

## **'Radical Economic Transformation' in the mining sector may prove unconstitutional**

*The new "top-up" provision in the latest Mining Charter gazetted on 15 June 2017 may prove to be unconstitutional, and may lead to further expensive legal action by the industry, writes Nicola Jackson, a partner at the law firm Fasken Martineau and a member of the firm's global mining group.*

Since the call for comments on the draft Mining Charter in April 2016, the industry's key concern has been the targets set for ownership by "Black People" (previously "historically disadvantaged South Africans") and whether the concept of 'once empowered always empowered' will be recognised.

The latest Mining Charter, published on 15 June 2017, has set the target for Black ownership at 30%, and emphasises that owners must be Black entrepreneurs, employees and communities. Black entrepreneurs must hold a minimum of 14% of the 30% Black ownership requirement in a mining company. Employees and the community must each hold at least 8% of the 30%.

The latest Mining Charter has strictly excluded the concept of 'once empowered always empowered', which many in the industry argued was incorporated into the 2010 Mining Charter. Instead, it has introduced the controversial "top-up" provision. Mining companies have to ensure their corporate structures include Black entrepreneurs, employees and communities. But now, they also have to re-empower their corporate structures when empowerment shareholders sell their stake in the company. Companies are then obliged to top-up the Black ownership portion, which usually comes at a discount, if not free carry.

The mining industry has been at odds with the government, arguing that previous Black Economic Empowerment (BEE) deals should be recognised in the ownership calculation. Government remains of the view that such transactions should not be recognised. This has already led to legal action. In 2015, the Chamber of Mines launched a declaratory application in the High Court in an attempt to resolve the issue, but the publication of this revised Charter could now render the Chamber's argument a moot point.

In terms of the revised Charter, previous empowerment deals will not be taken into account when determining whether the 30% Black ownership target has been met. Mining companies which currently do not meet this 30% Black ownership target have 12 months to ensure their empowerment credentials are consistent with the 2016 Charter or risk losing their mining rights.

It is arguable that this new top-up provision is unconstitutional as it attempts to impose retrospective obligations on the mining right holder. There are general presumptions against

interpretations that favour retrospective application. People should be able to conduct their affairs knowing what the law is at that given time and not be unfairly prejudiced down the line due to changes to the legislation.

In other words, where mining right holders have been granted mining rights in terms of the current provisions of the Mineral and Petroleum Resources Development Act (MPRDA), additional obligations cannot be retrospectively imposed on them.

The Charter, together with the latest Mining Charter redraft, remains a non-binding policy guideline and cannot be elevated to sub-ordinate legislation that obliges a mining right holder to maintain a specific Black ownership level.

Even if the Minerals and Petroleum Resources Development Act (MPRDA) was amended to incorporate reference to the Charter -- which appears to be the direction government is taking -- the argument still stands that the retrospective nature of the impact of the amendments would be unconstitutional.

Government has not adequately considered the practical difficulties of the top-up provisions. In particular, if one looks at listed companies, the whole purpose of these legal entities is that their shares can be freely traded on a regulated securities exchange. As such, it may be practically and legally difficult to implement policing mechanism to ensure the Black ownership shareholding does not drop below the specified level on a freely traded exchange.

The industry is also concerned with the employment equity and procurement targets. Mining companies argue that the targets have been unrealistically raised to unattainable and unsustainable levels. The industry also did not anticipate the introduction of a requirement on all future prospecting rights. The Charter now requires the holder of a new prospecting right to have a minimum of 50% plus 1 Black shareholding, and this shareholding must include voting rights.

The increased taxes and levies (said to amount to about ZAR3 billion a year) will also place a burden on an already ailing industry, while the R2 billion for human resource development already committed to by the industry, will be diverted into a new tax collection entity.

The publication of the new Mining Charter may appear to provide certainty to the industry, but many in the industry think this is not really the case as the framework still affords too much discretion to the officials entrusted with its implementation.

There is concern some of these officials may be politically driven, rather than simply carrying out their governmental administrative duties. This in turn could fuel corruption and drive away much needed investors in the sector. This is why some are calling for a complete overhaul of the mining legislation.

“Radical economic transformation” or not, we anticipate that the Mining Charter will not be well received by investors and that industry will, once again, be forced to turn to the courts.

**Nicola Jackson** is a partner at Fasken Martineau and a member of the global mining group. She has well over a decade of experience representing resource companies on acquisitions and divestments and corporate finance in respect of projects throughout Sub-Saharan Africa. Nicola also regularly advises clients looking to enter Sub-Saharan Africa on both commercial and regulatory aspects pertaining to mining investments. Her work involves advising clients from the exploration phase to the mining and production phase.