

**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

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**FILLING NOTICE**

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**DOCUMENT : RESPONDENT'S ANSWERING AFFIDAVIT**

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AND TO

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Second Respondent

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**FIRST AND SECOND RESPONDENT'S**

**ANSWERING AFFIDAVIT**

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I, the undersigned

**THIBEDI RAMONTJA**

do hereby say on oath that:

1. I am the Director General of the Department of Mineral Resources ("the Second Respondent") having been appointed in that capacity in 2011. I am the Second Respondent in the matter and am duly authorised to depose to this affidavit on my behalf and on behalf of the First Respondent.

2. The facts in this affidavit, unless stated otherwise or the contrary appears from the context, fall within my personal knowledge and are both true and correct.
3. Where I state facts that fall outside my personal knowledge, I attach confirmatory affidavits of those persons who are able to confirm the correctness and the veracity of those facts.
4. Where I make legal submissions, I do so on the strength of the legal advice of the Respondents' legal advisors, whose advice I accept to be correct.
5. I have read the affidavit of **AMBROSE VUSUMUSI RICHARD MABENA**. Before dealing with the allegations, contentions and arguments raised in the aforesaid affidavit, I am advised that it might assist the proper understanding of the Respondents position if I outline in broad terms the contextual matrix within which the Applicant and the Respondents operate. I deal with these under the following headings:
  - 5.1 The Statutory framework:
    - 5.1.1 The Constitution;
    - 5.1.2 The MPRDA;
    - 5.1.3 The Mining Charter impact assessment report;
    - 5.1.4 Stakeholders declaration;
    - 5.1.5 The Mining Charter;
    - 5.1.6 The Scorecard;
  - 5.2 The legal enforceability of the Charter;
  - 5.3 The concept of "*once empowered, always empowered*";
  - 5.4 False arguments;

- 5.5 The continuing consequences phrase;
- 5.6 Contentions;
- 5.7 Ring Fencing;
- 5.8 Grant of right; and then
- 5.9 Deal with each and every averment made in the affidavit of **MABENA**.

## **THE STATUTORY FRAMEWORK**

### **The Constitution**

- 6. The application deals with legislation whose aim is to deracialise the mining industry in South Africa. Regard being had to the legacies of the racial exclusion of the majority of South African's from the main stream economy, Parliament passed the Mineral and Petroleum Resources Development Act 28 of 2002 ("**MPRDA**") as a measure to introduce historically disadvantaged South Africans ("**HDSA**") into the mining industry.
- 7. In passing the **MPRDA**, Parliament, amongst others, intended to realise the achievement of equality and full enjoyment of all rights and freedoms promised under the Constitution of the Republic of South Africa, 1996 ("the Constitution").
- 8. The Constitution enjoins the government, to take legislative and other measures which are designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination. In this regard, reference in the Constitution to categories of persons disadvantaged by unfair discrimination is a reference to **HDSA**.

9. In its terms, the Constitution provides, in section 9(2) that:

“(1) ...

(2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*”

10. Given the historical inequities of excluding **HDSA** from meaningful participation in the mining industry, legislative measures were taken to correct that past and to ensure the participation of **HDSA** in the mining industry in the future.

#### **The MPRDA**

11. It is common cause that the then *status quo* within which mining companies operated in the pre-democracy era was not sustainable; did not encourage foreign direct investment; and excluded the majority of South Africans from ownership and management opportunities within the industry. There was also a constraint on the development of sound labour relations within the industry.

12. All of these matters of racial exclusion informed the decision to review the then *status quo* and to develop a new policy framework for the mining industry. One of the primary documents that records the history of post 1994 developments is the White Paper on a Minerals and Mining Policy for South Africa of 1998.

13. This policy document recognised and acknowledged the central role of mining in the South African economy. It essentially sought to create a policy and regulatory

framework within which necessary and fundamental changes could be made to the mining industry. One of its primary objectives was that of aligning mining operations with the imperatives of the Constitution and the strategic developmental goals of the newly formed democratic government.

14. The **MPRDA** is the legislative instrument in the mining industry that was enacted by Parliament to promote the achievement of equality as mandated by the Constitution. In its preamble, the **MPRDA** records in explicit terms, *inter alia*, a commitment to eradicating all forms of discriminatory practices in the mineral and petroleum industries. The preamble refers to the State's obligation under the Constitution to take legislative and other measures to redress the results of past racial discrimination.
15. In the relevant part, the preamble points to the fact that the legislature, in passing the **MPRDA**, is committed to "*eradicating all forms of discriminatory practices in the mineral and petroleum industries as well as having considered the obligations of the State under the Constitution 'to take legislative and other measures to redress the results of past racial discrimination'*".
16. Amongst the objects of the **MPRDA** is the stated intention to 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; to promote employment and advance the social and economic welfare of all South Africans as well as to give effect to section 24 of the Constitution.

17. Section 24 relates *inter alia* to the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that include securing ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
18. The provisions of the MPRDA, as far as is relevant, read:

***“Objects of Act***

***2. The objects of this Act are to—***

- (a) ....
- (b) .....
- (c) *promote equitable access to the nation’s mineral and petroleum resources to all the people of South Africa;*
- (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;*
- (e) ....
- (f) *promote employment and advance the social and economic welfare of all South Africans;*
- (g) ....
- (h) *give effect to section 24 of the Constitution by ensuring that the nation’s mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development...”*

19. It is clear that the **MPRDA** aims at promoting equitable access to the nation's mineral and petroleum resources to all the people of South Africa.

20. The opportunities for **HDSA** must, according to the objects of the **MPRDA**, be substantial and meaningful to enable them to benefit from the exploitation of the nation's mineral and petroleum resources. From this, it is evident that any steps that seek to undermine the participation of **HDSA** in the mining industry in the future would be contrary to the objects of the **MPRDA**.

21. "Historically disadvantaged person" means:

*"(a) any person, category of person or community, disadvantaged by unfair discrimination before the Constitution took effect;*

*(b) any association, a majority of whose members are persons contemplated in paragraph (a);*

*(c) any juristic person other than an association, in which person contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes".*

22. It is quite instructive that there is a specific provision for the interpretation of the **MPRDA**, and in this regard the section reads:

***"4. Interpretation of Act***

*4.(1) When interpreting a provision of this Act, any reasonable interpretation which is consistent with the objects of this Act must be preferred over any other interpretation which is inconsistent with such objects.*

(2) *In so far as the common law is inconsistent with this Act, this Act prevails.*"

23. The legislature was unequivocal in providing that precedence must be given to any reasonable interpretation which is consistent with the objects of the **MPRDA**, that is, any interpretation, reasonable or otherwise, that may stand in competition with the objects of the **MPRDA** must be rejected. This would include even the common law where it conflicts with the **MPRDA**. The **MPRDA** provisions trump any interpretation that is inconsistent with its objects.

24. In context, and to the extent that the concept "*once empowered always empowered*" may seek to disguise itself as a tool of interpretation under the common law, section 4 of the **MPRDA** and the objects sought to be achieved under section 2(d) of the **MPRDA** would ineluctably lead to the conclusion that the "*once empowered always empowered concept*", and what is interchangeably referred to as the "*continuing consequences limitation*" which the Applicant relies on, cannot stand.

25. The relevant provisions of Section 17 of the **MPRDA** reads:

*"(1) Subject to subsection (4) the Minister must grant a prospecting right if- ...*

*(2) ...*

*(3) ...*

*(4) The Minister may, having regard to the type of mineral concerned and the extent of the proposed prospecting project, request the applicant to give effect to the object referred to in section 2(d)." (Own emphasis)*

26. With regard to prospecting rights, the First Respondent is obliged to grant prospecting

rights if certain conditions are fulfilled. In granting such a prospecting right, and having had regard to the type of minerals concerned and the extent of the proposed prospecting project, the First Respondent may request an applicant to give effect to the objects referred to in section 2(d) of the **MPRDA**.

27. Invariably, the First Respondent does require an applicant for a prospecting right to give effect to the transformation objectives sought to be realised by the **MPRDA**.

28. I wish to underscore the fact that the realisation of empowering **HDSA** to participate in and derive meaningful benefits from the exploitation of the country's mineral resources permeates even prospecting rights.

29. Likewise, with regard to the grant of mining rights, section 23(1), in the relevant part, provides:

*“(1) Subject to subsection (4) the Minister must grant a mining right if - ...*

*(a)...*

*(b)...*

*(c)...*

*(d)...*

*(e)...*

*(f)...*

*(g)...*

*(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”. (own emphasis)*

30. Under sections 23 of the **MPRDA** and after having had regard to various peremptory requirements including the achievement of 26% **HDSA** ownership in the mining entities, the First Respondent is enjoined to grant a mining right. The authority to take into consideration these peremptory requirements is aligned to the transformation objectives that are sought to be achieved by the **MPRDA**.
31. In context, it is apposite to point out that the obligations of the **Charters** and their enforceability are above question. I say this because the grant of a mining right must further the objects of the **MPRDA** and in particular, be in accordance with the **Charters**.
32. I must emphasise that the **MPRDA** is unambiguous in providing that the grant of a mineral right under the **MPRDA** entails the furtherance of objects which, correspondingly, are in accordance with the **Charters**.
33. In addition, the **MPRDA** provides peremptorily that a holder of a mining right must comply, *inter alia*, with the relevant provisions of the **MPRDA**, any other relevant law and more importantly, I submit, the terms and conditions of the mining right granted.
34. A typical term and condition in the grant of a mining right is one that makes specific reference to the attainment of the objects set out in section 2(d) and (f) of the **MPRDA**. In support of this proposition, I point out that "*this Act*" that is, the **MPRDA**, is defined as including any terms and conditions attaching to the grant of the right.

35. Another indicator which calls attention to the fact that the targets set out in the **Charters** on ownership are to be maintained throughout the life of the mining right is that a holder of a mining right is obliged, under sections 25(2)(h) and 28(2)(c), to submit to the Director General an annual report. This report details the extent of the holder's compliance with the provisions of section 2(d) and (f).
36. Sections 25(2)(h) and 28(2)(c) of the **MPRDA** are monitoring instruments that enable the Second Respondent to ascertain whether ownership targets are being maintained and where they are not, the Second Respondent can direct that corrective action be taken.
37. The "*Charter*" contemplated in section 100 and the social and labour plan make it plain that the reports on compliance with the provisions of the "*Charter*" are to be filed annually. This negates the Applicant's interpretation that "*once empowered always empowered*" or interchangeably "*continuing consequences limitation*" to the extent that they seek to suggest that once there is compliance in a particular calendar year with a target spelt out in the "*Charter*" such a mining right holder will be deemed to remain compliant for the life of that right.
38. Section 47 of the **MPRDA** empowers the First Respondent to cancel or suspend, amongst others, a prospecting right or a mining right if the holder thereof breaches any material term or condition of such right or conducts prospecting or mining operations in contravention of the **MPRDA**.
39. It follows that where the grant of a mining right is made a condition on the mining right

holder meeting the objects of section 2(d) and (f) of the **MPRDA** a contravention of the ownership target spelt out in the **2010 Charter** will invariably result in a breach or a contravention of the provisions of the **MPRDA**. Such breach could give rise to consequential steps being taken, which might result in the suspension or cancellation of a mining right.

40. Section 100(2) (a) of the **MPRDA** enjoins the First Respondent to ensure the attainment of the Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, to develop a broad-based socio-economic Charter. This Charter is to set the framework, targets and time-table for effecting the entry of **HDSA** into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources. The First Respondent determined the **Charters** subsequent to the consultations held with relevant stakeholders including the Applicant.

41. It would be impossible to ensure the attainment of the government's objectives of redressing historical, social and economic inequalities if the targets and timetables set out in the **Charters** are not legally enforceable and the mining right holders are not obliged to realise them. The inescapable conclusion is that the **Charters'** obligations are legally binding and not merely "*aspirational and a guideline.*"

42. It is significant that the annual report of the Chamber for the year 2009-2010 records that the Applicant was satisfied that the **2010 Charter** is reasonably balanced and further that no single stakeholder's views are fully accommodated. Of further significance is the statement that the Applicant and its members are fully committed to

ensure that the **2010 Charter** is implemented not only in the letter but also in the spirit.

### The Mining Charter Impact Assessment Report

43. In 2009 and as a result of the agreement reached with stakeholders to meet after five years to review progress made with the **Original Charter** and determine what steps, if any, were required to achieve the objectives of the **Original Charter**, an impact assessment was undertaken.
44. As recorded in the impact assessment report, the Department of Mineral Resources (“the **Department**”) undertook this exercise *“to determine the extent to which the objectives of the Mining Charter have been achieved. In particular, the report records progress made against each element of the Charter. Contrary to the good progress made in terms of compliance with HDSA participation in management, examination of other elements paints a gloomy picture...”*
45. In essence, the intention was to strengthen the effectiveness of the **Original Charter** as an instrument for transforming the mining sector. Amongst the six objectives that were sought to be achieved was the goal of promoting *“equitable access to the nation’s mineral resources to all the people of South Africa”* and substantially and meaningfully expanding opportunities for HDSA *“including women to enter the mining and minerals industry and to benefit from the exploitation of the nation’s mineral resources”*.
46. Of significance in the data that was analysed with regard to the level of BEE ownership is the finding that *“the reported level of BEE ownership is concentrated in the hands of*

*anchor partners and SPV's, representing a handful of black beneficiaries, contrary to the spirit and aspiration of both the Freedom Charter and the Mining Charter."*

47. Regard being had to the fact that the **MPRDA** has one of the intended groups to benefit from the exploitation of the nation's mineral resources is that of communities, which is carried from the **Original Charter** through to the **2010 Charter**.
48. The only difference introduced in the **2010 Charter** which is absent from the **Original Charter** is the concept of meaningful economic participation which is happily embodied in the Stakeholder's Declaration which all parties have signed in acknowledgment as well as the capping of the beneficiation credit to be no more than 11%.
49. I attach a copy of the assessment report marked "**TR1**". I am advised that reference to the **2010 Charter** as a policy document is an unfortunate misstatement. It is a legal document arising from the policy of the government now reflected in the **MPRDA**.

#### **The Stakeholder's Declaration**

50. For ease of reference I annex a copy of the Stakeholders' Declaration on Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry dated June 2010 marked "**TR2**". This was subsequent to the exercise undertaken during 2009 to assess the effectiveness of the **Original Charter**.
51. Commitment 12 in the declaration addresses the question of ownership and funding. In this regard it reads:

*“Realising that equity ownership provides an effective means of incorporating HDSAs into the mainstream economy and that ownership can afford HDSAs an opportunity to influence the direction of a business, parties commit to the following:*

- A minimum target of 26% ownership by 2014 to enable meaningful economic participation of HDSA.*
- 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 and communities;*

*Barring any unfavourable market conditions, some of the cash flow should accrue 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 accrued 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 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 agreed timeframes of the BEE structure, taking into account the prevailing market conditions.”*

52. There cannot be a valid complaint that the Applicant or its members can make regarding the phrase or concept of meaningful economic participation which appears in the **2010 Charter** is an introduction of a concept which they are in disagreement with. I say this for the very fact that the Applicant is a signatory to the Stakeholder Declaration.

### **The Mining Charter**

53. The **2010 Charter** amended the **Original Charter**. The goal of the **Charters** is to create an industry that would “*proudly reflect the promise of a non-racial South Africa*”.
54. The **Original Charter** records the commitment of stakeholders to a minimum target of 26% ownership by 2014 to enable deracialisation of ownership in the mining industry through **HDSA** participation. That commitment is echoed in the **2010 Charter** and expanded to meaningful economic participation. Once again, these provisions indicate a full alignment between the MPRDA and the **2010 Charter**.
55. In so far as is relevant, the **2010 Charter** reads:

*“The systematic marginalization of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented Historically Disadvantaged South Africans (HDSA) from owning the means of production and from meaningful participation in the mainstream economy. To redress these historic inequalities, and to 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).*

*The objective of the MPRDA is to facilitate meaningful participation of HDSA in the mining and minerals industry. In particular, section 100(2) 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."*

56. So, the vision, mission and purpose of the **2010 Charter** is:

- 56.1 to facilitate sustainable transformation, growth and development of the mining industry;
- 56.2 to give effect to section 100(2)(a) of the **MPRDA**;
- 56.3 to give effect to section 9 of the Constitution;
- 56.4 to redress the historical exclusion of **HDSA** in mining;
- 56.5 to ensure meaningful participation by **HDSA** in the mainstream economy;
- 56.6 to review progress and to determine what further steps, if any, need to be taken to achieve the objects of the **2010 Charter**.

57. "Effective ownership" in the definition clause of the **2010 Charter** defines the term to mean the meaningful participation of **HDSA** in the ownership, voting right, economic interests and management control of mining entities.

58. The flow-through principle is not defined in the **2010 Charter**. Reference to the flow-

through principle is made in the Generic Codes of Good Practice on Broad Based Black Economic Empowerment (“the Generic Code”) and states:

*“3.3 Flow-Through Principle*

*3.3.1 As a general principle, when measuring the rights of Ownership of any category of Black people in a Measured Entity only rights held by natural persons are relevant. If the rights of Ownership of Black people pass through a juristic person then the rights of Ownership of Black people in that juristic person are measurable. This principle applies across every tier of Ownership in a multi-tiered chain of Ownership until that chain ends with a Black person holding rights of Ownership.”*

59. The Generic Code provides a method of applying the principle across one or more intervening juristic persons. Having applied the method, the result of the calculation will represent the percentage of ownership held by the participant.

60. It admits of no dispute, therefore, that the beneficiaries of the transformation objectives set out in the **Charters**, are natural persons whose participation in the mining industry is sought to be achieved.

61. The **2010 Charter** defines “*Meaningful economic participation*” as including *inter alia* the following key attributes:

61.1 that BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs;

61.2 workers (including ESOP’s); and

61.3 communities; and that

- 61.4     barring any unfavourable market conditions, some of the cash-flow should flow to the BEE partner throughout the term of investment, and that for this purpose, stakeholders should engage financing entities in order to structure BEE financing in a manner that permits a percentage of cash-flow to service the funding of the structure, while the remaining amount is paid to BEE beneficiaries.
62.     The definition of meaningful economic participation further states that BEE entities are to be able to leverage equity as from that time in proportion to vested interests over the life of the transaction in order to facilitate sustainable growth of BEE entities.
63.     The definition of “*meaningful economic participation*” is mirrored in the Stakeholder’s Declaration of June 2010 to which the Applicant is a signatory. As I alluded to earlier, the Applicant cannot complain about the inclusion of this concept where it appears in the **2010 Charter**. Notwithstanding that the **MPRDA** does not contemplate the stakeholder’s agreeing with the framework, targets and time-table provided in the **Charters**. In developing the **Charters** what the First Respondent must do is consult stakeholders, which was admittedly done as recorded in annexure “**TR2**”.
64.     As far as material, the objectives of the **Charters** are to, amongst others, promote equitable access to the nation’s mineral resources to all the people of South Africa and 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.

65. With regard to the element of ownership, clause 2 of the **2010 Charter** states in express terms that “*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 are to commit to achieving a minimum target of 26% ownership to enable meaningful economic participation of **HDSA** by 2014.
66. Clause 2 of the **2010 Charter** also deals with permissible offsets, limiting these to offsets “*against the value of beneficiation, as provided for by section 26 of the MPRDA and elaborated in the mineral beneficiation framework*”. Whereas the **Original Charter** did not cap the offsets that may be derived from beneficiation, the impact assessment review revealed that some right holders thought it was conceivable to achieve offsets and/or credits of up to 26% from beneficiation. This could never have been the intention that beneficiation can completely supplant the equity requirements in the **MPRDA**. To remove any doubt, the **2010 Charter** capped the credits that may be achieved through beneficiation to 11%.
67. To avoid prolixity I do not attach a copy of the **Charters** as both the **Original Charter** and **2010 Charter** are annexures “**FA3**” and “**FA4**” to this application.
68. Finally, I point out that after the adoption of the **Original Charter**, which came into operation in October 2004, the Department provided a clarification note on the application of the **Charter**. In the relevant part of this note, the objective was set out in these terms:

*“1. Objective – This document seeks to clarify any misconception that might have arisen as a result of interpretation and application of the Mineral and Petroleum Resources Development Act (MPRDA) 2002 and the BBSEE Charter as called for in the Act in regard to unused rights and pending applications. This does not apply to the requirements for conversion of rights governing currently operating mines and prospecting operations. For such operations the BEE requirement of 15% in 5 years and 26% in 10 years applies...”*

69. I attach hereto marked “TR3” a copy of the clarification note.

70. Item 7 of Schedule II of the **MPRDA** provides for the conversion of old order mining rights. It states that, provided that the holder of an old order mining right lodges a right to convert any old order mining right in force immediately before the **MPRDA** took effect, such old order right will continue in force for a period not exceeding five years.

### **The Scorecard**

71. Of relevance to this application is the fact that the **Charters**, as elaborated in the scorecard, divide the ownership compliance targets into two parts. The first part was the achievement of a 15% **HDSA** ownership target by 2009 and the second, the achievement of a minimum 26% **HDSA** ownership holding with meaningful economic participation and full shareholder rights by 2014. This merely mirrors the provisions of the **Charters**.

## THE LEGAL ENFORCEABILITY OF THE CHARTER

72. The contestation by the Applicant that the **2010 Charter** provisions are merely aspirational or a guideline, cannot be correct. As I have pointed out above, there are several mutually reinforcing provisions which point to the enforceability of the **2010 Charter**. In summary;

72.1 The Constitution demands everyone to enjoy equality which includes the full and equal enjoyment of all rights and freedoms. Participation of HDSA in the mining industry is a search for the substantive equality that is promised under the Constitution. The objective to achieve equality is not merely aspirational or a guideline.

72.2 The **MPRDA** in its own various provisions makes it patently clear that the transformational objectives spelt out, *inter alia*, in section 2(d), are legally binding.

72.3 The granting of a mining right is only legally competent if the First Respondent is satisfied that the transformation objectives are achieved as well.

72.4 The granting of a mineral right is often with the condition that the transformation objectives are to be achieved. By way of illustration, clause 17 of the mining right reads "*in the furthering of the objects of this Act, the holder is bound by the provisions of an agreement or arrangement dated ... entered into between the holder/empowering partner and ... (the empowerment*

*partner) which agreement or arrangement was taken into consideration for the purposes of compliance with the requirements of the Act and/or a Broad Based Economic Empowerment Charter developed in terms of the Act and such agreement shall form part of this right". The legal enforceability of the 2010 Charter could not have been stated any higher.*

- 72.5 Section 1 of the **MPRDA** defines the "Act" to include the terms and condition to the grant of the mining right. This is another pointer to the fact that the transformation objectives spelt out in the **2010 Charter** produce obligations which the right holders must meet.
- 72.6 The **MPRDA** empowers the First Respondent to develop a charter. This legislative instruction bears legal consequences which follow the development of the **Charter** by the First Respondent. Parliament therefore, in empowering the First Respondent to develop the **Charter** was intent on ensuring that Government's objectives of redressing historical, social and economic inequalities must be achieved in the broadest manner possible.
73. It admits of no doubt that Parliament's objective, as set out in section 2(d) and (f) of the **MPRDA**, of redressing historical inequalities through the charter, would not be realised if the charter had no legal force but was a mere "*aspirational*" document or were its provisions considered to be mere "*guidelines*".
74. It is also self-evident that the framework, targets and timetable in the **Charters** are a baseline set for the transformation of the mining industry, in that they are intended to

effect the entry of **HDSA** into mining and more importantly, ensure that such **HDSA** benefit from the exploitation of mining and mineral resources.

75. Accepting as the Applicant does that it embraces the transformation objectives of the **MPRDA** which in substance are particularised in the **Charters**, and then to argue that those targets are merely aspirational or guidelines, is plainly wrong.

**THE CONCEPT OF “ONCE EMPOWERED ALWAYS EMPOWERED”**

76. The Applicant contends that the **MPRDA**, the **2010 Charter** and the **Scorecard** properly interpreted must include a concept called “*once empowered always empowered*”. The contention in this regard is that once a right holder under the **MPRDA** has achieved the targets set out in the **2010 Charter** at granting stage or at any period during and up to the year ending 2014, the right holder remains compliant even if during the life of that right, the right holder falls below the targets set out in the **2010 Charter**.

77. The Respondents contend, to the contrary, that the obligations imposed by the **Original Charter** and the **2010 Charter** on a right holder under the **MPRDA** were to be met by 2014 and thereafter maintained throughout the period of the life of the right held under the **MPRDA**. Where, by way of illustration, a right holder under the **MPRDA** was to achieve the target of 26% of **HDSA** ownership at any stage before 2014 but fall below that target by the end of 2014, such a holder of a right under the **MPRDA** would be non-compliant with the provisions of the **MPRDA** and the **2010 Charter** and liable to a possible cancellation or suspension of such right in terms of section 47 of the

## **MPRDA.**

78. This is so for several reasons:

78.1 The **MPRDA** is one such legislative measure intended to address the constitutional imperative of equality as provided for in section 9(2) of the Constitution. An interpretation of the **MPRDA** which undermines the promotion or advancement and the protection of **HDSA** interests would stand in stark contradiction to the constitutional imperatives of realising the substantive equality promised under the Constitution. The concept "*once empowered always empowered*" if valid as an interpretation tool, would entail a possibility that the mining industry will in the future again be owned by non-**HDSA** only.

78.2 In the preamble to the **MPRDA**, Parliament indicates its commitment to eradicating discriminatory practices in the mineral and petroleum industries. Were it possible for a mining right holder to comply with the **2010 Charter** targets only for a limited period, that, I am advised, would frustrate Parliament's objects as set out in section 2 of the **MPRDA**. The reason is plain. Compliance with the targets in the **2010 Charter** for a limited period would over time undo Parliament's intention to make **HDSA** meaningful participants in the mining industry.

78.3 By way of illustration, the object set out in section 2(d) of the **MPRDA** would be frustrated in the event a right holder was to achieve 26% **HDSA**

ownership in 2005 and such **HDSA** ownership falls below 26% the following year. In that event there would have been no substantial and meaningful expansion of a mining opportunity for **HDSA** and the mining right holder would revert to being owned by a non-**HDSA** for the remainder of the mining life of that company.

78.4 Further, in relation to the equity holding within the affected company, there would be no benefit to **HDSA** in the continued operations of mining by that mining right holder for the remainder of the life of that mine arising from the exploitation of the nation's mineral and petroleum resources.

78.5 In essence, if a mining right holder was, for whatever reason, to achieve the 26% ownership target and subsequently fall below that target yet still be deemed to remain compliant, the constitutional imperative for the mining industry to redress the results of past discrimination would be nullified.

78.6 For all the reasons noted above, the "*once empowered always empowered*" concept is flawed if it is intended to connote that the original compliance endures where a mining right holder who at one point in the life of a mine, achieved the set target but then subsequently fell below the target and yet remains compliant. Such an interpretation would be inimical to the objects of the **MPRDA** and the **Charters**.

78.7 Section 4 of the **MPRDA** enjoins a court, when interpreting the **MPRDA**, to prefer any reasonable interpretation which is consistent with the objects

of the **MPRDA**. As a tool of interpretation, the concept "*once empowered always empowered*" is not consistent with the objects of the **MPRDA** because it would make it possible for the mining right holder to be owned exclusively by non-**HDSA** equity holders. The concept should, for that reason, be declared to be inconsistent with the provisions of the **MPRDA**.

78.8 Section 12 of the **MPRDA** empowers the First Respondent to facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations. By way of example, where the First Respondent would have exercised this power and the **HDSA** so assisted withdrew from the mining right holder as a shareholder, were such mining right holder to be deemed to remain compliant, this outcome would frustrate the endeavours by the First Respondent through such facilitation to assist the **HDSA** to remain in mining. It would also be hostile to the spirit of the **MPRDA**.

78.9 The power of the First Respondent (which is couched in peremptory terms) to grant a prospecting right under section 17 of the **MPRDA** includes, as one of its terms, the authority to require an applicant for a prospecting right to demonstrate how it intends to give effect to the transformation objective set out in section 2(d) of the **MPRDA**. If the "*once empowered always empowered*" concept is sound, it would leave the door open to a prospecting right holder to comply with the requirements of section 2(d) on the grant of the right, default thereafter, yet remain compliant for the duration of the right regardless of whether the ownership equity in the right

holder falls below the 26% threshold. This would constitute an absurdity not intended by Parliament.

78.10 Similarly, with regard to the grant of mining rights in terms of section 23 of the **MPRDA**, the First Respondent is enjoined to grant such a right if, amongst others, the First Respondent is satisfied that the grant of such right will further the transformation objects of involving **HDSA** in mining operations following the grant of such a right. A “*once empowered always empowered*” concept would undermine the very purpose for the grant of the mining right if, despite going below the 26% threshold, a right holder would be deemed to still be compliant.

78.11 It is significant that, in terms of section 24 of the **MPRDA**, a renewal of a mining right is competent where *inter alia* the applicant for renewal is not in contravention of any relevant provision of the **MPRDA**. However, where a mining right holder intends to apply for a renewal of its mining right, and is permitted to contend that it was “*once empowered always empowered*” (and therefore deemed to be entitled to such a renewal of the right), such interpretation would be wrong. I say this because correctly interpreted section 24 of the **MPRDA** can only mean that the objects of the **MPRDA** must be met by such applicant.

78.12 The requirement under sections 25(2)(h) and 28(2)(c) of the **MPRDA** for mining right holders to file annual reports *inter alia* detailing the extent to which the holder is in compliance with section 2(d) and (f) and the

**Charters** is an additional indicator that the “*once empowered always empowered*” concept cannot stand.

78.13 The risk of a mining right being suspended or cancelled for, amongst others, a contravention of the **MPRDA** and the **Charters** is an indication that the targets set out in the **Charters** are to be maintained to avoid a possible suspension or cancellation of such mining right. Failure to achieve the minimum thresholds set out in the **Charters** within the timeframes fixed therein cannot be avoided by the application of the “*once empowered always empowered*” concept.

78.14 There is also a power, provided for in section 93(1) (b) (ii) of the **MPRDA**, conferred on an authorised official, to order the suspension or termination of operations where there is non-compliance with a provision of the **MPRDA**. Any mining right holder who falls below the targets set out in the **2010 Charter** cannot claim the “*once empowered always empowered*” concept deems them to be compliant.

78.15 In terms of section 100(2)(a) the First Respondent, in determining the **2010 Charter**, is required to set out in such charter how the transformation objectives of the **MPRDA** are to be achieved. This includes setting out the equity holding by **HDSA** in the right. The targets in the **2010 Charter** are to be maintained by a mining right holder throughout. The “*once empowered always empowered*” concept cannot absolve them of the obligation to comply with the **MPRDA** and the **Charters**.

78.16 To the extent that the *“once empowered always empowered”* concept is said to be valid as a tool of interpretation it holds the risk of re-instating the systematic marginalisation of the majority of South Africans which the **MPRDA** intended to correct. If this were permitted, the historic inequalities that are sought to be redressed may recur.

78.17 Effective ownership under the **2010 Charter** is considered a requisite instrument to effect meaningful integration of **HDSA** into the mainstream economy. An interpretation that says that **HDSA** can enter and exit in the manner that the concept *“once empowered always empowered”* connotes, must mean that the meaningful integration of **HDSA** into the mainstream economy would not be achieved.

78.18 The vision of the **2010 Charter** is *“to facilitate sustainable transformation, growth and development of the mining industry”*. A *“once empowered always empowered”* concept is antithetical to any sustainable transformation. No sustainable transformation is possible if the *“once empowered always empowered”* concept can be read into the **2010 Charter**.

78.19 The concept of meaningful economic participation is in terms of the **2010 Charter** (barring any unfavourable market conditions) aimed at permitting a **HDSA** partner to benefit from some of the cash flow generated by its investment **throughout the term of the investment**. The concept of *“once empowered always empowered”* negates any meaningful economic

participation, as intended in the **2010 Charter**, should a **HDSA partner** exit as a shareholder whilst the right holder is deemed to remain compliant despite not holding the minimum ownership threshold prescribed by the **2010 Charter**.

78.20 As one of its objectives, the **2010 Charter** is 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.*” An interpretation of “*once empowered always empowered*” concept as contended for by the Applicant holds a real possibility of eroding any substantial and meaningful expansion of opportunities for **HDSA** to enter the mining and minerals industry.

79. To the extent that the concept of “*once empowered always empowered*” can be said to draw its inspiration from a common law principle, section 4(2) of the **MPRDA** states, in the clearest terms, that “*in so far as the common law is inconsistent with this Act, this Act prevails.*”

80. The **Original Charter** describes, as one of the goals, the intention to create an industry that would “*proudly reflect the promise of a non-racial South Africa*”. The concept of “*once empowered always empowered*” where it means that an empowered right holder which falls below the 26% threshold will be deemed to remain compliant will not achieve the above promise to “*proudly reflect the promise of a non-racial South Africa*” in the mining industry.

81. The preamble to the **Original Charter** recognises the history of South Africa, which resulted in blacks, communities located in mining areas and women largely being excluded from participating in the mainstream of the economy. An interpretation that holds "*once empowered always empowered*" to be sound will subvert the correction of this legacy of racial and gender exclusion which the **Charters** are intended to redress.
82. Further, the mining industry's stated intention was to adopt a pro-active strategy of change to encourage black economic empowerment and transformation at, *inter alia*, the ownership tier. Where **HDSA** are able to enter and exit without another **HDSA** partner replacing its equity interest, the stated strategy that is intended to change or foster or encourage black empowerment and transformation in the mining industry will not be realised.
83. There is a clear recognition in the preamble to the **Original Charter** that there is an imperative to redress historical and social inequalities as stated by the Constitution. I reiterate that the "*once empowered always empowered*" concept undermines this constitutional goal.
84. The signatories to the **Original Charter** had developed the **Original Charter** to provide a framework for progressing the empowerment of **HDSA** in the mining and minerals industry. The concept "*once empowered always empowered*" would reverse the progress sought to be achieved by the **Charters**.
85. According to the **Original Charter**, the term Broad Based Socio-Economic Empowerment was defined to refer 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...”* and in transforming *inter alia* the mining industry so as to *“assist in, provide for, initiate, facilitate or benefit from”* the ownership participation in existing or future mining operations.

86. The *“once empowered always empowered”* concept will frustrate the achievement of broad based socio-economic empowerment in that it will not help redress the results of past or present discrimination based on race, gender or other disability of **HDSA** in the mining and minerals industry.
87. The effort of government to consider special incentives to encourage **HDSA** companies to hold on to newly acquired equity for a reasonable period would be effort in vain if the **HDSA** could exit with no corresponding duty on the right holder to make sure that such exit is mitigated by the entry of another **HDSA** partner. This is because the duty to maintain the 26% **HDSA** shareholding lies with the right holder throughout.
88. The commitment to achieve 26% **HDSA** ownership of mining industry assets in 10 years was given by **each right holder**. This commitment is unambiguous in that it required that by 31 December 2014 each right holder had to show that 26% of its assets were owned by **HDSA**. The *“once empowered always empowered”* concept negates this commitment if, despite **HDSA** equity falling below 26%, the right holder is deemed to remain compliant.
89. I pause briefly to illustrate how the *“once empowered always empowered”* concept

distorts the objects of section 2 of the **MPRDA** read with the provisions of the **Charter**.

90. Gold Fields 35% HDSA equity ownership consists of 10% in a share trust, 15% in Mvelaphanda Resources Limited ("Mvela"), 1% in a community trust and 9% held by another investor. I refer this Honourable Court to annexure "FA12" in this regard.
91. Mvela is no longer a part of Gold Fields. Gold Field's claim of 15% from the Mvela transaction is inspired by the concept "*once empowered always empowered*" which the Respondents reject as a legitimate basis to claim a credit. If the Respondents are correct in their interpretation that "*once empowered always empowered*" does not apply, then Gold Fields **HDSA** ownership is 20% and falls below the 26% target.
92. Sibanye Gold Limited ("Sibanye") reported its **HDSA** ownership level at 26.75% calculated as 1% community, 10.75% ESOP's and 15% other broad-based groups. Mvela represents the entire 15% of the "other broad-based group". In this regard I refer this Honourable Court to annexure "FA 12".
93. Mvela is not part of Sibanye. Sibanye is claiming 15% arising out of a transaction that Gold Fields had concluded with Mvela. This it does through the application of the "*once empowered always empowered* concept". As I pointed out earlier, such a claim subverts the objects of the **MPRDA**.
94. Finally, all the stakeholders to the **2010 Charter** agreed on a 5 year review timeline, spelt out in the **Original Charter**, to review progress and determine what further steps,

if any, were needed to achieve the 26% target by 2014.

95. The clear meaning was that within the first 5 year period where a once empowered company fell below the 26% **HDSA** threshold, for whatever reason, the review process was to determine what further steps were needed to achieve the 26% target by December 2014. This must mean that "*once empowered always empowered*" is not a reasonable interpretation that is consistent with the objects of the **MPRDA** and the **Charters**.

96. I am advised that there is no tool of interpretation known as "*once empowered always empowered*". This phrase appears to be coined by the mining industry and erroneously given "legal" status.

### **FALSE ARGUMENTS**

97. There are various arguments which are offered as an explanation to justify the concept of "*once empowered always empowered*". Some of these are:

97.1 A previously empowered mining right holder whose **HDSA** shareholder, for whatever sound commercial reasons, seeks to dis-invest will be unable to do so. Alternatively the argument goes that such an **HDSA** shareholder will remain trapped. This is false. Such a shareholder would perfectly be entitled to sell its shares to another **HDSA**. The right holder and the **HDSA** shareholder can commercially ring-fence such a measure through their shareholding agreements.

97.2 It is also argued that holding a **HDSA** shareholder to its ownership status for a particular timeline disadvantages such an **HDSA** shareholder where it is unable to exit the market at an optimal market point, forcing it to sell when the market conditions are not favourable. This argument is also incorrect. There is no obligation for such an **HDSA** to dis-invest when market conditions are not conducive.

97.3 The other argument which is sponsored to support the concept of "*once empowered always empowered*" is that to ignore this concept and reason otherwise would mean that the mining right holder would have to continue seeking new **HDSA** investors each time its **HDSA** shareholder seeks to dis-invest. So goes the argument: the right holder would continue to seek new **HDSA** investors until its equity is eroded. This argument is without substance. If the **HDSA** equity is sold to another **HDSA** which is a transaction that is commercially in practice, then the transformation credentials of such a mining right holder will not be open to any threat.

97.4 A further argument which is offered in support of the case for the application of the "*once empowered always empowered*" concept is that mining companies would continuously have to perform **HDSA** transactions to remain at the level of 26% ownership at all times. The argument is that this introduces an absurdity in the requirements of the **Charter**. I do not agree. If all **HDSA** participants who seek to dis-invest are enjoined to sell their shares to other **HDSA** then there is no risk of dilution by the mining

company.

97.5 The other argument is that “*lock-up*” clauses in shareholder agreements are un-commercial. This too is untrue. There are many sound companies of varying economic standing which have “*lock-up*” clauses in their shareholder agreements without devaluation to such shareholders equity holdings.

97.6 A further question sometimes raised in support of the “*once empowered always empowered*” concept is: why should a **HDSA** invest in any mining company if at the outset, he or she would not be able to sell his or her shares when market conditions are optimal? I have already answered this question but in amplification I must add that such an **HDSA** shareholder would have, in the first place, been able to be part of the mining industry through the targets that are obligated by the **Charters**. Absent those targets, such a **HDSA** may never even have had the opportunity to participate in the mining industry.

97.7 It is also argued that compelling **HDSA** shareholders to sell to other **HDSA** shareholders “*immediately reduces the ability to sell shares at an optimum price to any buyer of any race*”. This is true. It is precisely why the **MPRDA** is designed the way it is, to retain a sustainable participation of **HDSA** in the mining industry.

97.8 As Ranti Mothapo will confirm that where an acquisition of ordinary shares

by **HDSA** is by a sale or issue of shares at a fair market value, then it is rational that the **HDSA** investor would not accept to be locked in the investment. This is because the acquisition is at the same value as would be obtained in the open market without restrictions on the ability to trade the shares.

97.9 Where the acquisition of ordinary shares by **HDSA** is facilitated at terms more favourable than fair market price, this comes at a cost to existing shareholders. The existing shareholders would accept this cost upon a clear identification of the benefits for incurring the costs. In the context of the **2010 Charter**, this would be to have **HDSA** ownership as required by the **2010 Charter** to retain the operating licence issued by the Department.

97.10 It would be reasonable and rational in accepting the costs of dilution that shareholders would lock-in the **HDSA** shareholders for some period required to realise such benefits, being the **HDSA** ownership required by the **Charters** at particular future periods. It would be irrational that shareholders would accept a dilution while the **HDSA** shareholders facilitated by the dilution are not locked in and are able to sell the shares the very next day.

97.11 The dilution of existing shareholders to enable **HDSA** ownership cannot be seen merely as an erosion of value as this dilution is in exchange for **HDSA** credentials that impact on the operating licences of the company.

- 97.12 The **2010 Charter** specifically prescribes for some cash flow to be paid to **HDSA** throughout the term of the investment in instances where economic circumstances allow. This is referred to as a trickle dividend where lock-in periods may be a hindrance for **HDSA** investors to accessing value or economic benefits.
- 97.13 A primary rationale for a business owner to participate in a particular business is for a share in the profits generated by that business. The objective of the **2010 Charter** is aligned to this rationale that **HDSA** should share in the dividends of mining companies as a way to access economic benefit. The trickle dividend would be a full dividend once any attaching debt is paid off.
- 97.14 It is not an objective of the **2010 Charter** that **HDSA** would extract economic benefits by selling their shares, and doing so at the most opportune price. In line with the objectives of the **2010 Charter** to include **HDSA** as economic participants in the South African mining industry, this economic participation is primarily by way of a share in the dividends of a company.
- 97.15 Therefore, the assertion that **HDSA** in mining companies will want to access value through a sale of shares, and that is a normal outcome, is not necessarily true.
- 97.16 A good practical illustration is the arrangement between Sishen Iron Ore

Company and its empowerment partner which had by the end of 2010 repaid the debt on the ordinary shares in Sishen and has since then been realising economic value for **HDSA** through applying the dividends it receives to various community development projects without a need to sell the ordinary shares it holds in the company.

97.17 There are numerous examples of the existence of a market where shares in a company are traded amongst **HDSA** post some lock-in period, thus enabling the company to retain a certain level of shareholding by **HDSA**. For example, these markets include empowerment transactions of VodacomSA, Sasol Limited, MTN and Multichoice.

97.18 The value of ordinary shares is the present value of future dividends to be received by the holder of that share. Where there are restrictions on the liquidity of the shares, such as an inability to sell for a particular period or a requirement to sell the shares to a limited subset of investors, such shares would be valued at a discount to fair market value to reflect the illiquidity discount.

97.19 The rational initial **HDSA** investor would demand a certain illiquidity discount and so will the subsequent **HDSA** investors. The shares for targeted **HDSA** investors can then trade perpetually at a discount to fair market price. However, such a discount does not mean that the **HDSA** investors are not benefitting from the company's growth in dividends and share price appreciation. If the illiquidity discount does not worsen, the rate

of growth of the shares held by **HDSA** and those traded in the open market-place could be similar.

97.20 I also refute the assertion that by insisting on the companies replenishing their **HDSA** ownership levels where they fall below the 26% target in the **2010 Charter** this will result in perpetual dilution of shareholders.

97.21 An indefinite lock-in period for **HDSA**, that is, where an **HDSA** investor can only sell to another qualifying **HDSA** investor, will retain the empowerment credentials of that company.

97.22 Access to economic benefits by way of a trickle dividend over the period where there is debt against the shares, if applicable, would mitigate against the effects of the lock-in.

97.23 The assertion that *“to retain a 26% BEE level, will force mining companies to perpetually dilute other shareholders”* is incorrect. By way of example, where there is a vendor financed deal, suppose, a company has 74 issued ordinary shares valued at R1.00 each, thus holding a total value of issued ordinary shares of R74.00 in 2009; the company may further issue 26% ordinary shares at R0.80 each to **HDSA**, thus have a total of 100 issued ordinary shares of which 26 are certainly in the hands of **HDSA**, thus achieving a 26% **HDSA** ownership target. The salient terms of the transaction for the share purchase and assumptions for purposes of this illustration would be:

- 97.23.1 The transaction is vendor financed with a debt (which may be notional) of R0.80 per share to **HDSA**;
- 97.23.2 The interest (which may be notional) is fixed at 5% per annum;
- 97.23.3 Until the notional debt is paid off, 80% of the dividends are applied to service the debt and interest with the other 20% of the dividends paid to **HDSA** as trickle dividends; and
- 97.23.4 The **HDSA** is locked-in for a period up to 31 December 2014 and after 31 December 2014, they may sell the shares to other eligible **HDSA**.
- 97.24 The shares have full voting rights and rights to dividends as all other ordinary shares issued by the company
- 97.25 The implications of this type of transaction are the following:
- 97.25.1 The dilution cost is approximately  $(R1.00 \text{ minus } R74.00 \text{ plus } R0.80 \text{ multiply by } 26) / 100$  equals R0.052 per share. For accounting purposes, this cost is spread over the term over which the HDSA shareholders will acquire the ability to sell their shares, being five years, thus a reduction in profits of R0.1 per share (that is 1%) for each of the year;

- 97.25.2 The existing shareholders accept this cost in exchange for HDSA ownership credentials and the HDSA receive the benefit in exchange for the limited liquidity of the shares they hold;
- 97.25.3 **HDSA** would realise economic benefits through trickle dividend they receive;
- 97.25.4 Since the transaction is vendor financed, the transaction would not default or be unwound if there is insufficient dividend to pay the debt and if the value of the shares fluctuates downwards;
- 97.25.5 Consequently, this company would, in the absence of the issuance of more shares, have certainty that at least 26% of its issued ordinary shares will be owned by **HDSA**. Such a transaction is immunized against unfavourable economic circumstances, and exit by a particular **HDSA** shareholder;
- 97.25.6 The shareholders of this company would have borne a once-off dilution cost of approximately 5.2% in exchange for **HDSA** credentials to secure their operating licence; and
- 97.25.7 Although there is a dilution cost to shareholders to secure a certain level of **HDSA** ownership, that is, 26%, it is not true that this dilution would be perpetual.

97.26 The right holders had a choice in how they structured their transactions to enable **HDSA** ownership in a manner that balances the interests of existing shareholders and **HDSA** for the common good of the right holder. Structured appropriately, a 26% **HDSA** ownership may be retained without a detrimental impact on existing shareholders.

97.27 I must refute that **HDSA** transactions, properly structured, with discounts and lock-ins would trigger a shareholder revolt in the South African mining industry.

#### THE CONTINUING CONSEQUENCES PHRASE

98. The Respondents contend further that the phrase “*continuing consequences of all previous deals*” properly interpreted means all empowerment transactions relating to the sale of units of production concluded prior to the promulgation of the **MPRDA** which remain extant will be considered in the compliance assessment of each right holder by 31 December 2014.

99. The Applicant takes the stance that this principle applies equally to empowerment transactions previously concluded even though they do not remain extant.

100. The Respondents maintain that the principle only applies to asset sales, (calculated in terms of market share as measured by attributable units of production to calculate credits/offsets), concluded before the coming into operation of the **MPRDA** and which

remained live at the time of the coming into operation of the **MPRDA**.

101. The intention was to recognise empowerment transactions relating to the sale of units of production concluded before the ten year window period contemplated in the **Original Charter**.

102. Any credits or offsets derived from market share as measured by attributable units of production concluded after the **MPRDA** and the **Original Charter** came into force would naturally follow as credits or offsets. For this reason, nothing turns on the inclusion in the **2010 Charter** of the phrase "*concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002...*" Previous deals as appears in clause 2.1 in the **2010 Charter** would obviously refer to empowerment deals of a particular character, i.e. "*those calculated in terms of market share as measured by attributable units of production*" concluded prior to the coming into operation of the **MPRDA** and which remain extant at the time of the promulgation of the **MPRDA**.

103. A prime example of an empowerment transaction that was entitled to benefit from the application of the continuing consequences phrase is the sale by AngloGold Ashanti of mining shafts to ARMGold. Another is that of the transaction between Anglo Coal and Eyesizwe in 2000. Both transactions were concluded prior to the **MPRDA** commencing and were extant at the time of the promulgation of the **MPRDA**. In the result AngloGold Ashanti and Anglo Coal continue to benefit from the continuing consequences of the sale of those units of production assets to ARMGold and Eyesizwe respectively.

104. There have been empowerment deals after the coming into operation of the **MPRDA** and the **Original Charter** that can be characterised as units of production asset sales. These would be characterised as transactions whose credits/offsets would be calculated in terms of market share as measured by attributable units of production, that give the mining right holder the benefit of the continuing consequences phrase.

### CONTENTIONS

105. The Applicant has stated publically that its members are 100% compliant on **HDSA** ownership holding by the right holders under the **MPRDA**. This, the Respondents refute. It will be useful to describe the measurement of compliance required by the **Charter** with regard to **HDSA** ownership. Right holders are to demonstrate three clearly identifiable beneficiaries:

105.1 First, each licence holder will have to demonstrate that it has BEE entrepreneurs;

105.2 Second, it has to include workers (ESOP's); and

105.3 Third, community involvement.

106. The **HDSA** ownership must, by 31 December 2014, reflect 26% equity in the mining right holder.

107. I now demonstrate why the Respondents contend that the assertion by the Applicant

that there is 100% compliance on **HDSA** ownership at 26% is a demonstrable error. According to the documents submitted by members of the Applicant the following is apparent:

107.1 Aquarius Platinum (South Africa) (Pty) Limited ("Aquarius") records **HDSA** ownership at 3.03% as at 31 December 2014. I refer this Honourable Court to annexure "FA12".

107.2 The 3.03% is indicated as "*other broad-based*" without sufficient specificity to indicate whether that relates to BEE, ESOP's or communities. On its own version, Aquarius has failed to meet the ownership target of 26% by 2014 as well as show that it has a **HDSA** ownership structure which includes ESOP's as well as communities.

108. Section 108 of the **MPRDA** expressly provides that in any legal proceedings in terms of the **MPRDA**, any statement, entry or information in or on any book, plan, record or other document is admissible as *prima facie* evidence of the facts in or on it by the person who made, entered, recorded or stored it. I will, for this reason, be placing reliance on the information supplied by some of the mining right holders as being rebuttably correct.

109. I am advised that the information submitted by right holders to the Respondents is often confidential and that the Respondents are enjoined by law to respect such confidentiality. To the extent that I do not attach such documentary proof for the examples I cite above, it is purely in order not to breach the confidence within which

the information was furnished. In the event any of the entities I cite above, waives their right to confidentiality, I will make available to the above Honourable Court copies of the relevant information.

110. The Applicant distances itself from the concept of “*double dipping*”. Disconcertingly, there are two mining entities which claim the Mvela transaction as part of their empowerment credits. This is so since Gold Fields Limited is also claiming 15% credits arising out of the same Mvela transaction that Sibanye is relying on. The “*double dipping*” illustrates the distortion that arises out of the “*once empowered always empowered*” concept.

111. More disturbingly there may even be “*triple dipping*”. Harmony claims 15% credit through the Mvela transaction arising out of Sibanye being a shareholder in Rand Uranium, a subsidiary of Harmony.

### **RING FENCING**

112. Also significant is the fact that the Respondents made it clear that it does not intend to interfere with the commercial transactions that the right holders would conclude in order to accomplish their **Charter** commitments by 2014. However the onus rests with the right holder to sustain compliance to all prescripts of the law including **HDSA** ownership. I refer, in this regard, to one of the shareholder agreements concluded by a right holder with its **HDSA** partner wherein it indicates that it is commercially viable to ring fence the **HDSA** equity which can in the future be sold to another **HDSA** entity.

By way of example:

112.1 Anglo Platinum Limited concluded, with one of its empowerment partners, a shareholder's agreement which addressed the question of the transfer of **HDSA** shares. The shares could be disposed of as follows:

112.1.1 to another **HDSA**; or

112.1.2 in the open market with the approval by the Respondents; or

112.1.3 to any other entity to the extent that no jeopardy could result from such a sale.

113. I do not annex the shareholders agreement to protect the confidentiality of the agreement. Should the Applicant obtain a waiver of this confidentiality protection then I will make a copy available at the hearing of this application.

114. Northam Platinum published on its website on 22 October 2014, a report recording an empowerment transaction that they concluded with various entities. It stated that "*The new BEE special purpose vehicle would be locked in for 10 years and would not be allowed to encumber its shares in any way or compete with Northam.*" I attach marked "**TR4**" a copy of the said website page.

#### **GRANT OF RIGHT**

115. The other contention by the Applicant is that the First Respondent, in terms of section 23 (1) (h) (new mining rights) of the **MPRDA** must issue a mining right after having satisfied himself or herself that the grant of such rights will further the objects of

section 2(d) and (f) and be in accordance with the charter contemplated in section 100 and the prescribed social and labour plans. Correspondingly, the First Respondent must convert an old order mining right. Schedule II Part 7 (2) (k) (conversion of old order mining rights) directs the First Respondent to convert the old order right if the holder of the right undertakes to comply with the requirements of section 2(d) and (f).

116. Strictly speaking, the First Respondent cannot in law issue a new mining right unless he or she is satisfied that the grant of such a right will further the objects of section 2(d) and (f) of the **MPRDA**. As a matter of fact, those applications for new order rights submitted before 2014, were granted where the applicant could show a roadmap on how the objects set out in section 2(d) and (f) would be achieved in terms of the **Charters** by 2014.

117. The contention by the Applicant that the mere granting of the new order rights meant that the First Respondent was satisfied that there has been compliance with the requirements of section 2(d) and (f) is therefore incorrect. An indication by an applicant for new order rights on how *inter alia* such an applicant intended to achieve the objects referred to in section 2(d) and (f) was sufficient for the granting of the licence.

118. The obligations as set out in section 25 of the **MPRDA** echo the same obligations that are spelt out in the grant of a new order right or the conversion of an old order right.

119. Understandably, the conversion of an old order mining right was, in terms of **MPRDA**

to happen within 5 years of the coming into operation of the **MPRDA**, failing which the old order mining right ceased to exist. This is in terms of sub item 7(1) read with sub item 7(8) of the **MPRDA**. The purpose was to give the holder of an old order mining right and its prospective new **HDSA** partner an opportunity to negotiate an agreement including securing the necessary funding. Given the timelines within which a conversion was to happen, a holder of an old order mining right could therefore give an **undertaking** how the objects referred to in section 2(d) and (f) were to be achieved.

120. I cannot over-emphasise the relevance of the conditions of the grant of a right. "*This Act*", reference being to the **MPRDA**, includes the regulations **and any term or condition to which any** right is subject. It must therefore mean non-compliance with the terms and conditions of the right will amount to a breach of the Act.

121. The Applicant also contends that the **2010 Charter** is not binding since it reflects a departure from some of the principles that informed the **Original Charter** to which the stakeholders were signatories. This contention is mistaken and I say so for the following reasons:

121.1 The power of the First Respondent under section 100(2) to develop the **Charter** does not require the development of such charter to be subject to approval by stakeholders.

121.2 The First Respondent's power to determine a charter is tempered only by the provisions of section 6 of the **MPRDA** dealing with principles of administrative justice. Since the development of a charter by the First

Respondent is an administrative act, it must be conducted within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness.

121.3 I have not heard any complaints regarding the processes leading up to the development of the **Charters** except one relating to the insertion of the phrase "*prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002*" as it appears in clause 2.1 of the **2010 Charter**. I have addressed this concern earlier.

122. There may very well be a contention that the First Respondent does not have the power to amend the **Original Charter**. If so, this contention, I am advised, is mistaken. Once a functionary is given the power to do something there is an implied power to undo the same thing where circumstances justify the undoing. I am advised further that legal argument will be made to the above Honourable Court at the hearing of this application.

123. In any event, those stakeholders who signed the Stakeholder declaration in June 2010 committed to "*finalising the review of the Mining Charter by August 2010*".

124. I now turn to deal with each and every averment requiring an answer in the affidavit of **AMBROSE VUSUMUSI RICHARD MABENA**.

#### **AD PARAGRAPHS 1.1-1.3.4**

125. Save to deny that the contentions, arguments made in the affidavit are correct, I note the allegations made in these paragraphs.

**AD PARAGRAPH 1.4 and 1.5**

126. I admit the allegations made in these paragraphs.

**AD PARAGRAPH 1.6**

127. I welcome that the Applicant and its members fully support the transformation objectives of the **Charters** and in fact assert that the obligations arising out of the **MPRDA** and the Charters are legally binding.

128. Annexure "**FA21**" may very well reflect the **HDSA** equity participation in the mining industry to an average of 38%. Nothing turns on this. The **MPRDA** and the **2010 Charter** requires compliance with the attainment of the targets spelt out in the **2010 Charter** by each and every mining right holder.

129. I maintain, as annexure "**FA12**" also confirms that there are right holders who did not meet the 26% ownership target by 2014.

**AD PARAGRAPH 1.7**

130. I accept the description of the issues between the parties.

131. I maintain that there is an on-going obligation to replenish any diminution of the **HDSA** ownership where it falls below the targets set out in the **Charters**.

132. I persist with the position taken by the Department that the "*once empowered always empowered*" concept does not apply.

**AD PARAGRAPH 1.8**

133. I admit that the position of the Respondents is correctly articulated in this paragraph.

134. For reasons stated in this affidavit, the contention by the Applicant in this paragraph is incorrect.

**AD PARAGRAPH 1.9**

135. I admit the allegations made in this paragraph.

**AD PARAGRAPH 1.10 and 1.11**

136. I admit the principles set out in this paragraph in so far as they correctly reflect the principles as set out in the **Original Charter**.

137. I reiterate that it was not for the stakeholders to agree to the principles set out in the **Original Charter**.

138. I accept that the First Respondent was enjoined in developing the charter to engage the stakeholders as required by PAJA.

139. I refer to note 10 to the **Original Charter**.

**AD PARAGRAPH 1.12**

140. To state that there has been a departure in the principles from the **Original Charter**

into the **2010 Charter** is too over-broad. The limited changes relate to the concept of meaningful economic participation as well as elements for sustainable development and growth.

141. I maintain that it is the First Respondent's right to amend the **Original Charter** having engaged the relevant stakeholders.

142. The word "only" does not appear in the **Original Charter**.

143. I am advised that further legal argument will be made at the hearing of this application.

**AD PARAGRAPH 1.13**

144. I assert that the First Respondent is entitled, having consulted stakeholders, to amend the **Original Charter**.

145. To label the amendment of the **Charters** as a "departure" is unfortunate.

**AD PARAGRAPH 1.14**

146. I note what the Applicant says is the fourth dispute between the parties.

**AD PARAGRAPH 1.14.1**

147. It is correct that under the **Original Charter** it was conceivable that a mining company which did beneficiation could have offsets amounting to 26% and claim that offset as a justification not to have **HDSA** equity ownership in its structure.

148. In the charter assessment review of 2009, the First Respondent observed this shortcoming and in the exercise of her powers to develop the **Original Charter**, amended the **2010 Charter** so as to cap the highest percentage offsets that can be made through beneficiation to 11%.
149. The decision of the First Respondent in this regard was rational to exclude the possibility of beneficiation completely substituting **HDSA** ownership.
150. I deny that the First Respondent acted *ultra vires* where the amendment sought to bring the **Original Charter** in line with the objects of the **MPRDA**.
151. I persist with the submission that the First Respondent has the power to amend the **Charters** after engaging the relevant stakeholders.
152. No case has been made out to show that any of these amendments cited in the paragraph are irrational.

**AD PARAGRAPH 1.14.2**

153. The insertion of “*meaningful economic participation*” was intended to clarify the categories of entities which qualify for equity participation in the mining entities such as the participation of communities.
154. It was also realised that some of the empowerment transactions were structured in a way that did not enable the **HDSA** to meet their debt obligations through dividend outflows. To correct this the **2010 Charter** spells out that barring unfavourable market

conditions, the companies should assist the **HDSA** to meet their debt repayments through dividend pay-outs as well as to give **HDSA** voting powers to meaningfully participate in the decisions of the mining rights holder.

155. The complaint of any retrospectivity is also without substance since the mining rights holders had until 2014 to make the necessary adjustments.

156. The amendments were brought about as a result of the assessment process revealing an absence of standardised structuring of empowerment transactions. There was inadequate empowerment of communities and workers.

157. There was therefore a rational basis for the First Respondent to make the amendment to insert "*meaningful economic participation*" in the **2010 Charter** which is in line with the Stakeholders Declaration signed by the Applicant.

#### **AD PARAGRAPH 1.14.3**

158. Paragraph 3 of the **2010 Charter** is a restatement of the provisions of the **MPRDA**.

159. The penalty provisions as well as the powers of the First Respondent to suspend or cancel a mining right, for instance, flows directly from the provisions of the **MPRDA**.

160. The contravention of the provisions of the **Charters** becomes a contravention of the **MPRDA** where the charter targets constitute one of the conditions for the grant of the right.

161. Any breach to comply with the obligations and provisions of the **Charters** requirements attracts the consequences spelt out in section 47 read with sections 98 and 99 of MPRDA.

**AD PARAGRAPH 1.15**

162. I agree with the allegations contained in this paragraph.

**AD PARAGRAPH 2.1**

163. I admit that the parties are as described in this paragraph.

**AD PARAGRAPH 2.2**

164. I agree with the recitation of the various processes described in this paragraph particularly in so far as they demonstrate an extensive process by the First Respondent to engage the stakeholders in the development of the **Charters**.

165. I refer to what I have stated above, namely that section 100(2) does not require agreement by stakeholders for the Minister to develop the **Charters**.

166. It is helpful but not a legal imperative that the stakeholders are in agreement with the principles which the First Respondent determines in developing the **Charters**.

167. It is immaterial whether there was no agreement reached in 2010 on the concept of “*continuing consequence*” or any part of the **Charters**. The **Original Charter** read “*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”.*

168. It is the Respondents view that the word “*prior to*” inserted in the **2010 Charter** did not change the right to receive credit and offset with regard to any transaction concluded subsequent to the coming into operation of the **Original Charter**. I must reiterate that this has nothing to do with what the Applicant calls the “*continuing consequences limitation*”.
169. I do not accept as correct the arguments made in this paragraph in so far as they stand inconsistent with those advanced on behalf of the Respondents.
170. The findings of the assessment that the First Respondent made reference to related to the 2009 assessment which is recorded in the Mining Charter Impact Assessment Report, October 2009.
171. I point to the fact that the deficiencies discovered during the assessment review period was the fact that the breadth of empowerment entities did not include, in many instances, the involvement of communities and employees as well as issues relating to sustainable development such as elements of environment, health and safety issues. By way of example I attach the First Respondent’s statement dated 13 September 2010 as annexure “**TR5**” hereto.
172. I disagree with the Applicant’s view that the **2010 Charter** “*departs*” from the **Original Charter** principles on which the commitment of the Applicant’s members or right holders was premised. There are two key areas of amplification, namely the

concept of meaningful economic participation as well as elements for sustainable development and growth.

173. I emphasise that there were consultations with the stakeholders on the amplification.

174. I repeat that nothing turns on whether the previous deals were done prior to or post the coming into operation of the **MPRDA**. As a matter of fact, no entity which concluded deals post the coming into operation of the **MPRDA** which were a result of transactions concluded as a market share as measured by attributable units of production was refused a credit or an offset.

175. There was therefore no limitation contended for by the Applicant on “*continuing consequences*”.

176. I invite the Applicant to produce an example of a mining right holder who was refused a credit or an offset in relation to transactions concluded as measured by attributable units of production or an asset sale subsequent to the coming into operation of the **MPRDA**.

177. It is correct that the failure to meet the charter requirements amounts to a contravention of the **MPRDA** as the Department assert. This is so for the following reasons:

177.1 The **Charters** are legally enforceable instruments with legally binding obligations.

177.2 The definition of “*this Act*” in the **MPRDA** includes any term or condition to which amongst others, a mining right is granted.

177.3 It is self-evident therefore that the grant of a mining right has attached to it certain conditions including the compliance with the **MPRDA** and the **Charters**. A fortiori a failure to comply with the **Charters** equates to a contravention of the **MPRDA**. Further, section 47 of the **MPRDA** can attract the suspension or cancellation of a mining right by reason of the fact that the mining operation is conducted in contravention of the **MPRDA**.

177.4 I admit the processes relating to the establishment of the MIGDETT, its structures, the Mining Charter Impact Assessment Report and the stakeholders declaration.

177.5 I disagree that there was any limitation to the continuing consequences principle.

#### **AD PARAGRAPH 2.4**

178. I admit the introduction of the **2010 Charter** (Annexure “FA4”).

179. It is important to re-emphasise that the **2010 Charter** was preceded by a comprehensive consultative process with the stakeholders who were signatories to the **Original Charter**.

180. I deny that there was any limitation to the “continuing consequences principle”.

181. The First Respondent was referring to the 2009 assessment report.

182. I reiterate that the assessment process revealed inter alia that the participation by communities in HDSA ownership holding was limited; the debt repayment capabilities of HDSA entities was compromised where there was no dividend outflows and the voting rights of HDSA entities needed strengthening.

183. I have explained earlier, the limitation on the off-sets that may have derived from beneficiation.

184. I deny that there was any departure from the principles of the **Original Charter** and state rather that they were amplified.

185. It is untrue that there were limitations on the offsets or credit arising out from the value of beneficiation in respect of deals concluded subsequent to the coming into operation of the **MPRDA**.

186. It is however correct that the credit offset arising from beneficiation can be no more than 11% for reasons that I have outlined above.

187. For completeness, the penalties for non-compliance derive their authority not from the **Charters** but from the **MPRDA**.

**AD PARAGRAPH 3**

188. It is correct that the Respondents did engage the services of Moloto Solutions who assisted in the creation of templates for assessment of the **Charters** compliance levels.

189. I deny that the results were published and instead it was the aggregated results.

190. It is correct that the Respondents engaged with MIGDETT principals (of which the applicant forms part) in order to establish a technical task team to create a consultative forum for the development of the mining charter templates.

191. It is further correct that the Respondents engaged with the mining companies regarding the template for the assessment of performance against the **2010 Charter**.

192. The issue of “*continuing consequences*” was raised by the Applicant in the task team created by MIGDETT dealing with the templates. The DMR officials reaffirmed the legal interpretation as contained in the **Charters**.

193. I state again for emphasis that the “*limitation*” to the “*continued consequences principle in terms of market share as measured by attributable units of production*” is inscribed in both **Charters**. The Deputy Director General, Mosa Mabuza was correct in his statement to the Charter Reference Group that empowerment transactions concluded after 1 May 2004 but which are no longer in place would not be included for purposes of measuring charter compliance with the ownership element.

194. The “*once empowered always empowered*” concept has never been considered applicable in measuring compliance levels. The position of the First Respondent has

always been that the mining right holders must by 2014 reflect 26% **HDSA** ownership. In the event that a mining right holder which at one point reached the 26% **HDSA** ownership target but which later falls below the 26%, will have to replenish the **HDSA** ownership to 26% by 2014.

195. Section 23(1)(h) and Item 7(2)(k) in Schedule II of the **MPRDA** does not convey a meaning that a subsequent reduction or change in **HDSA** ownership after the grant of the right will be deemed compliant. The conversion of old order rights was made on the basis of an undertaking that the **Charters** targets would be achieved by 2014. The granting of new order rights were also made having regard to a roadmap given by the applicants on how they would achieve the targets set out in the **Charters** by 2014.

196. In addition, the obligations of the holder of a mining right are also spelt out in section 25 of the **MPRDA** which includes submission of prescribed annual reports detailing compliance with the provisions of section 2(d) and (f), of the **MPRDA**.

**AD PARAGRAPH 3.1.3 and 3.1.4**

197. It is correct that the First Respondent provided a simplified template which had the input and approval of the applicant and its members.

198. Annexure "FA5" quotes the First Respondent as stating that he would not accept the "*once empowered always empowered*" principle for those BEE deals that have ended. It is incorrect to suggest that the First Respondent once accepted the "*once-empowered always empowered*" principle to be valid. I have referred to this matter earlier in this answer and I stand by those submissions.

**AD PARAGRAPH 3.1.5 and 3.1.6**

199. I admit the allegations made in this paragraph but also highlight the fact that the change in dates was as a result of requests for extension by individual members.

**AD PARAGRAPH 3.1.7**

200. I admit that the letter "FA6" raises these concerns, however, the concerns are misplaced.

201. The continuing consequences of previous deals in terms of market share as measured by attributable units of production have not been excluded from consideration to the extent that they were concluded before the promulgation of the **MPRDA**.

202. No mining company has been penalised in respect of previous deals arising out of continuing consequences that are still extant.

203. I reiterate that it is the prerogative of each mining company to structure its relationship with its **HDSA**. In instances where the mining company elects not to have any lock-in arrangements, it then stands the risk that for whatever reason, its **HDSA** partner may exit with adverse consequences to their **Charters** compliance targets.

204. There has been no retrospective limitation which the applicant is arguing. The inclusion of communities was not only dictated to by the **MPRDA** but was also a group specifically identified in both **Charters**.

205. I am unable to comment about the amounts which are referred to in this paragraph regarding the empowerment transactions. The First Respondent is yet to verify these amounts and the figures.

206. There is no doubt that excluding from the assessment, "*once empowered, always empowered*" factor will have an impact on the ownership scores of the various companies. As I point out elsewhere in this affidavit, the companies were not entitled to retain credit in respect of **HDSA** partners that no longer are a part of those companies. The **Charters** are explicit that come 2014, they were to achieve the charter targets, being 26% in relation to ownership.

207. I refer again to the section of this affidavit which deals with the fact that the majority of **HDSA** participants who enter into the mining sector do so with an intention of remaining participants in the industry. They do not take up shareholding with the intention of cashing out. It is probably in instances where their debt levels are not assuaged by dividend flows that they may elect to exit.

208. In instances where companies seek to protect their **HDSA** status even where an empowerment partner seeks to exit, this can happen without adversely affecting the **HDSA** ownership profile of the company if any such sale is to another **HDSA** or the shares are warehoused for a future sale to an **HDSA**.

209. I do not accept as correct, that companies which experience dilution in **HDSA** ownership would have to perpetually dilute. As I point out above, if the sale of the shares by the **HDSA** is to another **HDSA** or such shares are warehoused for a future

sale to another **HDSA**, then the result would be the maintenance of the empowerment standing.

**AD PARAGRAPH 3.1.8**

210. I agree with the Applicant to the extent that past transactions referred to, do not constitute deals concluded prior to the promulgation of the **MPRDA** in terms of market share measured by attributable units of production and remain extant.

**AD PARAGRAPH 3.1.9**

211. At the outset I wish to point out that there appears to be a conflation of two separate concepts. It is the “*continuing consequences*” phrase and the “*once empowered always empowered*” concept. The first is a legally cognizable concept recognising units of production deals concluded prior to the promulgation of the **MPRDA**. The latter, namely “*once empowered always empowered*” is a concept that runs at odds with the objects of the **MPRDA, the Charters**.

212. I deny that there was ever a point where the Respondents gave recognition to the concept “*once empowered always empowered*” and later jettisoned it. The concept has never been part of the position taken by the Respondents.

213. I note the rest of the allegations made in this paragraph.

**AD PARAGRAPH 3.1.10**

214. It is incorrect that the MCMIS did not allow submissions of post 2004 deal data.

215. The right holders were entitled to place such information as they thought accurate and competent to reflect their compliance levels.

216. It remained for the Respondents to determine whether a particular transaction would permit a credit or not for a particular applicant.

**AD PARAGRAPH 3.1.11**

217. I have no knowledge of the allegations made in this paragraph.

218. To the extent that the assessment was done to exclude "*once empowered and always empowered*" credits, such an assessment would be in line with the Respondents interpretation of the **Charter** obligations.

219. I do not accept as correct what the Applicant refers to as a "*continuing consequences*" limitation. I have alluded to the possible confusion flowing from the loose use of one concept for the other.

**AD PARAGRAPH 3.1.12**

220. I note the contents of annexure "FA7".

221. I note the concerns reflected.

222. I have already expressed the Respondents position that where empowerment transactions were concluded without any protection of the right holders' empowerment credentials, it is a risk which the right holder elected to take.

223. I reiterate even if I do not do so later, that there is no continuing consequences limitation in the **2010 Charter**.

224. The continuing consequence of deals concluded prior to the coming into operation of the **MPRDA** was a policy choice by the First Respondent to credit the right holders, particularly the old order right holders for transactions concluded *bona fide* before the promulgation of the **MPRDA**. These transactions could have been excluded. The First Respondent instead, elected to recognise them as credits despite having been concluded prior to the promulgation of the **MPRDA**.

225. Apart from the arguments I note the factual allegations in “**FA7**”.

**AD PARAGRAPH 3.1.13 and 3.1.14**

226. I acknowledge that “**FA8**” and “**FA9**” say what is reflected therein.

**AD PARAGRAPH 3.1.15**

227. I accept as correct that on 04 March 2015 the First Respondent directed the Applicant to meet with me.

228. I note the allegations in “**FA10**”.

**AD PARAGRAPH 3.1.16**

229. It is correct that the concerns raised in “**FA11**” were raised with me.

230. I did invite the Applicant to provide me with the scale of the problem.

231. I still reiterate that the “*continuing consequence principle*” has no limitations as clarified earlier in this affidavit

**AD PARAGRAPH 3.1.17 and 3.1.18**

232. I do not accept the arguments made in this paragraph to be correct.

233. “**FA12**” is a good illustration that the Applicant conflates “*continuing consequences*” as the phrase appears in the **Original Charter** and the **2010 Charter** and the “*once empowered always empowered*” concept relating to BEE deals which are no longer extant.

234. The Applicant admits that excluding the “*once empowered always empowered*” transactions, a third of the right holders ownership scores would move below the 26% target.

235. By way of illustration, the gold sector would record a score of 14% as reflected in Annexure “**FA12**” if the “*once empowered always empowered*” concept is found to be inconsistent with the objects of the **MPRDA**.

236. Once the Applicant and other stakeholders accepted as a premise that empowerment transactions would happen at a market value, the consequence would ineluctably be that the **HDSA** shareholder would exit as and when it concluded it was prudent to do so.

237. Those right holders who, as an incentive, would have offered shares as a discount to **HDSA** would have been entitled to insist that the shares be only transactable with another **HDSA** thereby securing the empowerment credentials of the right holder.

238. With the protection of the mining rights **HDSA** credentials locked in there is no risk of any perpetual dilution.

**AD PARAGRAPH 3.2.1 to 3.2.12**

239. I acknowledge what is recorded in “**FA13**”.

240. The DDG did refer to “*double dipping*”.

241. I reiterate the Respondent’s position in relation to the rights of shareholders to conclude their commercial arrangements as they saw fit.

242. Where however, there is risk of dilution and the mining right holder is willing to accept that risk, it cannot be open to that rights holder to argue that the objects of the **MPRDA** must suffer as a consequence.

**AD PARAGRAPH 3.3.1 to 3.3.8**

243. I acknowledge the contents of “**FA15**” insofar as they are correctly repeated in this paragraph.

244. I accept as correct that the beneficiaries had to fulfil the three components being entrepreneurs, communities and workers.

245. The three generic elements were indeed amplified in the **2010 Charter** after the review referred to in the **Original Charter**.

246. There is no retrospectivity as the mining right holders were to have the next five years up to 2014 to bring their compliance levels to include the three generic elements.

**AD PARAGRAPH 3.4.1 to 3.4.8**

247. It is correct that I made the presentation referred to in "FA16".

248. There is no substantial difference between the presentation that I made and the one made by Ms. Maseko.

249. My presentation collapsed the three generic elements under the heading "*Meaningful economic participation*".

250. It is correct that the First Respondent did express his concerns about the ownership aspects of the charter compliance and further that the MIGDETT principals must convene a meeting to agree to a mechanism to clarify the law including approaching a court of law for a declaratory order.

251. The First Respondent did express surprise that the legal status of the **2010 Charter** was being questioned.

252. It is correct that the First Respondent did express concern as to the extent of the alleged

non-compliance of the industry with the **Charters**.

253. There was indeed support for a declaratory order to be sought.

**AD PARAGRAPH 3.5.1 to 3.5. 7**

254. The discussions between the First Respondent and Mr Teke are correctly summarised in these paragraphs.

255. The allegations made in “FA17” and “FA18” are again correctly summarised in this paragraph.

256. The media statement made by the First Respondent is indeed in “FA19” and so is the response by the Applicant in “FA20”.

257. It is correct that the figures used in the media statement by the First Respondent related to aggregate figures. This was intended to give the country a percentage perspective of compliance in the mining industry.

258. I must emphasise that the obligation spelt out in the **Charters** rests on each individual right holder. Each right holder must show compliance with the targets set out in the **Charter**.

**AD PARAGRAPH 4**

259. I accept that the law is what it is.

12

260. For reasons already alluded to above, I do not accept Annexure "FA21" to be correct.

261. I welcome the Applicants commitment to the obligations resting on the right holders under the **MPRDA** and the **Charter**.

262. I have admitted that there exists a dispute between the Applicant and the Respondents.

263. I reiterate the proper interpretation of sections 23(1)(h) and item 7(2)(k) of Schedule 2 is as set out in my affidavit.

264. For reasons already stated in my affidavit, I do not accept as correct, the legal conclusions stated in this paragraph.

265. I have already dealt with the circumstances that the First Respondent is obliged to grant rights including where the applicants have shown a roadmap in terms of which the targets in the **Charters** are to be met as well as the undertakings which are made for conversion of old order rights.

266. I do not accept as correct that there are consequences contended for by the Applicant in what it now refers to as "*a maxim*" called "*once empowered always empowered.*"

267. The legislature granted the First Respondent the power to develop a **Charter** The First Respondent has an implied power to amend the **Charter** if rational reasons exist for doing so.

268. The amplification of the Original **Charter** to include ESOPS, for instance, did not require retrospective operation of the **Charter** requirements. The mining rights holders still had four years from 2010 to 2014 to bring their compliance levels to the determined threshold.
269. There have been no attempts to extinguish retrospectively the credits/offsets conferred by the **Original Charter**.
270. There has also been no attempt to deprive holders of mining rights of the benefits of continuing consequences concluded by them prior to the coming into force of the **MPRDA**.
271. What the Respondents says is the proper interpretation of the **MPRDA** and the **Charters** is that a dilution of **HDSA** ownership, even by reason of the **HDSA** exiting would render the mining right holder non-compliant come 2014.
272. I do not see why a mining right holder would conclude a **HDSA** deal which leaves it open for the **HDSA** to leave at any stage and then cry foul when that happens.
273. There is nothing commercially unsound with "*lock in mechanisms*" which are in fact common place in empowerment transactions. It is common place in the telecommunication industry to offer shareholding to **HDSA** which are ring-fenced and only tradable amongst **HDSA**. This does not reduce the value of the investment or materially impair opportunities available or discourage investments by **HDSA**.

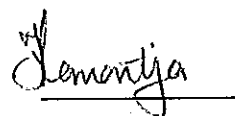
274. It is very narrow to argue that **HDSA** empowerment within the meaning of the **MPRDA** and the **Charters** relates to **HDSA** "*cashing in*" on any capital appreciation realised by the share price. True empowerment must entail a level of comfort for the **HDSA**, having made the investment, to realise value through the payment of dividends, whilst retaining its share participation in the mining industry.

275. For reasons already alluded to above, I do not accept the arguments made in this paragraph to be correct.

276. Further arguments made in this paragraph are denied.

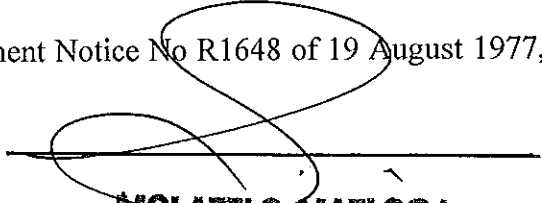
277. I attach hereto marked "**TR6**", "**TR7**" and "**TR8**" confirmatory affidavits of Advocate Ngoako Abel Ramatlhodi and Ranti Mathopo and Mosa Mabuza respectively.

278. I submit that the application stands to be dismissed with costs.



**DEPONENT**

**I HEREBY CERTIFY** that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria \_\_\_\_\_ on this the 05<sup>TH</sup> day of AUGUST (2015), the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.



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mineral resources

Department:  
Mineral Resources  
REPUBLIC OF SOUTH AFRICA

"TR 1"

# **MINING CHARTER IMPACT ASSESSMENT REPORT**

**OCTOBER 2009**

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## EXECUTIVE SUMMARY

On the 11<sup>th</sup> of October 2002, the erstwhile DME (now DMR) together with mining industry stakeholders, including the Chamber of Mines, South African Mining Development Association and the National Union of Mine Workers signed the Mining Charter. Stakeholders agreed to meet after five years to review the progress and to determine what steps, if any, need to be made to achieve the objectives of the Mining Charter.

The DMR has undertaken this assessment to determine the extent to which the objectives of the Mining Charter have been achieved. In particular, the report records progress made against each element of the Charter. Contrary to the good progress made in terms of compliance with HDSA participation in management, examination of other elements paints a gloomy picture.

Although the findings of the report indicate that the Mining Charter is a useful tool to effect transformation, they also illuminate challenges and opportunities in as far as the effective implementation of the Mining Charter is concerned. The shortcomings identified in the report necessitate an urgent need for review.

## **1. PREAMBLE**

This report presents the main findings of the assessment of the Mining Charter conducted by the DMR, with a view to strengthening the effectiveness of the Charter as a policy instrument to effect the transformation of the Mining sector in South Africa. The report provides a snapshot of the South African Mining Charter, details the impact of the Mining Charter or its lack thereof to address the challenges of transformation of the mining sector in South Africa.

In addition, the report delineates the historical background to the South African Mining Charter, spells out the relevant legislation for mining of mineral resources, outlines the statistical account of the progress made by the mining houses with regard to the nine elements of the Mining Charter intended to facilitate the transformation of the mining sector, teases out the contesting relationship between the State and the Mining Sector in South Africa and outlines the limitations or grey areas of the Mining Charter that often leads to different interpretations. In so doing, and while cognisant of what is in the general interest of South Africa and its people, the analysis of limitations provides a scope for solutions towards the transformation of the South African Mining sector.

## **2. THE MINING CHARTER IN CONTEXT**

The South African government, like many other governments globally endowed with abundant mineral resources, has developed market-driven policies to accelerate the pace of the transformation of the mining Sector. Mineral resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans. Mining companies in South Africa have to apply for rights (and permits) to the State for exploration and exploitation of the mineral resources. As a result, the Mining Charter attaches

cautiously thought-out conditions meant to accelerate the transformation of the mining sector, which right holders must comply with in order to continue participating in the country's mineral and mining sector. These conditions are imbued with the importance of operating in solid and tested policy directives aimed at avoiding the folly of potential harm through policies that have the propensity to freeze South Africa's economy into a catatonic state of zero progress.

The South African Mining Charter provides for the aspiration that for any meaningful transformation to be attained in the mining industry, transformation should actually permeate through the ranks of the international market as well in the manner that it be a consequence of a broad based economic model for the benefit of all South Africans and for the continued sustenance of the international investor confidence. Therefore, the South African Mining Industry does not operate as an island in isolation from the South African economic landscape.

Recognising that mining was used as a tool to perpetuate the inequalities in favour of a select group in a manner that precluded HDSA's from participating in a meaningful way within the broader South African economic pie in mineral resources, the South African Mining Charter was developed and adopted as a tool to effect broader transformation of the mining sector.

The creation of the Mining Charter in the main is intended to avert the status quo where HDSA's are generally considered as a repository for cheap labour. On the other hand, management and company ownership was a reserved privilege benchmarked along racial lines in South Africa, and to be precise in favour of the minority white South Africans. Therefore, the Mining Charter is derived from the same values of the supreme law of the country, which is, the Constitution of the Republic of South Africa as it is more vociferous on the subject of equality, in inter alia section 9 on equality and discrimination (in the Bill of rights) that talks to redressing historical and social inequalities.

Section 100(2)(a) of the Mineral and Petroleum Resources Development Act [MPRDA] provides that the Minister, inter alia, *"must within six months from the date on which this Act take effect develop a broad based socio economic empowerment charter that will set the framework, targets and time-table 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"*.

To give effect to section 100 (2) (a) and thus promote transformation in the mining sector, stakeholders have developed the Mining Charter which seeks to achieve the following six objectives:

- 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;
- Utilize the existing skills base for the empowerment HDSA's;
- Expand the skills base of HDSAs in order to serve the community;
- Promote employment and advance the social and economic welfare of mining community and the major sending areas; and
- Promote beneficiation of South Africa's mineral commodities;

The Mining Charter introduced nine (9) elements (incorporating relevant legislation) aimed at redressing past racially discriminatory practices that were perpetuated during the apartheid era to exclude the HDSA's from actively participating in the ownership and management of the mining sector. Stakeholders have agreed to create an enabling environment for the empowerment of the HDSA's by adhering to the following:

- Human resource development (*Skills Development Act 97 of 1998*)
- Employment equity (*Employment Equity Act 55 of 1998*)
- Migrant labour (*Immigration Act 13 of 2002*)
- Mine Community development
- Housing and living conditions
- Procurement (*Preferential Procurement Policy Framework Act 5 of 2000*)
- Ownership and joint venture (*Competition Act 89 of 1998*)
- Beneficiation
- Reporting

Stakeholders recognised that the achievement of the objectives set out in the Charter entails continuous engagement on reporting, monitoring and evaluation and further agreed to review the Charter if required.

### **3. ANALYSIS OF PROGRESS AGAINST CHARTER ELEMENTS**

As a vehicle to redress the socio-economic imbalances of the past, the Mining Charter, as a negotiated instrument, identified nine basic elements to effect the transformation of the South African mining industry. The analysis is informed by the DMRs internal inspection processes and findings from an independent assessment conducted by a consultancy group appointed by the Department. The question that this section answers is as follows: What progress has been made towards the attainment of the objectives of the Charter?

#### **3.1 Human Resource Development**

The mining industry is knowledge based, thus requiring greater emphasis placed on skills development. The Charter recognised that the South African labour market does not produce enough requisite skills for the mining industry. Consequently, stakeholders agreed to work together in addressing the inherent skills deficit and adopted measures to effect skills development which would be measured as follows:

- (i) Has the company offered every employee the opportunity to be functionally literate and numerate by the year 2005 and are employees being trained?
- (ii) Has the company implemented career paths for HDSA employees including skills development plans?
- (iii) Has the company developed systems through which empowerment groups can be mentored?

In respect of the abovementioned measures, the assessment yielded the following results:

Functional Literacy: An average of 17.1 percent was achieved.

( Career Pathing: An average of 17.1 percent was achieved.

Mentoring of empowerment groups: An average of 11.4 percent was achieved.

( The assessment of this Charter element further indicates innate inhibitions against progress on skills development, which include, albeit not limited to lack of management support for staff participating in Adult Basic Education and Training (ABET), as evidenced by recalling of staff from classes to accelerate production, loss of bonuses for ABET attendees and classes arranged after working hours, typically non-proximal to employees residences. Consequently, the prevailing conditions are less attractive for employees to enrol on the programs of skills development. The findings further indicate that the bulk of ABET training beneficiaries are mostly characterised by non-South Africans.

( Additionally, investigations of the career pathing and mentoring of empowerment groups measures indicate a disconnect between the plans submitted to the Department of Mineral Resources and actual implementation. The bulk of interviewed mentors and protégés of these programs purport to be oblivious to the plans, as a result of which their participation is limited. Additionally, career plans are typically focussed on development of senior managers at the exclusion of lower level employees.

The companies that are succeeding in the implementation of agreed measures of the HRD element tend to provide sufficient resources and incentives for training.

The continuing paucity of skills in the industry, coinciding with the longest commodity boom, as corroborated by perpetual utterances by the industry captains, bears testimony to the lack of investment in critical skills development. While the original intent of the Charter was to use and expand the existing skills base to contribute to sustainable development of the mining industry, it appears that the implementation of this element has focussed on basic skills development at the expense of developing the requisite skills to effect meaningful transformation of the industry.

Government created the Mining Qualification Authority (MQA) to drive skills development in the mining sector, in terms of the Skills Development Act No. 97 of 1998. Furthermore, the MQA gives credence to the objectives of the Charter by executing Government's undertaking to provide training in mining and entrepreneurial skills. The MQA is also mandated to conduct skills audits, in partnership with the stakeholders, on the basis of which comprehensive skills development strategies were to be developed. The apparent lack of skills resulted in South Africa's mining industry not benefiting nearly as optimally from the commodity super-cycle, owing to poor investment in the development of core skills.

### 3.2 *Employment Equity*

As cornerstone of apartheid discriminatory employment practices, the mining industry remained, to a large extent, unreformed at the time of the promulgation of the Charter. Consequently, stakeholders deemed it appropriate to include Employment Equity as an element of the Charter to effect a demographically representative workforce in the mining sector, consistent with the central tenets of

the Employment Equity Act No. 55 of 1998 and the Basic Conditions of Employment Act No. 75 of 1997, as amended.

Stakeholders agreed to cooperate in facilitating the achievement of a representative workforce, and adopted the following measures:

(i) Has the company published its employment equity plan and reported on its annual progress in meeting that plan?

(ii) Has the company established a plan to achieve a target for HDSA participation in management of 40percent within five years and is implementing the plan?

Has the company identified a talent pool and is it fast tracking it?

(iv) Has the company established a plan to achieve the target for women participation in mining of 10percent within the five years and is implementing the plan?

#### *Employment Equity Plans and reports*

Only 37 percent of mining companies have developed Employment Equity (EE) plans, while a lesser number of companies have published these plans. There is no evidence of EE reports (either audited or unaudited) submitted to the Department of Mineral Resources. These findings demonstrate the intransigence and lack of commitment by the industry to transform.

#### *HDSA participation in management*

An average of 26 percent of mining companies achieved a threshold of 40 percent of HDSA participation at management level, while the average achievement for the industry is 33 percent. It has to be noted that HDSA participation includes white women participation, which currently stands at 10 percent. However, it was further established that a large number of HDSA's occupy middle management

positions while an insignificant number of HDSA's are in key decision making positions.

#### *Women participation in mining*

The results reveal that only 26 percent of mining companies have complied with the 10 percent women (inclusive of white women) participation in mining. However, the average rate of women participation is 6 percent, the bulk of whom are represented in support functions with less than 1 percent in core management positions, a large proportion of which represents a preserve for white women.

#### *Talent pool identification and fast tracking*

An average of 83 percent of mining companies have not identified talent pool, while only 17 percent are in the process of fast tracking those identified for management positions.

Employment patterns in the mining industry reflect that the majority of HDSA still occupy lower levels of employment and the targeted 40 percent of HDSA participation in management, as espoused in the Charter, has not yet been achieved.

The Human Rights Commission report dated 4<sup>th</sup> November 2008 confirms the afore-mentioned findings relating to the lack of compliance with the employment equity targets in the mining companies, in terms of race and gender representations. This observation is corroborated by the findings of the 9<sup>th</sup> Employment Equity Commission report, which highlight that white South Africans (female and male) continue to occupy top management positions and earn more than blacks regardless of skills and experience.

The assessment further revealed the prevalence of racially discriminatory practices in the mining industry, which impacted negatively on the progress towards attainment of equitably transformed workplace.

The lack of investment in HDSA skills development by the industry has created a limited pool of expertise required to effect meaningful gender and racial representation. As a result, retention of a few skilled HDSAs in companies has proven to be a challenge. There is evidence that progress on employment equity remains minimal, with most mining companies developing equity plans for regulatory compliance purposes.

### *3.3 Migrant Labour*

Since the mining industry was developed on the blood and sweat of both South African and migrant labourers, the signatories to the Charter deemed it necessary to make special provision to ensure non discrimination of migrant labourers.

The following measure was adopted to assess progress made in regard to this element:

Has the company subscribed to government and industry agreements to ensure non-discrimination against foreign migrant labour?

This element appears to have been significantly complied with, consistent with the objects of the Immigration Act No. 13 of 2002. This is illustrated by the benefits enjoyed by immigrant workers in terms of skills development. However, evidence of agreements to promote non-discrimination entered into between companies and government was not readily available.

### *3.4 Mine Community Development*

Minerals exploration and mining activities are located in remote and under-developed areas of the country. Mining activities in South Africa, which extend

beyond a century, have led to the proliferation of mining ghost towns, due to poor mining practices of the past' which were inconsistent with sustainable development principles. To ensure the achievement of the triple bottom line, particularly the socio-economic dimension, stakeholders agreed to pursue community upliftment programmes to support communities within which mining takes place as well as labour sending areas. It was agreed that this element would be measured as follows:

Has the company cooperated in the formulation of integrated development plans and is the company cooperating with government in the implementation of these plans for communities where mining takes place and for major labour sending areas?

Has there been an effort on the side of the company to engage local mine community and labour sending area communities? (Companies will be required to cite a pattern of consultation, indicate money expenditure and show a plan)

The assessment indicates that 63 percent of companies engaged in consultation processes with communities, while 49 percent of companies participated in the formulation of Integrated Development Plans (IDP) in mine communities. However, only 14 percent of companies extended their participation in the development of IDPs for labour-sending areas. A mere 37 percent of companies showed proof of expenditure in accordance with commitments set out in approved Social Labour Plans (SLP). The rest of the companies implement corporate social responsibility projects and report these as part of their contribution to IDPs.

Despite seemingly high compliance levels in terms of community consultation, there is no evidence of a direct link between the proposed and implemented community development projects as far as the needs of affected communities are concerned. This is a result of inefficient consultation process, poor or lack of collaboration with communities and lack of alignment to established Local Economic Development (LED) frameworks. The disjuncture between consultation and collaboration with affected communities minimises the developmental impact

of the mining industry on communities, as corroborated by the poor correlation between SLP commitments and related expenditure.

The assessment further identified the narrow empowerment approach of handpicked individual disguised as representing the broader interest of host communities.

The industry expressed a need for a uniform approach to SLP models countrywide, contrary to the unique development requirements of every community. This proposal contradicts international best practice of the same mining companies operating in developed countries where significant investments are made towards community development projects, which address specific needs of those communities prior to the commencement of mining activities.

A model of integrated resource management, which is characterised by mining companies intending to develop projects within the same proximity through pooling of their respective resources in pursuit of high impact development within the host communities, has been proven successful.

### *3.5 Housing and Living conditions*

The appalling living conditions under which black mine workers were made to live before the advent of democracy led to a myriad of social ills, including the destruction of the social fabric of communities, substance abuse, as well as the contraction and spread of diseases, particularly HIV/AIDS. These conditions necessitated stakeholders' intervention to promote humane living conditions for affected workers. To address the situation, stakeholders agreed to implement redress mechanisms which would be measured as follows:

For company provided housing has the mine, in consultation with stakeholders established measures for improving the standard of housing including the

upgrading of 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 overtime and is implementing the plan?

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 to show a plan to progress the plan over time and is implementing the plan?

The assessment indicates that 26 percent of the mining companies have provided housing for the employees, while 29 percent have improved the existing standards of housing. The results further indicate that 34 percent of companies have facilitated employees' access to home ownership through various schemes. In addition, 29 percent of companies have offered nutrition to employees or have established plans to effect improved nutrition. The majority of mines have moved away from the hostel systems, as a result of which 9 and 6 percent of companies have achieved upgrading of hostels as well as conversion of hostels to family units, respectively. The mining industry has made reasonable progress towards the creation of descent housing and living conditions for mine workers through the various schemes. However, despite the reduction of the number of occupants from 16 to 4 persons per unit, this occupancy rate remains unacceptably high. Accordingly, inspection of most hostels further revealed unhygienic living conditions that hostel dwellers are subjected to. The upgrading as well as the conversion of existing hostels into family units remains unacceptably low.

Less than a third of the mining companies make nutritional provision for their employees. Inspections have revealed that nutrition is typically outsourced to service providers with inadequate expertise, characterised by former employees of the mining companies. The assessment also revealed a conspicuous absence of adequate facilities for employees to prepare their own meals.

Further, the assessment found that most mining companies have resorted to giving workers "living out allowances". The unintended consequence of the aforementioned is the proliferation of informal settlements. It is common knowledge that informal settlements in South Africa often provide a conduit or cesspool of crime, substance and alcohol abuse, and the spread of diseases.

The housing and living conditions standard gazetted in April 2009 was developed by the Department of Mineral Resources (DMR) in consultation with industry stakeholders and the Department of Housing (Housing Act No. 107 of 1997). This policy sets out various standards and guidelines to enable industry to accelerate the attainment of requisite levels of humane living conditions for mining sector employees, consistent with international best practices.

### 3.6 *Procurement*

While political freedom has been achieved in South Africa, economic freedom remains elusive to the majority of its citizens. South Africa continues to display two economies that are divided along racial lines. Procurement of capital goods involving huge sums of capital funds managed and dispensed by the mining industry continues to be dominated by non HDSA companies. The procurement element of the Charter is a deliberate intervention by stakeholders to create new avenues for HDSA supplier participation in the mainstream economy, to bridge the divide between the two economies, as espoused in the Broad Based Black Economic Empowerment Act No. 53 of 2003. The mining stakeholders adopted this element of the Charter and agreed to the following measures:

Has the mining company given HDSA's preferred supplier status?

Has the mining company identified current level of procurement from HDSA companies in terms of capital goods, consumables and services?

Has the mining company indicated commitment to a progression of procurement from HDSA company over a three (3) to five (5) year time frame in terms of capital

goods, consumables and services and to what extent has the commitment been implemented?

The assessment illustrates that 89 percent of companies have not given HDSA companies preferred supplier status, while 80percent have not indicated commitment to the progression of procurement from HDSA companies over a 3-5 year time-frame. The current reported level of procurement from HDSA companies averages a mere 37 percent of companies, although companies could not always ascertain the ownership and management control status of their HDSA suppliers.

Procurement of capital goods, consumables and services managed and dispensed by the mining companies continues to be skewed in favour of their preferred untransformed suppliers to the detriment of HDSA companies.

HDSA companies largely benefit from procurement contracts for the provision of consumables and non-core services such as providing cleaning facilities, toilet paper and other trivial activities.

The value of HDSA procurement expenditure as a percentage of total procurement remains below 3 percent, consistent with the insignificant provisions of preferred supplier status to HDSA companies. There is no evidence that stakeholders have identified levels of procurement from the HDSA companies and developing HDSA procurement capacity as per their undertaking at the time of adopting the Charter. This demonstrates lack of commitment by mining companies to advance the procurement element of the Mining Charter. The pervasive resistance by the industry to meaningfully engage the services of HDSA companies continues to delay the achievement of broader economic freedom.

### *3.7 Beneficiation*

Mineral value addition is a deliberate government intervention to facilitate a paradigm shift from a resource based to knowledge based economy. This intervention is premised on the comparative advantage assumed by the country from its mere endowment with mineral resources to developing a competitive advantage which should meaningfully contribute to the accelerated economic

growth. Recognising the significant opportunity presented to South Africa by introducing mineral beneficiation programmes, stakeholders embraced the introduction of this element and agreed on the following measures:

Has the mining company identified its current level of beneficiation?

Has the mining company established its baseline level of beneficiation and indicated the extent that this will have to be grown in order to qualify for an offset?

Although the above measures have not been achieved, there has been pockets of local beneficiation of the country's mineral resources, albeit in an uncoordinated manner. To create an enabling environment to effect coordinated beneficiation in South Africa, Government has introduced the Precious Metals Act No. 37 of 2005 and the Diamonds Amendment Act No.29 of 2005, which led to the establishment of the South African Diamond and Precious Metals Regulator (SADPMR) and the State Diamond Trader (SDT). Further, the development of the beneficiation strategy has sought to create a broader framework to promote increased local value addition, consistent with other programmes of government such as the National Industrial Policy Framework.

The review of the Mining Charter presents an ideal opportunity to strengthen the beneficiation element of the Charter, which should be aligned to the country's mineral beneficiation strategy. South Africa should not permit continued exportation of mineral resources for beneficiation elsewhere, to the detriment of local skills development, creation of decent jobs, increased Gross Domestic Product (GDP) value addition per capita and contribution to economic growth.

### *3.8 Consultation, Monitoring, Evaluation and Reporting*

Recognising that the achievement of the objectives of the Charter requires an ongoing process of consultation, monitoring, evaluation and reporting, stakeholders agreed on mechanisms to ensure that the objectives of the Charter are achieved. Mining companies further undertook to report on an annual basis, as

per the provisions of section 28(2)(c) and section 29 of the MPDRA. The following measure was agreed upon by stakeholders:

Has the company reported on an annual basis its progress towards achieving its commitments in its annual report?

Assessment shows that 37 percent of companies have audited reports, while only 11 percent purport to have submitted their annual progress report to the DMR.

It is apparent that a large proportion of mining companies with audit reports has not subjected the Mining Charter compliance data to an independent audit framework. Accordingly, there is absence of coordinated mechanisms within the Department of Mineral Resources (DMR) to effectively monitor and evaluate progress against the Mining Charter targets on an annual basis. There is also lack of adherence by stakeholders to the provisions of section 28(2)(c) and section 29 of the MPRDA, as well as stringent enforcement systems.

The amount provided for in section 99 of the MPRDA as a penalty for non compliance with the provisions of section 28(2)(c) and section 29 of the MPRDA is preposterously inadequate.

### 3.9 Ownership and Joint Ventures

The perpetual marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented black people from owning the means of production and from meaningful participation in the mainstream economy. As a result, the majority of South Africans still provide a source of cheap labour. This necessitated a deliberate intervention to redress this situation, in line with clause (3) of the Freedom Charter, which states that: "*The National wealth of our country, the heritage of South Africans shall be restored to the people. The mineral wealth beneath the soil... shall be transferred to the ownership of the people as a whole*". It is through the prism of this perennial document that the ownership element of the Mining Charter was adopted by all stakeholders to

facilitate the transfer of ownership to HDSAs. Stakeholders adopted the following to measure compliance with this element:

*Has the mining company achieved HDSA participation in terms of ownership for equity or attributable units of production of 15percent in HDSA hands within 5 years and 26percent in 10 years?*

Upon the adoption of the Mining Charter, stakeholders made the following undertaking: *"The industry agreed to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5 years. Participants agreed that beyond R100 billion - industry commitment in pursuance of the 26 percent 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"*.

The assessment revealed that the current net asset value of the South African mining industry averages R2 trillion, indicating that the 15 percent HDSA ownership threshold requires no less than R300 billion to accomplish (in 2009 terms). The industry's stated commitment of R100 billion to facilitate HDSA ownership represents 5 percent of the current net asset value of the mining industry, which falls far short of the agreed 15 percent empowerment target envisaged within 5 years. However, the assessment further recognises the limitations of the absolute value of commitment as well as the compounded annual growth of the industry's net value, which ought to have been factored in at the time of the commitment.

Analysis of the available data shows that aggregated BEE ownership of the mining industry has, at best, reached 9 percent. There are several empowerment vehicles that constitute BEE ownership, viz.: Women in Mining, Employee Share Ownership Schemes (ESOPS), Community Trusts, Anchor Partners and Special Purpose Vehicles (SPV). Regrettably, the reported level of BEE ownership is concentrated in the hands of anchor partners and SPV's, representing a handful of black beneficiaries, contrary to the spirit and aspiration of both the Freedom Charter and the Mining Charter.

Despite the noble intention of the empowerment vehicles (ESOPS and Community Trust) to effect the broad ownership transformation envisaged in the Mining Charter, a closer examination of these vehicles highlights the pervasive constraints presented in the form of non equitable distribution of benefits inherent in their implementation and such benefits being extended to non HDSA, which remains proverbially problematic.

The underlying empowerment funding model has resulted in the actual ownership of mining assets intended for transformation purposes being tied in loan agreements. Accordingly, the net value of a large proportion of empowerment deals is negative, due to high interest rates on the loan and moderate dividend flows, compounded by the recent implosion of the global financial markets. The rapacious tendencies of the capital markets have consistently thwarted the intended progress towards attaining the goals of transformation, as embedded in the Charter.

The assessment shows that the structure of most empowerment deals is insidiously effected at operational (mining rights) levels, which allows for ring-fencing of transformation at holding company level. Such undesirable practices perpetuate a culture and focus on regulatory compliance at the expense of fundamental transformation of the mining industry, including albeit not limited to deracialising the corporate profiles and ownership of mining companies.

The assessment also points to a structural malaise in BEE deals focussed solely on economic interest, which is not representative of the true ownership transfer of mining assets to HDSA's. As a result of these structural weaknesses, the BEE companies end up in an invidious financial position, as evidenced by the swift mass exodus of these companies, which coincided with the global financial crisis.

The realisation of the benefits of BEE deal-flows to HDSA beneficiaries is delayed by elusive structuring of these deals. The nature of most BEE deals is such that the repayment terms for the HDSA continue beyond the Life of Mine (LOM). There are often onerous conditions attached to agreements to discourage HDSA participation. A majority of empowerment deals are structured with a lifespan ending 2014, contrary to the object of this element, which sought to achieve these targets as a baseline of transformation. Some companies have used what they call the “**pool and share**” method, which is their own creation and features nowhere in the Charter. Through this method, established mining companies enter into joint ventures with black owned companies and each party brings resources into the deal based on the close proximity of their operations “geographically”.

The profits are shared on the basis of who has what percentage of the reserves brought into the deal. Effectively, the BBBEE ownership in such an arrangement is based on how much reserves each party brings into the deal. In essence such companies are not empowered and should not claim credit on the basis of attributable units of production since they did not give up any of their reserves for the benefit of black owned company and their racial profile remains unaltered.

Lack of HDSA representation at empowering companies’ boards limits their decision making authority and leaves them at the mercy of empowering companies. Consequently, HDSA companies are generally excluded from major decisions relating to investment/divestment and key policies that determine the future direction of the company.

The prevalence of fronting is both an insult and an indictment to the broader objectives of the Mining Charter. This unscrupulous practice sets back the transformation agenda of South Africa and must be condemned in the strongest terms possible. The surreptitious nature of fronting remains a scourge to South Africa’s transformation agenda.

#### **4. IMPACT OF THE MINING CHARTER ON ECONOMIC GROWTH AND EMPLOYMENT**

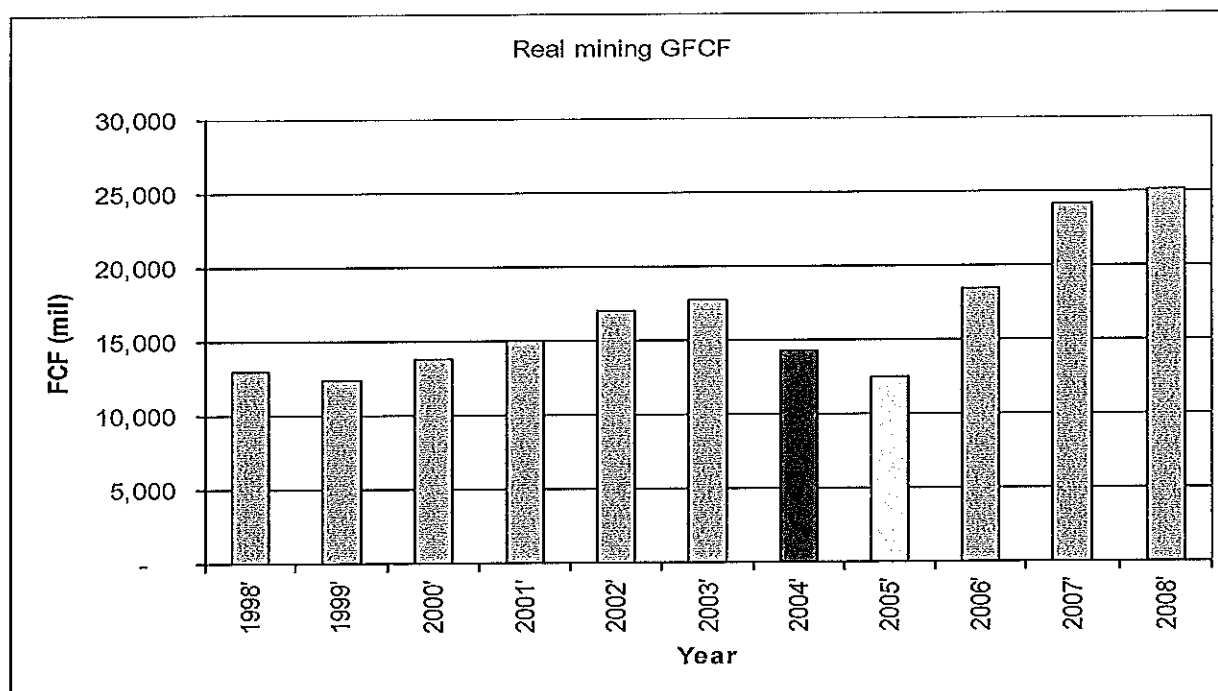
The promulgation of the MPRDA and the implementation the Mining Charter in 2004, replaced the preceding mining regulatory framework which had locked mineral rights in private individuals (including juristic persons). The private individuals were characterized by the previously advantaged minority of South Africans and thwarted momentous prospects of foreign investment flows into the sector. The new regulatory framework vested the custodianship of mineral rights to the State.

The implementation of the Charter also coincided with a protracted declining trend in employment, which tracked the contraction in gold output. The 1986 official statistics of employment in the mining sector was 829 000, marking the beginning of the contraction in employment, which reached a trough of 449 000 in 2004, indicative of a cumulative job losses of 46 percent over this period. The implementation of the Mining Charter enabled diversification of the mining industry in South Africa in terms of a number of commodities mined, volumes produced, revenue generation for the country, especially export earnings which kept the country's balance of payment relatively stable and job creation. Currently, the sector employs 6% of the country's total labour force, with steady growth in employment under the new regulatory regime peaking at 519 000 by 2008 (annual employment growth averaged 4% from 2005 to 2008). However, this number decreased to 494 000 by June 2009, due to the current global financial climate, representing a cumulative loss of 25 000 (Quarterly Employment Statistics, June 2009, StatsSA).

The Gross Fixed Capital Formation (GFCF) in the mining industry declined by respective 20 percent and 12 percent in 2004 and 2005, due to uncertainty of the introduction of the Mining Charter, regional geo-political stability presenting new

prospects for mining in competition with South Africa and the recovery of the Rand. The GFCF grew at a much faster pace averaging 24 percent between 2005 and 2008, once the confidence in the regulatory regime was attained.

**Figure 1**



During the first five years of the implementation of the Mining Charter (i.e. between 2004 and June 2009), the Department of Mineral Resources received over 22 000 applications for new mining rights, mining right conversions, reconnaissance permits and prospecting/prospecting rights, corroborative of the continued investor confidence in the mining sector, created by the new regulatory framework.

The contribution of the South African mining sector to the National Gross Domestic Product (GDP) correspondingly grew from R89 Billions in 2004, to R196 Billions in 2008.

The economic and employment statistics suggest that the new South African mining regulatory framework (the MPRDA and the Mining charter) has reinforced

investor confidence in mining sector, contributory to systematic growth in economic performance and opportunities for creation of decent employment for South Africans.

## **5. CONCLUSIONS AND RECOMMENDATIONS**

The first period of the implementation of the current Mining Charter coincided with the longest synchronised commodity boom ever experienced by the mining industry globally. The Charter was developed as a pre-cursor lever to effect sectoral transformation, aligned to the broader national transformation agenda. In developing the Mining Charter, the DME accommodated the diverse interests of various stakeholders, as they lobbied for the protection of their various constituencies.

As an agreement based on concessions by the various stakeholders, the Mining Charter is not without shortcomings. The ambiguity inherent in the current construct of the Charter elements has given rise to various interpretations, which afford the industry an opportunity to exploit intrinsic weaknesses. This has resulted in shocking levels of non compliance.

Consequently, the intended benefits flowing from the mining industry fall significantly below the expectations and aspirations of the majority of South Africans as intended by the Charter. To this extent, there is a degree of criticism levelled against the Mining Charter that in its current form, it is a blunt tool to address the broad based transformation agenda.

Although some of the elements of the Charter allude to the national objectives, there is a need to further align it to the developmental state agenda. However, this raises questions as to whether the state has utilised State Owned Enterprises for the maximum benefit of the nation and what needs to be done to ensure that such utilisation occurs.

It is therefore imperative that the Mining Charter be reviewed to ensure that it remains relevant and true to its original intent, and aligned to the Broad Based Black Economic Empowerment (BBBEE) Act No.53 of 2003 and the Codes of Good Practice championed by the DTI.

While the assessment of the Mining Charter demonstrates a measure of cumulative progress towards the attainment of its objectives as embedded in the elements, it also illuminates some deficiencies in the construct and mechanisms of implementation thereof. The juxtaposition of interpretation of the Mining Charter aligned to the score-card (measures) is blurry. Accordingly, the intent of some elements of the Charter is not adequately articulated. What follows delineates the current limitations intrinsic in the Mining Charter:

*Lack of a definition chapter in the Mining Charter:*

The lack of a definition section in the Charter allows for various inconsistent interpretations of the provisions of the Charter by the mining sector stakeholders.

*The current definition of HDSA:*

The current definition of HDSA in the Mining Charter should be aligned to the definition of HDSA's in the Broad Based Black Economic Empowerment Act No.53 of 2003. In addition, the Charter should seek to be more inclusive of vulnerable groupings. For instance, the Mining Charter is silent on the role persons with disabilities, as part of HDSA's, can play within the mining Industry. Yet ironically mining companies have contributed significantly to the increasing number of people with disabilities. In other words, if transformation as espoused in the Mining Charter has to impact in a more meaningful way, the mining sector should create meaningful opportunities for people with disabilities.

### *Ownership:*

While the element captures the recognition by government and industry that one of the means of effecting 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 assets by HDSAs, it only provides the definition of participation in terms of active and passive involvement, the terms of which are not clearly defined. This provides room for ambiguity and different interpretations. For example, the DMR interpretation of ownership includes voting rights, economic interest and net value, while the industry obfuscates interpretation of ownership as HDSA's economic interest, and views net value as an additional ownership criterion. In addition, the absence of criteria for offsetting beneficiation against ownership, as well as lack of clarity on the continuing consequences of previous BEE transactions and the use of attributable units of production require specific attention.

### *HDSA's in Management (including Women in mining):*

Mining companies often employ HDSA's in support services as opposed to core business positions. The core business positions within mining companies continue to be occupied by white South Africans (men and women) the exclusion of HDSA's. The definition of HDSA attribute requires specific attention.

### *Human Resources Development:*

This element recognises that the South African labour market does not produce enough skills required by the mining industry for sustainable growth. However, the element currently places greater emphasis on offering opportunities to become functionally literate and numerate. The conspicuous lack Research and Development in the current Charter requires special attention.

### *Procurement:*

While the Charter identifies procurement as an area of opportunity to contribute to sustainable development of communities, it only identifies three variables of procurement and does not commit mining companies to effectively support the economic growth of HDSA supplier companies across all three levels of procurement.

*Recommendations:*

The assessment of the Mining Charter has demonstrated that the Charter and its constituent elements for effecting meaningful transformation remain relevant. However, the efficacy of the Charter as an instrument of promoting transformation is blunted to a large extent by the identified shortcomings. It is therefore recommended that the Charter be reviewed to strengthen and sharpen its effectiveness in driving transformation in the industry. It is further recommended that the MPRDA be amended to ensure that non-compliance with the provisions of both the Charter and the Act is severely penalised. In addition, there needs to be greater synergy between the procurement element of the Mining Charter and the procurement element of the DTI Codes of Good Practice.

The BBBEE Act makes provision for the establishment of the BEE Advisory Council to be chaired by the State President. DMR must, in partnership with the DTI and other relevant departments, expedite the establishment of the Council to ensure that transformation issues receive attention at that level. Further, capacity should be built and adequate resources allocated within the department to promote the effective and efficient monitoring and evaluation of compliance with the provisions of the Charter and the MPRDA.

# **STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY**

**Mining Stakeholders include:**

1. The Department of Mineral Resources
2. National Union of Mineworkers
3. Chamber of Mines of South Africa
4. South African Mineral Development Association
5. Solidarity
6. UASA - The Union

STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY

**PREAMBLE**

This declaration lays a foundation for a strategy to position South Africa's mining industry on a trajectory of sustainable growth and meaningful transformation. The strategy emphasises the complementary nature and interdependence of competitiveness and transformation. This declaration further acknowledges the vital contributory role of the mining industry to national socio-economic development as well as the necessity to use country's mineral base as a catalyst to enhance diversification of the economy that corresponds with the industrialisation priorities of government.

Considering the intrinsic value of mining which encompasses the sustainable development potential of the sector, stakeholders are fully cognisant of the constraints that limit the realisation of this potential and they therefore reaffirm their commitment to working together to successfully and holistically implement the provisions of the strategy. South Africa is a land endowed with incredible possibilities and through collaborative efforts of relevant stakeholders it is contended that much more can be achieved. In accordance with the harmony of the zebra colours, this declaration symbolises the spirit of common purpose by the stakeholders.

In order to ensure the sustainable growth and meaningful transformation of the mining industry, stakeholders acknowledge and commit to mitigate various constraints that are evident in infrastructure inadequacies, the paucity of requisite skills, the regulatory framework, as well as low levels of exploration and research and development. In addition, stakeholders recognise the transformation backlog in the industry, the unsatisfactory pace of which has fuelled socio-economic developmental disparities, influenced workplace inequity, and aggravated the plight of mining areas. Meaningful economic HDSA participation has also been detrimentally affected. In response, the stakeholders are committed to integrating transformation priorities with measures to promote the globally competitive growth of the sector. Having regard to the national government's order of priorities and inspired by the development potential of the mining industry, stakeholders further commit to develop the mining industry in resonance with government's socio-economic development priorities.

STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY

COMMITMENT 1

**Objectives**

Inspired by the values associated with transparency and integrity, this declaration provides the basis for stakeholder commitment to creating an environment that is conducive to supporting the sustainable growth and meaningful transformation of South Africa's mining industry, with the following aims:

- To promote investment, enhance competitiveness and drive transformation objectives;
- To mitigate constraints limiting sustainable growth and meaningful transformation;
- To emphasise the mutual reinforcement of competitiveness and transformation;
- To commit to effective implementation of the strategy.

COMMITMENT 2

**Infrastructure**

Recognising that infrastructure is one of the key drivers of the competitiveness with a material impact on its potential growth, and further recognising that shortages of critical infrastructure such as rail, ports, electricity and water supply can act as constraints to growth, the parties commit to the following:

- Establishment of an "Integrated Long Term Infrastructure Planning Mechanism" for the mining sector;
- Evaluation of short to long-term infrastructure requirements underpinning the envisaged growth of mining industry through a process of engagement between industry and government;
- Identification of areas that are industry and/or government responsibilities, including shared responsibilities;
- Engagement with relevant national processes committed to long-term integrated planning process with specific emphasis on the mining industry's infrastructural needs.

COMMITMENT 3

**Innovation in mining**

Taking into account the importance of mining innovation through research and technology development, cost and management efficiency as well as productivity in driving meaningful growth and transformation, parties agree to work towards attainment of a research driven and technology based competitive edge, and henceforth commit to the following:

- Assess the current research and development landscape in the mining industry;
- Resuscitate a research and development culture in the mining industry;
- Strengthen partnerships with research institutions both locally and internationally.

STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY

COMMITMENT 4

**Sustainable Development**

Acknowledging the importance of balancing economic benefits with social and environmental concerns without compromising the ability of future generations to meet their needs, parties commit to:

- Develop and implement a National Action Plan for the management of acid mine drainage;
- Adopt a regional approach in dealing with integrated and cumulative environmental impacts resultant from mining;
- Embark on research and development initiatives directed towards the sustainability of mine closure and mining environmental legacies;
- Establish a multi-stakeholder forum on derelict and ownerless mines;
- Implement Mine Health and Safety Tripartite Action Plans;
- Establish a task team to develop mechanisms of accelerating exploration investment;
- Strengthen linkages of mining with other industries, such as infrastructure, upstream and downstream value addition, technology, services and manufacturing, to ensure sustainable mining 'beyond a hole in the ground';
- Work towards the development and effective implementation of a 'Mining Vision 2030' informed by sustainable development principles;
- Adopt an integrated development approach through pooling of resources.

COMMITMENT 5

**Beneficiation**

Recognizing the importance of translating our comparative advantage in mineral resources endowment into competitive advantage to fuel further industrialisation and the need to increase value addition to our minerals before they are exported, parties commit to:

- Support local beneficiation in order to unlock the intrinsic value of South Africa's minerals;
- Consider establishing a national beneficiation agency to drive downstream, upstream and side-stream beneficiation as well as all industries associated with mining;
- Enlist the support of strategic international partners to facilitate skills and technology transfer for the benefit of local beneficiation.

STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY

COMMITMENT 6

**Regulatory Framework**

Noting 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 investment, parties commit to:

- Strengthen the MPRDA architecture to improve its efficiency and effectiveness by 2011;
- Strengthen enforcement, monitoring and evaluation of the regulatory framework;
- Streamline administrative processes to eliminate inconsistent application of the overall mineral regulatory regime;
- Harmonise the mineral regulatory regime with other related legislation impacting on the mining industry;
- Finalise the review of the Mining Charter by August 2010;
- Messaging of a positive regulatory framework to promote South Africa's ranking as an investment destination of choice;
- Explore an option of a single authority regulating all environmental issues;
- Transparent and results yielding compliance;
- Promote greater cooperation and coordination between the DMR, its agencies and other governing bodies.

COMMITMENT 7

**Human Resources Development**

Recognising the current shortage of requisite skills and that human resource development constitutes an integral part of competitiveness and social transformation of the workplace and knowledge based industry, parties commit to the following:

- Conduct at least two skills audits by 2014 and assess institutional and organisational absorptive capacity by no later than December 2010;
- Invest a percentage of annual payroll in all skills development activities, but excluding the mandatory skills levy, as follows:
  - Target for 2010 = 3%;
  - Target for 2011 = 3.5%;
  - Target for 2012 = 4%;
  - Target for 2013 = 4.5%;
  - Target for 2014 = 5%;
- Ensure that mechanisms for directing the mandatory skills levy are in place, efficient and effective.

STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY

COMMITMENT 8

**Employment Equity**

Acknowledging that diversity and equitable representation in the workplace remain catalyst for social cohesion, parties commit to the following:

- Create a conducive environment that promotes and encourages diversity in order to increase and retain requisite skills;
- Demographic representation of HDSA with a minimum target of 40% by 2014 in each of the following occupational categories:
  - Top Management (Board);
  - Senior Management (Exco);
  - Core & Critical Skills;
  - Middle Management;
  - Junior Management.

COMMITMENT 9

**Mine Community Development**

Recognising that mine communities form an integral part of mining development, hence a realisation that 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. Parties henceforth commit to attain the following:

- Develop guidelines and adhere to community consultation processes;
- Develop a partnership approach towards mine community<sup>1</sup> development and consider establishment of regional (social) development funds for effective implementation of social and labour plans;
- Implement and monitor social labour plan undertakings.

COMMITMENT 10

**Housing and living conditions**

Noting that mining operations are, in most cases, located in remote areas with often less-than salubrious facilities for the workforce, parties commit to restore human dignity of employees in line with the Constitution of the Republic of South Africa, as follows:

- Attain the occupancy rate of one person per room by 2014;
- Upgrade or convert hostels into family units by 2014;
- Promote home ownership options and provide balanced nutrition.

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<sup>1</sup> Mine community includes both host community and major labour sending areas.

STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY

COMMITMENT 11

Procurement

Realising that procurement provides an important market opportunity for goods and services and that lack of access to market is a major impediment to growth and expansion of enterprises, parties commit to:

- Adhere to fundamental principles of enterprise development, irrespective of the mining company's turnover;
- Develop mechanisms for multinational suppliers of capital goods to the mining industry, which are operating in South Africa to contribute towards social development.

COMMITMENT 12

Ownership and funding

Realising that equity ownership provides an effective means of incorporating HDSAs into the mainstream economy and that ownership can afford HDSAs an opportunity to influence the direction of a business, parties commit to the following:

- A minimum target of 26% ownership by 2014 to enable meaningful economic participation of HDSA.
- 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 and communities;
  - Barring any unfavourable market conditions, some of the cash flow should accrue 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 accrued 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 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 agreed timeframes of the BEE structure, taking into account the prevailing market conditions.

STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
TRANSFORMATION OF SOUTH AFRICA'S MINING INDUSTRY

COMMITMENT 13

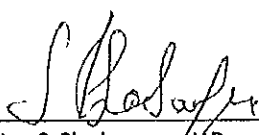
Monitoring and Evaluation

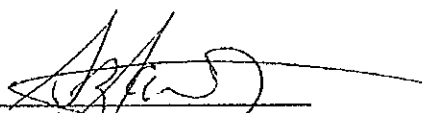
Realising that monitoring and evaluation (M&E) plays a vital role in assessing the effectiveness of a strategy in terms of achieving its intended objectives and that M&E results can highlight existing gaps and inconsistencies, parties commit to:

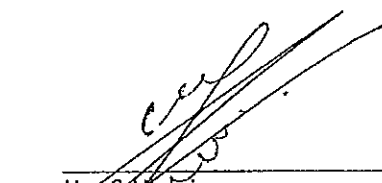
- Adhere to effective implementation of strategy;
- Comply with annual progress reporting requirements;
- Monitor and take into account the impact of constraints beyond the stakeholders' control which may result in not achieving set targets.


STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL  
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Mining stakeholders, as represented by the Department of Mineral Resources (DMR); organised labour, including National Union of Mine Workers; Solidarity and UASA, as well as organised business, including Chamber of Mines and South African Mining Development Association, convene on 30<sup>th</sup> June 2010 to affirm their commitment towards attainment of sustainable growth and meaningful transformation of South Africa's mining industry.


  
Ms. S Shabangu, MP  
Minister  
Department of Mineral Resources

  
Mr. S Zokwana  
President  
National Union of Mine Workers

  
Mr. S Nkosi  
President  
Chamber of Mines

  
Mr. L Grobler  
COO  
UASA - The Union

  
Mr. N Moloi  
Chairman  
SAMDA

  
Mr. S Scott  
President  
Solidarity

Signed at PRETORIA on the 30<sup>th</sup> day of JUNE 2010.

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# Clarification on the Application of the BBSEE Charter and the MPRDA

## DEPARTMENT OF MINERALS AND ENERGY

1. **Objective.**—This document seeks to clarify any misconception that might have arisen as a result of interpretation and application of the Mineral and Petroleum Resources Development Act (MPRDA) 2002 and the BBSEE Charter as called for in the Act in regard to unused rights and pending applications. This does not apply to the requirements for conversion of rights governing currently operating mines and prospecting operations. For such operations the BEE requirement of 15% in 5 years and 26% in 10 years applies.

The purpose of the Charter is to ensure a globally competitive mining industry fully open to foreign investment. Foreign investors are expected to act responsibly as set out in the charter.

2. **Background Statement.**—Section 100(2)(a) of the Mineral and Petroleum Resources Development, 2002 (Act 28 of 2002) empowers the Minister to develop a Broad-based socio-economic empowerment Charter which should set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow HDSAs to benefit from the exploitation of mining and mineral resources.

3. **Application of Policy.**—For the purposes of this document substantial and meaningful participation is defined as follows:

3.1.1 In general, where a company has made investment in respect of the right concerned, there will be low BEE participation requirement. However, in instances where no investment has been made in respect of the right concerned, there will be high BEE participation requirement.

3.1.2 For unused old order rights:

3.1.2.1 If the rights are former state owned, the state in its capacity as owner will require Black Economic Empowerment (BEE) participation of not less than 51% during the one-year transitional period.

3.1.2.2 If the rights were formerly privately held, the Black Economic Empowerment requirement will be a minimum of 26% during the one-year transitional period.

3.1.3 For pending applications for prospecting rights the following will apply:

3.1.3.1 If the rights are former state owned, the state in its capacity as owner will require Black Economic Empowerment (BEE) participation of not less than 51% during the one-year transitional period.

3.1.3.2 If the rights were formerly privately held, the Black Economic Empowerment requirement will be a minimum of 26% during the transitional period.

3.1.4 All applications for rights not catered for above that are in the custodianship of the state will be subject to a minimum of 26% BEE participation.

This document seeks to ensure that the spirit and letter of the law are applied in a fair and equitable manner whilst providing the security of tenure needed in the mining industry.



## MEDIA STATEMENT

For immediate release

**Northam Platinum concludes fully-funded 10 year R6.6 billion BEE equity transaction combined with a R4.6 billion capital raising**

***Transaction secures HDSA ownership for at least a decade, and facilitates Northam's ability to grow with net R4.0 billion cash injection***

**22 October, Johannesburg:** Northam Platinum Limited (Northam) today announced the conclusion of a successful equity raising of R4.6 billion, in conjunction with a fully-funded R6.6 billion Black Economic Empowerment (BEE) transaction. The dual and inter-related transactions will secure a sustainable 35.4% Historically Disadvantaged South African (HDSA) interest in Northam and, at the same time secure funding for the company's growth ambitions.

### Key features of the transaction:

- Increase HDSA ownership to an effective 35.4% (including the Toro Trust).
- Injection of R4 billion free cash to fund Northam's growth strategy.
- Current value and growth potential of the company recognised and supported by anchor shareholders, the Public Investment Corporation (PIC) and Coronation Asset Management (Pty) Ltd (Coronation)
- Resolves uncertainty relating to BEE and future fund-raising, so that Northam is well-positioned to deliver growth and value to a broad range of stakeholders.
- 10-year security of HDSA ownership, ensuring that Northam exceeds the minimum Mining Charter equity requirements, and is well-positioned in the sector as a potential HDSA partner for further transactions. The transaction has the support of the Department of Mineral Resources (DMR).
- Immediate economic value transfer to broad-based HDSA participants, including employees and communities, as well as a range of strategic HDSA partners.

- All funding for the transaction is fully-secured through support of major shareholders.
- Northam shareholders will have the right to participate in the transaction funding on a *pro rata* basis.

Northam CEO, Paul Dunne said, "This landmark transaction recognises the fundamental value of the company and its growth potential. We expect to realise further upside, armed with a powerful balance sheet and with substantial and meaningful empowerment participation.

"Northam is well-positioned as a fully-integrated, fully-empowered South African mine-to-market PGM producer. The transaction effectively catapults Northam into the '1<sup>st</sup> division' and, importantly, all stakeholders will share in the benefits of the business."

## Introduction

Following the unbundling of its Northam shares to its underlying shareholders by Mvelaphanda Resources (then Northam's largest BEE shareholder) in 2011, Afripalm and Mvelaphanda Holdings (Mvela) were Northam's major direct BEE shareholders, holding 26% of the company's equity. As a result of a collapse in the share price of platinum producers, including Northam, both Afripalm and Mvela found themselves in breach of covenants under their respective BEE financing arrangements. Consequently, Afripalm and Mvela were required to dispose of a significant portion of their Northam shares in order to address the breach of covenants, resulting in Northam's BEE shareholding being eroded.

Northam has continued to engage with potential empowerment partners, and with the DMR, on ways to re-establish its 26% BEE shareholding structure.

## Aims of the transaction

Northam's aim in securing this transaction has been to:

- Ensure fair treatment of current shareholders through a transaction that is value-accretive, within acceptable risk parameters risk-free and which is sustainable, and in which shareholders have the opportunity to participate.
- Achieve meaningful empowerment, both at an employee and community level, and through the active participation of strategic HDSA partners.

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- Raise capital to fund the company's growth ambition.

### Structure of the transaction

The proposed transaction is structured as follows:

- Northam will issue 112 195 122 new ordinary shares to the vehicle representing all the HDSA parties (BEE SPV), representing 22% of the company's issued share capital (after the issue) at a subscription price of R41 per share. This amounts to an aggregate consideration of R4.6 billion. The subscription price represents a premium of 9.3% to the 30-day volume weighted average price (VWAP) of a Northam share as at 20 October 2014.
- The HDSA participants, via BEE SPV, will acquire an additional 47 710 331 existing ordinary shares from the PIC, also at an acquisition price of R41 per share. This amounts to a total purchase consideration of R1 956 123 571. The PIC had previously acquired these shares with the intention of furthering the objectives of BEE at Northam, and has elected to use this transaction as the mechanism through which it will achieve this socio-economic objective.
- As a result of these transactions, HDSA shareholders will hold a 31.4% collective interest in Northam's issued share capital. Combined with the existing HDSA profit share of 4% by way of the Toro Trust, the total HDSA benefits in Northam will rise to 35.4%, providing long-term headroom.
- Northam will facilitate the issuing of 159 905 453 new HDSA listed preference shares with an aggregate value of R6.6 billion by the HDSA shareholders to finance the subscription for and acquisition of Northam shares.

Eligible Northam shareholders will be able to subscribe for BEE preference shares at an issue price of R41 per share. Subscription undertakings for the full value of the preference shares have been secured from Coronation and the PIC.

Northam will act as guarantor for the BEE preference shares. The rights provided to shareholders will be distributed as renounceable letters of allocation (LAs), the details of which are available in the SENS announcement. Eligible shareholders may elect to subscribe for preference shares, sell their letters of allocation on the JSE, allow the LAs to lapse or subscribe for preference shares in excess of their entitlement pursuant to their

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LAs. Details relating to the dividend rate, the term and final redemption and settlement of the preference shares are detailed in the SENS announcement.

- To ensure immediate economic participation by the HDSA shareholders and in the interests of securing lock-in agreements with the HDSA shareholders wherein they undertake not to compete with Northam, nor to dispose of or encumber their interests for a period of 10 years, the HDSA participants will realise immediate economic benefit of R400 million.

Upon completion of the transaction – expected in first or second quarter 2015 – Northam will receive unencumbered funds, net of costs, in excess of R4 billion.

### **Setting up the BEE SPV**

The ordinary shares held by the BEE SPV will be held by the HDSA participants through separate entities specifically created for the purpose of the transaction and each representing a specific HDSA grouping, as follows:

- ESOP Trust set up for the benefit of Northam's existing and future employees. The ESOP Trust will hold a 3% interest in Northam. This is in addition to the existing Toro Trust, which remains in place. The mechanics of the ESOP trust will be put in place in the coming months, in consultation with organised labour.
- A Zondereinde Community Trust set up for the benefit of communities in the vicinity of Zondereinde Mine, near Thabazimbi; and the Booyseindal Community Trust set up for the benefit of communities in the vicinity of the Booyseindal Mine, located near Mashishing. The trusts will hold a 5% interest in Northam. Engagement with the various communities will be undertaken in the coming months to establish ways of ensuring maximum and broad-based benefit.
- The Atisa Consortium led by Mr Lazarus Zim, the company's previous empowerment partner and current chairman. The Atisa Consortium will hold a 4% interest in Northam.
- The Mpilo Resources Consortium led by Mr Sipho Mseleku, the chairman of Sakhumnotho Group, and the past CEO of Nafcoc. The Mpilo Resources Consortium will hold a 9.4% interest in Northam.
- The Malundi Consortium, led by Mr Brian Mosehla, the CEO of Mosomo Investment Holdings. The Malundi Consortium will hold a 4% interest in Northam.

- The Khumalela Women's Consortium led by Advocate Brenda Madumise, the former Chairman of Business Unity South Africa and acting chairman of PetroSA. The Women's Consortium will hold a 6% interest in Northam.

The transaction is subject to certain suspensive conditions and approvals.

Issued by Russell & Associates

Johannesburg

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**Northam chief executive Paul Dunne will be presenting the transaction to the investment community today, Wednesday 22 October 2014 at 10:30 at the JSE auditorium in Sandown. Further details of phone-in facilities and webcasts are available at [www.northam.co.za](http://www.northam.co.za)**

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SPEECH BY MINERAL RESOURCES MINISTER SUSAN SHABANGU ON THE  
OCCASION OF THE LAUNCH OF THE MINING CHARTER REVIEW AND  
SCORECARD

13 September 2010

Pretoria, South Africa

South Africa has made great strides in fundamentally shifting the socio-economic and political paradigm since the historical transition in 1994. Whilst making this transition, the country stabilised the inherited unsustainable fiscal and monetary environment through prudent macroeconomic policies, gradually integrated the economy into the global economy through trade and capital control liberalization. Our policies remained focused on strengthening the institutions that support democracy. At the same time, the State embarked on a considerable programme to rewrite and modernise the country's policies and laws to normalize the socio-economic environment and integrate the previously excluded majority into the mainstream economy through a multi-pronged process of transformation.

Despite a significant progress made since 1994, South Africa's economy achieved a modest average annual growth rate of 3.3 percent per annum over the period. The necessary reforms to the country's macroeconomic policies allowed the economy to benefit from the rising tide of global economic growth, but the growth was not enough to address the disparities inherited from the apartheid regime. In fact, a combination of historic structural imbalances together with the dynamics growth exacerbated the In 2009, South Africa is reported to have become the most unequal country in the world. The gross disparities happen at the time when the economy and GDP per capita are growing modestly, suggestive of fundamental economic structural challenges.

The mining industry has been and remains a critical sector in our economy. Its transformation therefore is vital for our national socio-political objectives. The development of the Mining Charter of 2002 was informed by transformation considerations, consistent with the evolution of the political landscape. The sterling work of stakeholders in reaching a consensus on attributes of transformation of the mining sector, whilst none other sector charter had been developed must be applauded. In terms of the implementation of the socio-economic transformation of the mining industry, we have reached a critical period of assessing the extent to which the objectives have been achieved. To this extent, the observations are that the growth of the industry has left much to be desired and that transformation within the sector has been disappointingly slow.

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( My department concluded a detailed assessment of the progress on the industry's transformation against the Mining Charter objectives as adopted in 2002. The executive summary of this review work is available on the departmental website. In the main, very little has been achieved on the transformation of the sector. The gender and racial distribution of the workforce in the sector is hardly reflective of the workforce diversification we had envisaged. The recent findings of the Commission for Employment Equity confirm that after 10 years of affirmative action being adopted as policy, progress on diversification of management and core-skilled workers remains minimal. White men and women continue to dominate top management and technical positions in the mining industry and earn much more than their black counterparts, regardless of skill and experience. The DMR report further illuminates lack of investment in the development of core and critical skills it requires to underpin its competitiveness and sustainability, while the bulk of mining companies continue to harbour illiterate workers.

As it well know, mining activities are largely located in remote and under-developed areas of the country. The need for a harmonious coexistence of mining and prosperous communities cannot be overstated. The emerging tensions between communities and mining companies must be resolved as a matter of top priority, with full consideration for the welfare of the communities and workers.

The racial ownership pattern of mining assets has remained largely unchanged, with only 8.9% BEE ownership attained by 2009 against a target of 15%. As I indicated at the signing ceremony of the declaration of the 30<sup>th</sup> June 2010, all stakeholders agree on the imperative to transform the economy and to ensure that the economy is more inclusive, in line with the ethos of the Freedom Charter, the Constitution and the transformational framework of government.

The executive summary of the impact assessment mentioned earlier further indicates that there is nothing wrong with the substance of our transformation policy as articulated in the Mining Charter, but the challenge is centered on the provisions of the charter, which allow for multiple interpretations. Accordingly, the scorecard needed more work to enable proper reporting and quantification of progress hereto.

It is a increasingly the case that globally there is a tension between growth and socio-economic development on the one hand and the environment on the other. We in South Africa grapple with the same challenge, as espoused in the sustainable development framework. The recent closure of a coal mine in Limpopo, which resulted in loss of employment of more than 500 people in one of the poverty nodes amplifies the quantum of the challenge that lies ahead. I am also mindful that the

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greatest threat to the mining industry today is the green revolution, if we it is taken simplistically. I therefore strongly believe that this necessitates appropriate action to be taken by the industry collective to ensure that this industry is well positioned to deal with the concerns raised, and opportunities offered, by the green revolution.

In this context, I am pleased to note that one of the differentiating attributes of the South African mining industry is the unique ability of all stakeholders to tackle current and impending challenges as a collective. Our track record on collaborative work dates back to the 1990s at the time of the gold crisis, during which we established a working group to develop mechanisms that will mitigate against the impact of the crisis. We also worked together as stakeholders to develop the Mining Charter in 2002, which became a precedent for all other sector charters in the country to effect the notion of transformation. The latest collaborative effort is the formation and work of MIGDETT, which was established at the outset of the global financial crisis and has yielded positive results over the past two years.

I must emphasise that today's launch of the reviewed mining charter represents yet another collaborative work among stakeholders, under the auspices of MIGDETT. This work flows from the summit at the end of March this year, followed by the signing of the declaration among stakeholders on the 30<sup>th</sup> June 2010 and the collaborative conclusion of the mining charter review today.

We have agreed among stakeholders that competitiveness and transformation are mutually reinforcing and that they underpin the sustainability of the mining industry in our country. In this light, we have developed a strategy for sustainable growth and meaningful transformation of the mining industry, which seeks to position the country's industry along a maximum growth path. For this reason, this mining charter is integral to the aforesaid strategy.

We have improved on the construct of the Charter to remove any potential ambiguities that create room for multiple interpretations. The vision of this charter aptly captures the essence of our intent, namely *"To facilitate sustainable transformation, growth and development of the mining industry"*. We have also strengthened the scorecard to obviate any prospects of confusion and to enable proper quantification of progress against our objectives as a collective.

I am pleased that stakeholders have agreed on complete elimination of hostels by 2014. This is an important achievement which demonstrates the industry's commitment to enhancing the living conditions of the workforce. I believe this will significantly improve productivity of our mines. We have introduced a weighting

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mechanism on the scorecard and have assigned a significant part of this weighting to the human resources development element of the charter. This seeks to contribute towards the creation of a critical mass of skills that will underpin our envisaged growth of the sector in a medium to long term.

Accordingly, we recognise that the development of the country's mineral complex presents opportunities to expand related industries that supply material/services for mining to be effective. To this extent, we have strengthened the notion of local content to support local industries, consistent with the government's drive for local industrialisation, creation of decent jobs and poverty alleviation.

We have also introduced a sustainable element in this charter, which is premised on the understanding that the social license to operate includes the environment, health and safety performance.

Today marks the beginning of an auspicious moment in South African history. As peoples of South Africa, we remain indebted to the pioneering work by those who conceived of the first Mining Charter document – for without their considerable input we could not have been able to begin talk of having reviewed this critical Mining Charter document. Having said that, it would be remiss of me if I did not commend the remarkable achievement through a collaborative effort between my officials and industry stakeholders. A great deal of hard work and detailed negotiations have gone to making this review process possible.

It is our common understanding that the Mining Charter document of 2004 should be reviewed within a period of five years. Hence, today I am tabling before you the reviewed Mining Charter.

I thank you.

ENDS

In case of queries, please contact: Jeremy Michaels (Head of Communication) at +27 (0)82 772 1122 or +27 (0)12 444 3242 or [jeremy.michaels@dmr.gov.za](mailto:jeremy.michaels@dmr.gov.za)

*Issued by the Department of Mineral Resources, Republic of South Africa*

✓ J.R.

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

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**CONFIRMATORY AFFIDAVIT**

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I, the undersigned

**NGOAKO ABEL RAMATLHODI**

do hereby say on oath that:

1. I am the Minister of Mineral Resources, a position that I was appointed to in 2014.
2. I have read the founding affidavit deposed to by **Thibedi Ramontja**, the Director General and Accounting Officer of the Department of Mineral Resources.

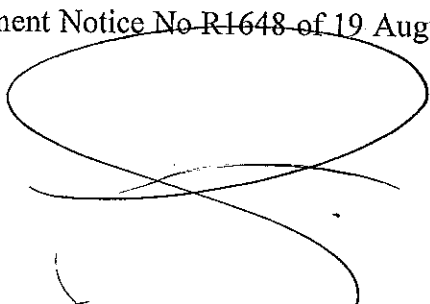
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3. I confirm the correctness thereof insofar as it relates to me.

Molatele Matloga

**DEPONENT**

I **HEREBY CERTIFY** that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria \_\_\_\_\_ on this the 05<sup>TH</sup> day of AUGUST (2015), the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

  
\_\_\_\_\_  
COMMISSIONER OF OATH

**MOLATELO MATLOGA**  
**COMMISSIONER OF OATHS**  
EX OFFICIO: PRACTISING ATTORNEY  
301 KARL KLING BUILDING  
260 VERMEULEN STREET  
PRETORIA 0002

"TR8"

IN THE HIGH COURT OF SOUTH AFRICA  
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In the matter between:

THE CHAMBER OF MINES OF SOUTH AFRICA

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MINISTER OF MINERAL RESOURCES

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DIRECTOR-GENERAL, DEPARTMENT OF

MINERAL RESOURCES

Second Respondent

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CONFIRMATORY AFFIDAVIT

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I, the undersigned

MOSA MABUZA

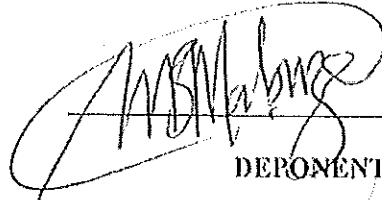
do hereby say on oath that:

- 1 I am a Deputy Director General, Mineral Policy and Promotions in the employ of the Department of Mineral Resources.
- 2 I am one of the officials who has over the years had oversight over the implementation of the Original and 2010 Charters.
- 3 I have read the founding affidavit deposed to by Thibedi Ramontja, the Director

M.T. MR

General and Accounting Officer of the Department of Mineral Resources.

4 I confirm the correctness thereof insofar as it relates to me.

  
DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria Sunnyside on this the 06<sup>th</sup> day of August (2015), the regulations contained in Government Notice No R1258 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 Name: Mphahlele Trevor

Title: Legal Administration Officer

Department of Tourism  
12 Trevenna Str, Sunnyside  
Pretoria

Republic of South Africa

Date: 2015/08/06

