conference at 11h00, Johannesburg Country Club, Auckland Park on 15 May 2015.**

**ENDS**

**Issued by: The Chamber of Mines of South Africa**

For enquiries contact Zingaphi Matanzima on 082 766 3940

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CHAMBER OF MINES OF SOUTH AFRICA  
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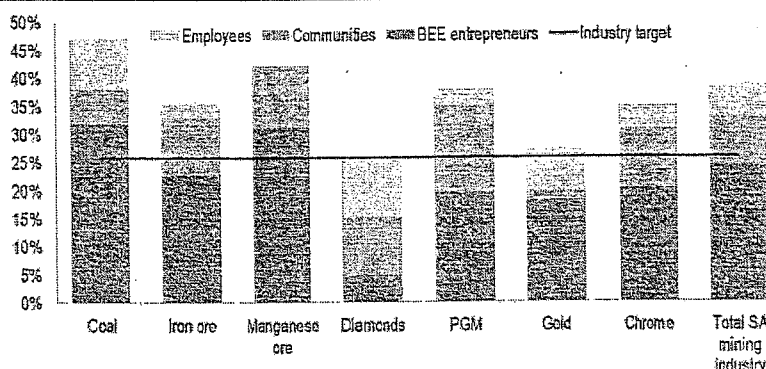
## CHAMBER OF MINES CALCULATES BROAD BASED HDSA OWNERSHIP OF 38% and MEANINGFUL ECONOMIC VALUE TRANSFER OF >R159 BN

The Chamber of Mines (Chamber) and its members, release findings of a comprehensive report which demonstrates the meaningful economic participation of HDSAs in the South African mining industry as per the ownership element of the Mining Charter. It is an aggregation of company information based on DMR submissions as at 31 December 2014. Given the significance of this milestone which sets the 26% HDSA ownership target, the Chamber has engaged the services of industry experts SizweNtsalubaGobodo (SNG) auditing firm and Rand Merchant Bank (RMB) corporate finance. The analysis represents the majority of the Chamber membership and also captures a significant portion of the South African mining industry (80% – 90% based on BEE transactions, value and volumes).

Although it is a calculation at end 2014, the analysis has captured the ownership compliance in relation to asset level mining rights' compliance over the last 12 years. The results below demonstrate that the industry has met and exceeded the ownership target of 26% HDSA by 2014 and has transferred significant value to HDSAs despite the significant challenges posed by the 2008 World Financial Crisis and the subsequent bear market for commodities. In addition, meaningful economic participation of HDSAs has occurred with a broad based identifiable beneficiaries and cash flowing to HDSA beneficiaries. This demonstrates the industry's commitment to transformation and the spirit of the Mining Charter. The highlights are:

- Since the commencement of the process of transformation in the mining industry, meaningful economic empowerment participation by HDSA has been 38% on average, based on the Chamber of Mines collation. This is above the Mining Charter 26% HDSA ownership target by 2014.
- The various sectors of the South African mining industry have similarly all met or exceeded the HDSA ownership targets – PGM at 38.0%, Gold at 27.3%, Coal at 47.2%, Diamonds at 26.0%, Iron Ore at 35.7%, Manganese Ore at 42.2% and Chrome at 35.1%.
- The composition of identifiable HDSA beneficiaries in the industry that has benefited through ownership, both directly and indirectly, is 63% BEE entrepreneurs (46 BEE companies), 22% communities (6.9 million HDSAs) and 15% employees (210 thousand HDSAs).
- The DMR's interpretation of the Charter is that the definition of meaningful economic participation has to include all three beneficiary categories to be compliant (this interpretation is not shared by the Chamber). Based on the company information we have received, we found that the proportion of companies that have all three categories present, i.e. BEE entrepreneurs, communities and ESOPs in their HDSA empowerment structures represent a minimum of 41% of the SA Mining Industry.

Figure 1: Portion of ownership of mining industry transferred to HDSA controlled entities up to 2014

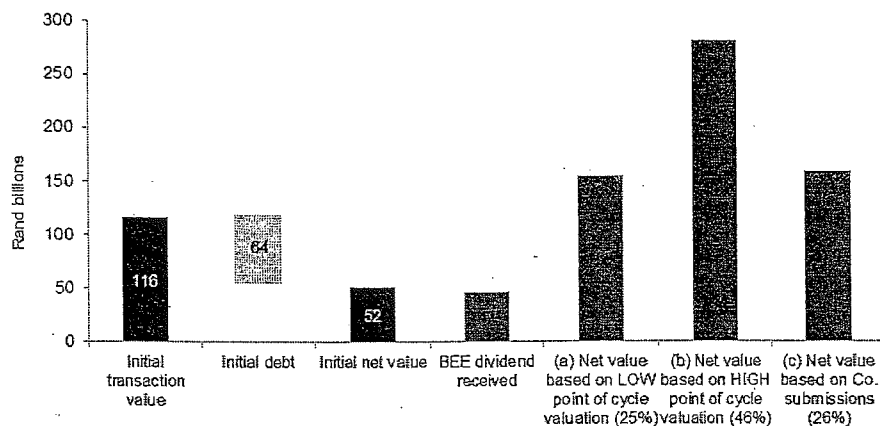


Source: SNG and Chamber of Mines analysis

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- Over the 12 year period, dividends of a minimum of R47 billion were paid to HDSA beneficiaries, representing 19.6% of the total 'company' dividends paid over the period. This is in line with the staged HDSA ownership target from 15% by 2009 to 26% by 2014 and fairly represents the average over the period. It also does not take into account profit from asset sales over the period and should be considered against a background where many shareholders during the period did not receive dividends.
- BEE transactions with an initial value of R116 billion were implemented over the period. These transactions created net value of around R159 billion (+207%) over the same period. The net value (after deducting debt from the asset values) created for HDSA controlled entities represented 26% of the value (EBITDA multiple basis) of the entire industry at December 2014.
- However, based on a through-the-cycle low and high valuation of assets, the net value created represents between R155bn (+200%) and R282bn (+444%) or 25% to 46% of the entire industry value (EBITDA multiple basis), respectively.

Figure 3: Estimation of value created (meaningful economic participation of HDSA)

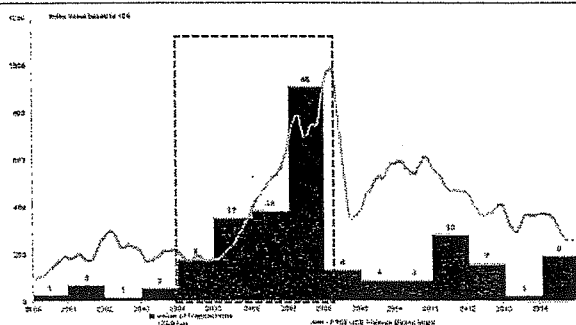


Source: SNG, RMB and Chamber of Mines analysis (Net value = Total asset value – debt outstanding + dividends; (a) and (b) valuation based on EBITDA multiple calculations)

These results have been achieved by the industry, despite the fact that measurement is occurring at a low point in the commodities cycle. Key lessons learnt include:

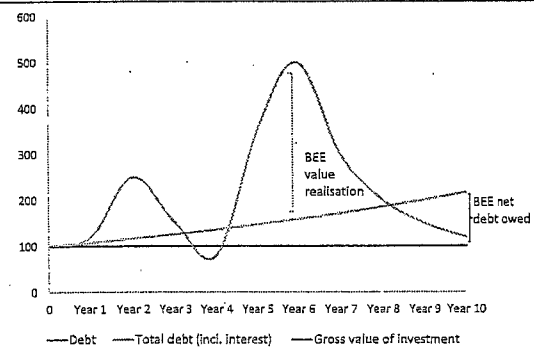
- Market volatility has impacted value creation. Underlying funding structures depended on rising commodity prices to result in value creation for beneficiaries.
- Lock-in provisions have prevented beneficiaries from unlocking value created during the peak of the cycle. Lack of diversification is an inherent risk in BEE transactions.
- Facilitation important in ensuring sustainable transaction e.g. vendor funding, free shares, minimum guaranteed cash flows. Implementing BEE transactions at the height of the commodities cycle resulted in unsustainable high debt levels.

Figure 1: Mining BEE transactions and Equity performance



Source: RMB and Dealmakers online

Figure 2: Illustrative impact of Commodity cycle on value



Source: RMB



### Summarised HDSA ownership results

<b>The South African Mining Industry</b>	The industry has achieved BEE ownership of 37.7% (22.8% BEE entrepreneurs, 10.8% communities and 4.2% ESOPs) weighted based on value of the assets. The ownership structure has benefited 60% BEE entrepreneurs, 29% communities and 11% ESOPs, and an estimated 7 million individuals. In terms of volumes weighting (Production and revenue), the industry has achieved BEE ownership level of 38.8% (24.3% BEE entrepreneurs, 9.1% communities and 5.4% ESOPs). The ownership has benefited 63% BEE entrepreneurs, 22% communities and 15% ESOPs. The industry has created net value of between R 155 320 million and R 282 018 million representing a return of between 200% and 444%. In addition, most of the sectors have not only met but also exceeded the 26% minimum compliance requirement.
<b>PGM</b>	The PGM sector has achieved BEE ownership of 39.5% (19.5% BEE entrepreneurs, 18.0% communities and 2.0% ESOPs) weighted based on value. The ownership structure has benefited 49% BEE entrepreneurs, 46% communities and 5% ESOPs, and an estimated 2 774 493 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 38.0% (19.8% BEE entrepreneurs, 15.5% communities and 2.6% ESOPs). The ownership structure has benefited 52% BEE entrepreneurs, 41% communities and 7% ESOPs. The PGM sector has a total net value of between R 43 442 million and R 65 987 million representing a change of between 109% and 212%.
<b>Gold</b>	The Gold sector has achieved BEE ownership of 28.8% (18.6% BEE entrepreneurs, 0.9% communities and 9.2% ESOPs) weighted based on value. The ownership structure has benefited 65% BEE entrepreneurs, 3% communities and 32% ESOPs, and an estimated 135 109 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 27.3% (18.3% BEE entrepreneurs, 1.6% communities and 7.5% ESOPs). The ownership structure has benefited 67% BEE entrepreneurs, 6% communities and 27% ESOPs. The Gold sector has a net value of between R 7 182 million and R 32 267 million representing a change of between -31% and 209%.
<b>Coal</b>	The Coal sector has achieved BEE ownership of 43.9% (32.0% BEE entrepreneurs, 5.3% communities and 6.3% ESOPs) weighted based on value. The ownership structure has benefited 74% BEE entrepreneurs, 12% communities and 14% ESOPs, and an estimated 1 753 087 individuals. In terms of volumes weighted, the industry has achieved a BEE ownership of 47.2% (32.0% BEE entrepreneurs, 6.2% communities and 9.0% ESOPs). The ownership structure has benefited 68% BEE entrepreneurs, 13% communities and 19% ESOPs. The Coal sector has a net value of between R24 000 million and R 49 512 million representing a change of between 189% and 497%.
<b>Diamonds</b>	The Diamond sector has achieved BEE ownership of 26.0% (4.4% BEE entrepreneurs, 11.6% communities and 10.0% ESOPs) weighted based on value. The ownership structure has benefited 17% BEE entrepreneurs, 45% communities and 38% ESOPs, and an estimated 114 653 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 26.0% (5.1% BEE entrepreneurs, 10.2% communities and 10.7% ESOPs). The ownership structure has benefited 20% BEE entrepreneurs, 39% communities and 41% ESOPs. The Diamond sector has a net value of between R 616 million and R 5 290 million representing a change of between -56% and 282%.
<b>Iron ore</b>	The Iron Ore sector has achieved BEE ownership of 38.2% (24.0% BEE entrepreneurs, 12.0% communities and 2.2% ESOPs) weighted based on value. The ownership structure has benefited 63% BEE entrepreneurs, 31% communities and 6% ESOPs, and an estimated 1 482 163 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 35.7% (22.9% BEE entrepreneurs, 10.3% communities and 2.5% ESOPs). The ownership structure has benefited 64% BEE entrepreneurs, 29% communities and 7% ESOPs. The Iron Ore sector has a net value of between R 53 220 million and R 115 330 million representing a change of between 433% and 1054%.
<b>Manganese ore</b>	The Manganese Ore sector has achieved BEE ownership of 50.1% (33.3% BEE Entrepreneurs, 16.3% Communities and 0.0% ESOPs) weighted based on value. The ownership structure has benefited 67% BEE entrepreneurs, 33% communities and 0% ESOPs, and an estimated 411 512 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 42.2% (31.2% BEE entrepreneurs, 11.0% communities and 0.0% ESOPs). The ownership structure has benefited 74% BEE entrepreneurs, 26% communities and 0% ESOPs. The Manganese Ore sector has a net value of between R -436 million and R 8 389 million representing a change of between -100% and 100%.
<b>Chrome</b>	The Chrome sector has achieved BEE ownership of 28.1% (15.9% BEE entrepreneurs, 7.0% communities and 5.2% ESOPs) weighted based on value. The ownership structure has benefited 57% BEE entrepreneurs, 25% communities and 18% ESOPs and an estimated 454 594 individuals. In terms of volume weighted, the industry has achieved a BEE ownership of 35.1% (20.3% BEE entrepreneurs, 10.6% communities and 4.2% ESOPs). The ownership structure has benefited 58% BEE entrepreneurs, 30% communities and 12% ESOPs. The Chrome sector has a net value of between R 1 824 million and R 5 242 million representing a change of between 204% and 774%.

# Chamber of mines of South Africa Assessment of Mining Charter 2014 targets

Per the Mining Charter Scorecard		DMR published assessment		Chamber assessment		Broad alignment with DMR (Yes/No)
Element (Scorecard weighting)	Description	Target	Unweighted	Weighted <sup>1</sup>	Assessment	
Ownership (Y/N)	Min HDSA ownership %	26%	(i) 30.6%	(i) 32.5%	Achieved well	No - significant differences in definitional interpretation
	Percentage of companies achieving 26%	100%	(ii) 79%	(ii) 90%		
	Percentage of companies with BEE, community & ESOP	(not agreed)	(iii) 6.3%	(iii) 20%		
Housing and living conditions (Y/N)	Percentage reduction of occupancy rate towards 2014 target	100%	(i) ---	(i) 73%	Good progress made	No
			(ii) 55%	(ii) 73%		
	Percentage conversion of hostels into family units	100%	(i) ---	(i) 63.4%	Work to be done	
Procurement and enterprise development (15%)	Capital goods (5%)	40%	(i) ---	(i) 72%	Achieved well	Yes (on weighted data)
	% of companies meeting the target		(ii) 39.6%	(ii) 82.1%		
	Services (5%)	70%	(i) ---	(i) 63%	Good progress made	
	% of companies meeting the target		(ii) 33.2%	(ii) 64.9%		
	Consumable goods (2%)	50%	(i) ---	(i) 72%	Achieved well	
	% of companies meeting the target		(ii) 60%	(ii) 85.2%		
	Annual spend on procurement from MNCs (3%)	0.5% of procurement	(i) ---	(i) 20%	Work to be done	
Employment equity (16%)	% of companies meeting the target		(ii) 3.3%	(ii) 14.9%		Yes (on weighted data)
	Top Management (Board) (3%)	40%	(i) 50.4%	(i) 50.4%	Achieved well	
			(ii) 41.9%	(ii) 41.9%	Achieved	
	Senior Management (Exco) (4%)	40%				
	Middle Management (3%)	40%			Achieved well	
	Junior Management (1%)	40%			Achieved well	
Human resource development (25%)	Core skills (5%)	40%	(i) 75.5%	(i) 75.5%	Achieved well	Yes - but DMR still critical of white males dominating at strategic levels of industry
			(ii) 5.5%	(ii) 5.5%		
	HRD expenditure as % of total annual payroll	5%	(i) ---	(i) 5.5%	Achieved well	
	% of companies achieving the target		(ii) 38.1%	(ii) 56.9%		
	Mine community development	Implement approved community projects	Up to date implementation	(i) ---	Work to be done	
	% of companies meeting target		(ii) 36%	(ii) ---		
	Sustainable development and growth (29%)	Implementation of approved EMPs (12%)	100%	(i) 90.6%	Good progress made	
Sustainable development and growth (29%)	% of companies meeting target		(ii) 44.5%	(ii) 48.6%		No - DMR wants occupational health elements to be improved
	Implementation of the tripartite action plan on health and safety (12%)	100%	(i) ---	(i) 86.2%	Achieved well	
	% of companies meeting the target		(ii) 2.8%	(ii) 1.6%		
	Percentage of samples in SA facilities (5%)	100%	(i) ---	(i) 84.6%	Achieved	
	% of companies meeting the target		(ii) 65.5%	(ii) 84.2%		

Source: Chamber of mines, Department of Mineral Resources

Note 1: Weighting based on DMR employment figures

Note 2: Weighting based on Chamber employment figures, except for ownership which is based on volumes and mineral sales

Note 3: Based on Independent Chamber Ownership Collation report



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**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH GAUTENG DIVISION, PRETORIA**

Case no:

41661/15

In the matter between:

**THE CHAMBER OF MINES OF SOUTH AFRICA**

Applicant

and

**MINISTER OF MINERAL RESOURCES**

First Respondent

**DIRECTOR-GENERAL, DEPARTMENT OF  
MINERAL RESOURCES**

Second Respondent

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**CONFIRMATORY AFFIDAVIT**

---

I, the undersigned

**MICHAEL SOLOMON TEKE**

hereby say on oath that:

- 1 I am an adult male. At all material times I was employed as the President of the Chamber of Mines of South Africa (**Chamber**).
- 2 I have read the founding affidavit deposed to by Ambrose Vusumuzi Richard Mabena. I confirm the correctness thereof insofar as it relates to me and to the Chamber.

---

**Michael Solomon Teke**

I certify that the deponent has acknowledged that he knows and understands the contents of this declaration which was signed and sworn to before me at            on the    day of June 2015, and that the provisions of the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, were complied with.

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**Commissioner of Oaths**

IN THE HIGH COURT OF SOUTH AFRICA  
NORTH GAUTENG DIVISION, PRETORIA

Case no:

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In the matter between:

THE CHAMBER OF MINES OF SOUTH AFRICA

Applicant

and

MINISTER OF MINERAL RESOURCES

First Respondent

DIRECTOR-GENERAL, DEPARTMENT OF  
MINERAL RESOURCES

Second Respondent

---

CONFIRMATORY AFFIDAVIT

---

I, the undersigned

MONIQUE ROXANE MATHYS

hereby say on oath that:

- 1 I am an adult female. At all material times I was employed as the Head of Economics of the Chamber of Mines of South Africa (**Chamber**).
- 2 I have read the founding affidavit deposed to by Ambrose Vusumuzi Richard Mabena. I confirm the correctness thereof insofar as it relates to me and to the Chamber.

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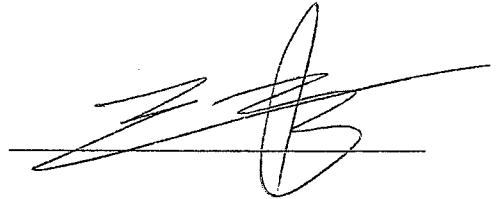
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**Monique Roxane Mathys**

I certify that the deponent has acknowledged that he knows and understands the contents of this declaration which was signed and sworn to before me at SANDTON on the 3 day of June 2015, and that the provisions of the Regulations contained in Government Notice R1258 of 21 July 1972, as amended, were complied with.



**Commissioner of Oaths**

HAI HE  
ADAMS & ADAMS  
Johannesburg Office, 2nd Floor  
100 Fredman Drive (Cnr 5th Street)  
Sandton  
COMMISSIONER OF OATHS  
Practising Attorney R.S.A.