

Circular No. 1/2018

16 October 2018

MINING CHARTER III

INTRODUCTION

Mining Charter III came into effect on 27 September 2018.

It has been generally well received and, this time, is the product of substantial engagement between key stakeholders.

Some of the concerning elements of the 2017 Charter have been removed. These include the requirement for existing rights to top up from 26% BEE ownership to 30% and ignoring the once empowered always empowered principle.

Also encouraging is the removal of the EBITDA payment which would have been unaffordable and the ownership requirement on prospecting rights.

The new Charter must be read together with implementation guidelines which are still to be gazetted.

For new mining right holders, there must be a minimum of 30% BEE shareholding. This must be distributed amongst certain categories of shareholders.

New targets are set for procurement, human resource development, employment equity, mine community development, housing and living conditions.

Uncertainty remains about the legal status of the Mining Charter. On 5 April 2018, the Gauteng High Court handed down its judgment on the interpretation of the Mining Charter.

The judgment concluded that the Mining Charter only had relevance to the conversion of old order rights and does not provide an avenue for the Minister to impose new terms and conditions on holders of existing mining rights.

The Minister filed notice of intention to appeal the judgement which had the effect of staying the judgement. The Minister has not taken the matter to the next step, which is to apply for leave to appeal. Until this issue is resolved, there is legal uncertainty as to the status of the new Charter.

EXISTING RIGHTS

Existing mining right holders who have achieved a minimum of 26% BEE shareholding shall be regarded as compliant.

If an existing mining right holder achieved a minimum of 26% BEE shareholding and the BEE shareholder/s exited prior to the commencement of the new Charter, then the holder is regarded as compliant for the duration of the mining right, save that the recognition will not be applicable upon renewal.

A renewal of an existing mining right shall be subject to the Mining Charter requirements, requiring a restructuring.

Pending applications are processed in accordance with the old Mining Charter requirements save that the right holder is required within 5 years to increase the BEE shareholding to 30%.

The Charter is silent on what is to happen to existing rights which are amended.

NEW MINING RIGHTS

New mining rights must have a minimum of 30% BEE shareholding.

The minimum of 30% BEE shareholding must be distributed between a minimum of:

- a) 5% to qualifying employees;
- b) 5% to host communities;
- c) 20% to BEE entrepreneur(s); 5% of which preferably should be women.

A right holder who holds the minimum of 20% shareholding shall not dilute below 51% ownership and control by a BEE entrepreneur.

The flow through principle shall apply where the BEE shareholding is concluded at a level other than at mining right level.

EQUITY EQUIVALENCE AND HOST COMMUNITIES

The shareholding by host communities may be a direct shareholding or through an "equity equivalent benefit". An equity equivalent benefit is a percentage equivalent to the issued share capital of the mining right holder, at no cost to a trust or similar vehicle set up for the benefit of a host community.

Special rules are applicable to the trust and provision is made for a host community development programme which is separate from and in addition to the social and labour plan commitments.

DISPOSAL OF BEE SHAREHOLDING

When a BEE shareholding is disposed of after the commencement of the Charter, the mining right holder's empowerment credentials are recognised provided that, at the time of the disposal the mining right holder is compliant with the requirements of the Charter and the BEE shareholder has held the shares for at least a third of the duration of the mining right. In addition, an unencumbered net value must have been realised and the exit contract submitted to the Department.

BENEFICIATION EQUITY EQUIVALENT

A mining right holder may claim the equity equivalent against a maximum of 5 percentage points of a BEE entrepreneur shareholder.

A right holder claiming the 11 percentage points beneficiation off-set prior to the 2018 Charter shall retain the off-set for the duration of the mining right.

A right holder must submit to the Department a beneficiation equity equivalent plan for approval as outlined in the implementation guidelines still to be introduced. The equity equivalent reports are subject to further conditions which need to be complied with. Annual reports need to be submitted to the Department in line with the approved beneficiation equity equivalent plan.

PROCUREMENT

A minimum of 70% of non-discretionary mining goods procurement must be South African, with 21% of the spend to be from historically disadvantaged persons. 44% of the spend must be on BEE compliant companies.

Of services, 80% must be spent on South African companies with 50% of the services to be supplied by historically disadvantaged persons or companies.

The target must be complied with progressively over a 5 year period.

A mining right holder may invest in enterprise and supplier development against which it may offset its procurement obligations, subject to prescribed criteria.

HUMAN RESOURCE DEVELOPMENT

At least 5% of the leviable amount as defined in the Skills Development Levies Act must be spent on skills development.

EMPLOYMENT EQUITY

50% of the board of directors must comprise historically disadvantaged persons proportionately represented in terms of the provincial or national demographics.

50% of executive management must be historically disadvantaged persons proportionately represented in terms of national demographics.

The minimum targets for senior management are 60%, middle management 60%, junior management 70% and employees with disabilities 1.5%.

MINE COMMUNITY DEVELOPMENT

A mining right holder must meaningfully contribute towards mine community development. Development priorities must be contained in the prescribed and approved social and labour plan.

HOUSING AND LIVING CONDITIONS

Mining companies must improve the standard housing and living conditions of mine employees, as stipulated in the Housing and Living Conditions Standard for the Mining and Minerals Industry.

A right holder will be required to submit a Housing and Living Conditions Plan to be approved by the Department.

The Housing and Living Conditions Standard is to be reviewed to provide clear targets and timelines for implementation of the Housing and Living Conditions principles.

JUNIOR MINERS

The regime for junior miners applies to right holders with single or multiple mining rights having a combined annual turnover of less than R10 million or between R10 million and R150 million.

Junior miners are exempt from some of the provisions of the Charter.

THE APPEAL

On 4 April 2018, a full bench of the Gauteng Division of the High Court handed down judgement in the matter brought between the Chamber of Mines (now the Minerals Council), the Minister and the Director-General of Mineral Resources. The Court, in the proceedings, also admitted two friends of the Court in the form of the Serodumo Sa Rona Community Based Organisation and the National Empowerment Fund.

The main issue of concern to the Chamber was whether the once empowered always empowered principle applied or whether a mining right holder had a continuing obligation to maintain a 26% BEE shareholding.

The Chamber argued that the Charters were formal guidelines or statements of policy whereas the Minister regarded the Charters as creating legally enforceable instruments with legally binding obligations.

The Court held that the original Charter was relevant for the purposes of Section 23(1)(h) of the MPRDA. In other words, whether, at the time of the grant of the mining right, there was compliance with the provisions of the Charter. The Charter had relevance for the conversion of a mining right or the grant of a new mining right and not thereafter.

The Court questioned whether the 2010 Charter could be the "Charter contemplated in Section 100" as set out in Section 23(1). The Court felt that the original Charter was the Charter contemplated in Section 100 and not the 2010 Charter. It thus concluded that the Charter was not capable of amendment.

A further point was raised as to whether the Charter could be amended or a new Charter issued as part of the Minister's powers to make regulations. This was left open by the Court and is not clarified by the notice of 27 September 2018.

Is the Charter a regulation or is it something which has no legal significance?

CONCLUSION

The 2018 Charter is a big improvement on the 2017 Charter which was unworkable. Its status however remains uncertain. That uncertainty will only be resolved should either the Council or the Minister pursue the appeal.

At least with existing mining rights, much of the confusion about the requirement to increase the BEE shareholding or whether the Once Empowered Always Empowered principle continues, has fallen away.

It is unclear whether the amendment to existing rights requires compliance with the new targets of the 2018 Charter. Certainly, with a renewal of a mining right or the application for a new mining right, the new targets will have to be met. Whether this is simply a policy of the Department reflected in the Charter or a legal requirement, remains uncertain.

FURTHER ADVICE

Should you require advice or assistance on the 2018 Mining Charter, please contact Michael Jackson on 031 – 536 8512 email : mjackson@coxyeats.co.za, Keren Watson on 031 - 536 5818, email : kwatson@coxyeats.co.za or Simon Watson on 031 - 536 8530, email : swatson@coxyeats.co.za or Jason Goodison on 031 - 536 8517, email : jgoodison@coxyeats.co.za or Jenna Padoa on 031 - 536 8529, email : jpadoa@coxyeats.co.za or Wade Ogilvie on 031 - 536 8527, email : wogilvie@coxyeats.co.za or Benjamin Meadows on 031 - 835 3109, email : bmeadows@coxyeats.co.za or Xola Madikizela on 031 - 835 3113, email : xmadikizela@coxyeats.co.za or Arnold Mbeje on 031 - 835 3119, email ambeje@coxyeats.co.za