What The Proposed Charter Holds For The Future Of The Sa Mining Industry (If There Is One?)

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The legal foundation for the Mining Charter lies in Section 100(2)(a) of the Minerals and Petroleum Development Act (the MPRDA) whereby the Minister of Mineral Resources:

"..must … develop a broadbased socioeconomic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources."

The so-called "Mining Charter" in its present form is in a government notice issued in 2010 and it specifies the various targets to achieve these aims, as well as a detailed timetable for their attainment.

Paragraph 3 of the government notice provides as follows:

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

Section 47 of the MPRDA allows the Minister the power to suspend or cancel a company's mineral rights.

In April 2016 the Minister published a draft of the proposed new Mining Charter and invited comments by the mining industry.

The Minister has further said that he intends to go ahead and issue the final Government Notice in March 2017, despite protests from the Chamber of Mines and industry lobby groups that there has been inadequate consultation.

Some of the main sticking points that the lobby groups and the Chamber have identified are:

- The refusal to allow historic empowerment deals to be recognised, meaning that the black empowerment shareholding component has to be maintained at 26% at all times, with the result that if a company previously complied, its shareholders must sell to persons that meet the empowerment criteria,
- The targets for employment equity have been increased upwards in most work categories and at board and executive level
- Funding the establishment of a Ministerial Skills Development Trust Fund and a Social Development Trust
- New targets for procurement of goods and services

In addition, most of these new measures carry very significant compliance costs due to the more onerous reporting requirements that have been proposed.

Roger Baxter the Chief Executive Officer of the Chamber of Mines was quoted by David Mc Kay in an article published in Mining Mx.com on 27 February 2017 as saying:

The Chamber remains deeply concerned that the DMR's draft reviewed mining charter in its current published form contains unachievable targets.

He has warned that if it is published in its current form that the Chamber will have no option but to challenge it in court. The Minister on the other hand has maintained his position that the Charter will be published later in March 2017.

So it seems that government is intent on implementing what the industry considers to be unrealistic targets and if they are not met, then according to the legislation, the Minister will then begin a process that will result in mining companies losing their right to mine in terms of the sanctions provided for in the government notice and the MPRDA.

If the Chamber of Mines court challenge is unsuccessful and this scenario is played out, it is unlikely that any further significant new investment will take place in the mining industry, as most multinationals who run competitive mining operations internationally would similarly find the targets "unattainable".

It is even possible that the state mining company could take up some of the forfeited rights if the private sector loses the appetite to apply for and acquire the forfeited rights and this may be the start of a shift towards nationalisation of the industry.

According to the Chamber of Mines, in 2013, the mining sector accounted for 8.3% of GDP directly, on a

nominal basis (2012:8.6%) and it continues to make a valuable contribution to the South African economy, most notably in terms of foreign exchange earnings, employment and economic activity. Nominal mining GDP of R279.7 billion was recorded in 2013.
Most mining capital expenditure can be classified as “stay in business” capital expenditure. This follows from the unique situation in conducting mining operations where you have to spend capital without expanding your operating capacity because just to equal last year’s production you have to mine a new area equal to the area that was mined last year.
Consequently most of the capital expenditure numbers quoted are likely to fall into this category.

The trend of underinvestment in new projects has already been detected in the SA mining industry and has been commented on at some length in an excellent article by Dirkie De Vos of the Daily Maverick on 27 February 2017.
On a measure that plots capital expenditure against depreciation, South African companies are now running down their assets. Basically, we are going backwards in absolute terms – we are seeing disinvestment.
Unless the government can provide a realistic framework within which the mining companies and their capital providers can operate in, the downward spiral of the mining sector is likely to continue and we could also be witnessing an attempt by the government to indirectly nationalise the mining industry.
The private sector remains the biggest contributor to investment in the mining industry worldwide and foreign investors remain very big players in the South African mining sector. They must surely be watching these events with some trepidation.
It is hoped that good sense will prevail and that the government will agree with the Chamber on what are achievable targets for the Charter, otherwise it is possible that international investment appetite will all but dry up for South African mining shares and for new investment in the SA mining industry.