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THE 2018 DRAFT MINING CHARTER: TRANSFORMATION TRUMPS SUSTAINABILTY

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The cover photograph, supplied by Gold Fields, shows part of the large underground workshop at its South Deep mine. At this workshop, 2.7 km below the surface, vehicles can be repaired without having to be hauled up to ground level.

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THE 2018 DRAFT MINING CHARTER: TRANSFORMATION TRUMPS SUSTAINABILITY

Introduction

The draft mining charter gazetted on 15th June 2018 by mining minister Gwede Mantashe overlooks South Africa's economic malaise. The economic growth rate has remained below the population growth rate for close on five years, while the unemployment rate stands at 27% in general and at a staggering 54% among young people aged 15 to 24.[1]

The mining sector is vital to any recovery in economic growth. It is also a key source of jobs for relatively unskilled labour. Yet the draft mining charter, as the Minerals Council South Africa (formerly the Chamber of Mines) points out, will add to costs while doing little to promote competitiveness. 'Without competitiveness, investment in new exploration and mining will be limited and the current mining sector will continue to decline to the detriment of all citizens. This is directly contrary to President Cyril Ramaphosa's stated intention to attract $100 billion in investment into South Africa in the next five years.'[2]

Regulatory certainty and predictability are also vital to the mining industry, which generally requires enormous upfront capital investments and has long lead times. Since 2004, however, when the Mineral and Petroleum Resources Development Act (MPRDA) of 2002 took effect, repeated revisions to the Act, the initial mining charter, and other relevant rules have steadily eroded that predictability.

> *'Without competitiveness, investment in new exploration and mining will be limited and the current mining sector will continue to decline to the detriment of all citizens', says the Minerals Council.*

Under the initial charter, which took effect in 2004, mining companies were expected to transfer 26% of their equity or assets to historically disadvantaged South Africans (HDSAs) by the end of 2014. The charter added that ownership deals were to be done at 'fair market value on a willing seller/willing buyer basis'. It also stated that 'the continuing consequences' of all previous transactions must be taken into account in measuring HDSA ownership, even if HDSA beneficiaries had since sold out or otherwise exited from these deals.

Since 2010 those key principles have been steadily eroded, while empowerment obligations have been sharply ratcheted up. The 2018 draft mining charter is particularly damaging because its demands are so unrealistic and so costly to meet. It also signals that ownership and other targets are likely to keep shifting in the future. This makes it all the more difficult for investors to know what might in time be expected of them if they are to retain their mining rights.

The 2018 draft is better in many ways than its predecessor, as gazetted by the then mining minister Mosebenzi Zwane in June 2017. But this should not obscure the fact that the current document is still profoundly investor unfriendly. It will damage the sustainability of the industry and make it very much harder for South Africa to compete with other countries for essential new mining investment.

The 2018 draft is open for public comment until 27th July 2018, while a mining summit is to be held early in July to discuss it further. However, Mr Mantashe seems to have prejudged the outcomes of this public

participation process by saying that the current text is 'unlikely to be altered much'.[3] The essential features of the 2018 draft document are set out below.

Ownership requirements for existing mining rights holders

The 2017 charter was particularly controversial because it required the holders of mining rights to top up their black ownership 'from the existing level to a minimum of 30%' within a year. Since the Department of Mineral Resources (DMR) was unwilling to accept the 'continuing consequences' principle, this wording meant that a company such as AngloGold Ashanti – which had achieved 27% black ownership before many of its BEE investors sold out, thereby reducing its black ownership to 6% – would have had to top up by 24 percentage points within 12 months.[4]

As earlier noted, the 'continuing consequences' principle is an integral part of the initial mining charter of 2004. The controversy around it stems largely from the revised mining charter of 2010, which tried to limit the principle to ownership deals concluded before 2004. When the DMR insisted that the 2010 charter must prevail, the chamber sought and, in April 2018, obtained a Pretoria high court judgment confirming that the principle could not be retrospectively changed in this way.[5]

The 2018 draft charter partially reflects this judgment – and is thus substantially different from its 2017 predecessor on the 'continuing consequences' issue. Under the 2018 document, a company which 'at any stage' achieved a 26% BEE shareholding, and whose BEE investors have since exited, will be 'recognised as compliant'. Hence, it must top up by only four percentage points to reach the 30% level. It also has five years, rather than 12 months, in which to do so.[6]

This is substantially better than before. However, the top-up requirement was never agreed by the Charter Task Team, says the Minerals Council, and is 'a surprise inclusion' by the minister. The council rejects the requirement, saying it prejudices companies that secured their mining rights on the basis of the 2004 and 2010 charters.[7]

> *Under the 2018 document, a company which 'at any stage' achieved a 26% BEE shareholding, and whose BEE investors have since exited, will be 'recognised as compliant'. Hence, it must top up by only four percentage points to reach the 30% level.*

The top-up rule is also at odds with a key aspect of the Pretoria high court's April 2018 judgment. According to this ruling, a top-up obligation may apply only if a mining right is expressly made subject to it at the time of its granting.[8]

The 2018 draft also seeks to limit the 'continuing consequences' principle in other ways. It says, for instance, that this principle will no longer apply once mining rights are renewed. The principle will also fall away whenever mining rights are 'transferred'.[9] This provision is likely to reduce the market value of such rights, as the transferee may then have to do many more ownership deals to regain the 30% level.

The draft goes on to state that companies which have failed to achieve the 26% target will not 'enjoy the recognition of continuing consequences'. Instead, they will immediately be 'subjected to the MPRDA corrective processes' (which are not further explained). Such companies will have to 'supplement their BEE shareholding to a minimum of 30%' within five years.[10] Hence, if a company had reached 24% BEE ownership – rather than the 26% required – on the basis of the continuing consequences principle, it will be denied the benefits of that principle under the 2018 document. If its earlier BEE investors have exited and its current BEE ownership stands at 10%, it will thus have to top up by 14 percentage points within five years. Again, these provisions are at odds with the Pretoria high court ruling.[11]

Ownership requirements for new mining rights holders

Applicants for new mining rights will need 30% black ownership, of which 8% must go to mine employ-

ees, 8% to mine communities, and 14% to BEE 'entrepreneur(s)', defined as company/ies with 51% black ownership. [12]

Mine employees and communities will each be entitled to a 5% 'free carry' and will only have to pay for 3% of their 8% stakes.[13] Companies seeking new mining rights must thus give 10% of their equity away.

According to the 2018 document, if a BEE entrepreneur sells out before 'a third of the [30-year] duration of the mining right has elapsed' – in other words, before ten years have passed – then the mining company will get no credit for its earlier 14% deal. The same, it seems, will apply if the BEE entrepreneur sells out after ten years, but before any remaining debt on its shares has been written off, so as to give him the 'unencumbered' net value of his stake. (This requirement seems to trump another clause providing for a more gradual vesting process over the duration of a mining right.)[14] Overall, these provisions could add greatly to costs and the overall compliance burden.

If the holder of a new mining right fails to pay dividends for five years, it must thereafter (in every year in which ordinary dividends are not paid) provide a 'trickle down' dividend to employees and communities. This must be calculated at 1% of earnings before interest, taxes, depreciation and amortisation (ebitda). Paying such dividends to some shareholders but not to others may contravene the Companies Act of 2008. The obligation will also add to costs at a time when a mine may not yet be fully operative, or may otherwise be in financial trouble.[15]

The mining company is in theory entitled to have these trickle down dividends repaid once it starts paying out ordinary dividends. However, this claw-back may prove difficult to implement in practice. In addition, the trickle down dividend was not agreed by the Charter Task Team and its inclusion is another 'surprise', says the Minerals Council.[16]

According to the 2018 draft, if a BEE entrepreneur sells out before 'a third of the [30-year] duration of the mining right has elapsed' – in other words, before ten years have passed – then the mining company will get no credit for its earlier 14% deal.

If an existing rights holder applies for an additional mining right (say, on an adjoining property which has not been mined before) this new right will be subject to all these rules. In this situation, say mining experts at Webber Wentzel, a law firm, the mining company will become fully 'subject to the empowerment regime applicable to the holders of new mining rights'.[17]

Penalties for non compliance with the ownership requirement

According to the 2018 draft, all mining rights holders must maintain 100% score on the ownership target for the duration of their mining rights, which is usually 30 years. If a mining company fails to do so, it may be in breach of the charter and hence of the MPRDA. The company might then have its mining right suspended or cancelled, and might also face fines and other penalties.[18]

(In a subsequent clause, the 2018 draft adds that these penalties will apply only where the mining company has also scored less than 50% on its new scorecard.[19] However, on the general approach reflected in the draft, any failure to comply with the 100% requirement would itself be a breach of the charter and hence of the MPRDA. It might thus attract all the penalties applicable to breaches of the statute, irrespective of its BEE score.)

These provisions in the 2018 draft are at odds with the Pretoria high court's April 2018 ruling. This judgment made it clear that the mining minister cannot impose additional obligations, on top of those which applied at the time the mining right was granted. The court also ruled that a failure to comply with charter obligations does not constitute a breach of the MPRDA for which the penalties in the Act may be imposed.[20]

If mining rights are indeed to be cancelled because companies have failed to maintain 100% scores on the ownership element over 30 years, the economic consequences will be severe. Any such rule will profoundly undermine the security of mining titles. It is, of course, an important advance that the 2018 draft no longer imposes the same 100% requirements and cancellation penalties on the skills development element and the mine community upliftment one, as its 2017 predecessor did. The grounds on which mining rights can be cancelled have thus been reduced in the 2018 document, but these clauses should rather have been scrapped altogether.[21]

The clauses that remain in the 2018 draft are also inconsistent with the BEE generic codes of practice. This contradicts the Broad-Based Black Economic Empowerment Act of 2003, as amended in 2013, which says that the generic codes must take precedence over all conflicting empowerment rules. According to this statute, all sector specific codes, including the mining charter, have to be brought into line with the generic codes. But the 2018 draft goes far beyond the generic codes in demanding 100% compliance on the ownership element on pain of a draconian penalty (the termination of a company's mining rights). By contrast, the generic codes give firms credit for partial performance on the ownership target and punish them comparatively lightly – by reducing their level of BEE contribution by one level – if they fail to reach a 40% minimum score on the ownership element.[22] If alignment with the generic codes is to be achieved, the 2018 draft should follow a similar approach.

Equity equivalents

Under the draft charter, all mining right holders will be able to earn 'equity equivalents', of up to 11% of their BEE shareholding, if they provide mineral products to 'independent local beneficiation entities' at a discount to the 'mine-gate' (production) price or otherwise help to advance local value addition.[23]

> *However, few South African companies – and even fewer firms that are 51% black-owned – have the capacity to manufacture sophisticated horizontal raise boring machines, other drilling and hoisting equipment, crushing mills, furnaces, drag lines, and similar capital goods.*

This wording indicates that no equity equivalent will be available if a mining company embarks on its own beneficiation activities, rather than using a third party for this purpose. This makes little sense, for the government's concern is presumably to see more value added locally, irrespective of who is responsible for doing this.

Having to sell at below production prices to qualify for equity equivalents will add significantly to the financial burden on miners. In addition, the government's continued insistence on local beneficiation makes little economic sense – as the National Development Plan pointed out six years ago – when South Africa lacks the necessary capital and skills, and has such high input costs. The 356% increase in electricity prices between 2007 and 2017 has been particularly damaging and has made it all the harder for South Africa to compete with China and other manufacturing behemoths.[24]

Preferential procurement

Under the draft charter, all mining rights holders must buy 70% of their capital and other mining goods from South African manufacturers. Of this 70%, 26% must come from 51% black-owned firms (of which 5% must be owned by black women or black youth). The remaining 44% must come from firms with 26% BEE ownership and level 4 BEE ratings. This requirement is essentially the same as it was under the 2017 charter.[25]

However, few South African companies – and even fewer firms that are 51% black-owned – have the capacity to manufacture sophisticated horizontal raise boring machines, other drilling and hoisting equipment, crushing mills, furnaces, drag lines, and similar capital goods. Yet if mining companies fall down on

this requirement, this could also jeopardise their mining rights – especially as procurement obligations count for 60% of the points on the draft charter scoreboard.[26]

This risk will put pressure on mining companies to help establish and build up the necessary 51% black-owned suppliers. Yet having to incubate such entities would be an enormous burden on mining companies and would prevent them from concentrating on their core business. In addition, newly created suppliers will lack necessary experience and may not be cost-effective. They may also find it difficult to sustain their operations when the local market for mining capital goods is so limited.

The draft charter further stipulates that all mining rights holders must buy 80% of the services they need from South African companies. Of this 80%, 70% must come from 51% black-owned companies (of which 10% must be owned by black women or black youth). This is a slight decrease on the earlier target, for the 2017 charter required that 80% of relevant services be bought from 51% black-owned firms.[27]

According to the draft charter, the services in issue include 'mining production services' and 'drilling' as well as 'mineral marketing', 'transportation', and 'shipping', along with 'consulting', 'financial', 'insurance', and 'legal' services. Again, the necessary 51% black-owned firms are unlikely to exist in sufficient number and may thus have to be created. This would also be a major burden on mining companies.[28]

Take the 'transportation' requirement, for instance. If Transnet cannot be relied upon – given its general inefficiency and a recent sharp increase in train derailments – then mining companies needing to get their mineral products to port will have to find local 51% black-owned firms that are able to do the job instead. Yet how many firms of this kind have the massive fleets of heavy trucks required? If not enough of these BEE entities are available, then mining companies may find themselves having to incubate new firms. Effectively, they will have to enter into the trucking business to get their products to port in ways that comply with the charter.

> *If Transnet cannot be relied upon to rail mineral products to port, mining companies will need 51% black-owned firms to do the job instead. But how many firms of this kind have the massive fleets of heavy trucks required?*

It is not only in the transport sphere that this burden will arise. Mining companies may also have to become involved in auditing, banking, insurance, and shipping (to name but a few examples) to make sure that their procurement obligations under the charter can be met. In addition, often inexperienced 51% BEE firms will have to be used irrespective of whether their services are cost-effective or reliable.

Foreign suppliers will be restricted to providing 30% of mining goods and 20% of relevant services, as the remainder will have to be locally sourced. However, these restrictions are contrary to South Africa's binding obligations under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) of the World Trade Organisation. The GATT requires all member states to accord foreign suppliers treatment which is 'no less favourable' than that given to domestic ones, while the GATS includes a similar obligation.[29]

Foreign companies which supply either mining goods or relevant services will have to contribute 0.5% (down from 1% in the 2017 charter) of the annual turnover they generate from South African mining operations to the Mandela Mining Precinct for research. (This precinct was formally opened in April 2018 as an R&D hub for the mining industry.) However, this 0.5% levy is effectively a tax which the mining minister has no authority to impose, and which can be introduced only by Parliament. In addition, all tax revenues are supposed to be paid into the National Revenue Fund and cannot easily be directed elsewhere. Hence, the mining minister has no authority to stipulate that the levy be paid to the Mandela Mining Precinct. The minister is also trying to give the charter an extra-territorial application, even though foreign firms are not bound by South African law.[30]

Skills development

All mining rights holders must contribute 5% of their annual payroll to skills development. (This is in addition to the 1% levy payable under skills development legislation.) This 5% must be paid in every year irrespective of whether companies are making profits or losses. Of the 5% total, 3.5% must go to training for both employees and non-employees (mine community members, for example). The remaining 1.5% must go to public universities and other research institutions.[31]

These institutions must be chosen, it seems, on the basis of 'national or provincial demographics'.[32] Presumably, what this means is that most of the universities selected must be historically black. However, such universities have limited research capacity, especially in the complex areas of hard-rock deep-level mine mechanisation or the remediation of acid mine drainage and other pollution.

(These provisions are very much the same as those in the 2017 charter. The main differences are that 3.5% of the 5%, up from 2% before, can now be spent on training, rather than research. In addition, the Mining and Transformation Agency, which would earlier have been entitled to a 2% slice, no longer features.)[33]

Employment equity

Under the draft charter, all mining rights holders must have 50% black representation at board level. In addition, black representation must reach 50% at top and senior management levels, 60% at middle management level, and 70% among junior managers.[34]

Each of these targets for black representation must be sub-divided among black men and women, so that black women make up 20% of the 50% target at board level, 15% of the 50% target at top management level, 15% of the 50% target among senior managers, 20% of the 60% target for middle management, and 25% of the 70% target for junior managers.[35]

> *The revised targets are still impractical and inordinately difficult to meet when half of the black population is under the age of 25 and only 3% of black people have the university degrees that are often needed or advisable for management positions.*

These targets have been reduced to some extent from those in the 2017 charter. The earlier targets closely mirrored the BEE generic codes in requiring 60% black representation for senior management, 75% for middle management, and 88% for junior management. However, the revised targets are still impractical and inordinately difficult to meet when half of the black population is under the age of 25 and only 3% of black people have the university degrees that are often needed or advisable for management positions.[36]

The 2018 draft also demands that black people should make up 60% of a mining company's 'core and critical skills'. These skills are defined as including 'science, technology, engineering and mathematical skills'. But the country's schooling system is so poor that South Africa, despite the large tax revenues spent each year on education, ranks in 128th place out of 137 countries (on the World Economic Forum's Global Competitiveness Index 2017-18) for 'the quality of its maths and science education'. Given the poor foundation provided by the education system, this charter requirement will not be easy for mining companies to fulfil.[37]

Mine community development

All mining rights holders must 'meaningfully' contribute to mine community development in terms of their approved Social and Labour Plans (SLPs). SLPs must provide 'clear targets and timelines for implementation', while any amendments to targets and budgets must be approved by the DMR. SLPs must also be made available to mine communities, both in English and other relevant language(s).[38]

The 2017 charter was different, for it required mining companies to make contributions to mine community upliftment which were 'proportionate to their investments'. This wording no longer features. In addition,

mining rights can no longer be cancelled if companies fail to maintain 100% scores on this requirement.[39] However, the costs of fulfilling SLPs may still be difficult for mining companies to sustain, particularly at times when mineral prices are depressed and input costs are rising.

Housing and living conditions

All mining rights holders must provide mine employees with housing and living conditions that are consistent with the standards laid down by the mining minister in the relevant housing code. Again, 'clear targets and timelines' must be provided, while implementation costs are likely to be significant. (These provisions have been simplified in various ways but otherwise remain much the same as in 2017.)[40]

Junior miners

Junior miners are bound by the draft charter, but may apply to the mining minister for exemption from some of its provisions.[41] No objective criteria have been included to help guide the minister's unfettered discretion – and junior miners can have no certainty that exemptions will be granted. Yet the charter's obligations are demanding and costly enough to bankrupt many struggling juniors.

Monitoring and enforcement

According to the draft charter, the ownership element is 'ring fenced' and 'requires 100% compliance at all times'. This obligation, like other charter requirements, applies 'for the duration of a mining right', which is normally 30 years.[42]

As noted, the 2017 charter earlier required 100% compliance for 30 years on two other elements as well (these being skills development and mine community upliftment). These additional demands have fallen away under the current draft.

> *A mining rights holder who fails to score 100% at all times on the ownership element and who also fails to score at least 50% on the draft charter scorecard will be regarded as non-compliant with the charter and hence as in breach of the MPRDA. For this breach, relevant penalties will include the suspension or cancellation of mining rights, as well as possible fines and prison terms.*

According to the 2018 text, a mining rights holder who fails to score 100% at all times on the ownership element and who also fails to score at least 50% on the draft charter scorecard will be regarded as non-compliant with the charter and hence as in breach of the MPRDA. For this breach, relevant penalties will include the suspension or cancellation of mining rights, as well as possible fines and prison terms for directors.[43]

As earlier noted, this wording contradicts the Pretoria high court's April 2018 judgment. Here, the court held that a failure to comply with the mining charter does not constitute a punishable breach of the MPRDA.[44]

The MPRDA Amendment Bill of 2013, which is currently before Parliament, aims to make the charter a part of the MPRDA, but this change has yet to be enacted into law. In addition, the charter, which is a statement of policy adopted by the mining minister, cannot easily be elevated into a part of the MPRDA, as all legislation must be passed by Parliament.[45]

Prospecting rights

The 2017 charter required all applicants for new prospecting rights to have 'a minimum of 50% + 1 black person shareholding' or 51% black ownership for short. This requirement has fallen away.[46]

The 2018 draft is largely silent on prospecting rights. All it says is that the new charter will 'apply to prospecting rights as contemplated in Section 17(4) of the MPRDA'. Under this section, as amended in

2008, the minister may 'request' an applicant for a prospecting right to 'give effect' to the MPRDA's aim of increasing black participation in the mining industry.[47]

The Minerals Council is nevertheless concerned that a 30% black ownership target will also be applied to 'new greenfields prospecting rights'. This, the council cautions, will continue to limit exploration, despite this being 'the lifeblood of new projects for the industry'.[48]

Legal experts at Webber Wentzel also believe that new prospecting rights are to be 'subject to the same empowerment regime' as new mining rights.[49] However, the current wording of Section 17(4) does not give the mining minister the power to impose this obligation on applicants for prospecting rights.

Amendments to the charter

The mining minister is empowered to 'review' the mining charter by notice in the *Gazette*. This suggests that he will be able to amend it unilaterally, which erodes the policy certainty that miners need. Giving the minister this amendment power – when both the 2018 draft and the 2013 Bill are also intent on making the charter a part of the MPRDA – contradicts the separation of powers and is unconstitutional.[50]

Transitional provisions

Under the draft charter, mining companies are generally given five years (rather than 12 months) to comply with the new ownership, procurement, and employment equity obligations.

> *On the current wording of the MPRDA, the minister has no authority to amend the initial 2004 charter, let alone repeal and replace it. The 2018 draft is thus* ultra vires *the minister's powers under the statute.*

The document adds that its references to 'black' persons must be seen as referring to 'historically disadvantaged persons' until such time as the MPRDA has been amended. This clause has been included because the MPRDA speaks of benefitting 'historically disadvantaged South Africans', rather than 'black' people. The draft charter's references to black people are thus *ultra vires* the MPRDA until such time as the statute is changed. This is one of the amendments the 2013 Bill is seeking to achieve, but the Bill has yet to be enacted. It is also so flawed (both on substantive issues and in terms of the procedures used in its adoption) that it is unlikely to survive any challenge to its validity that may be brought before the Constitutional Court.[51]

Repeal of earlier charters

According to the 2018 draft, the 2004 charter will be repealed and replaced by the new mining charter when this is gazetted in its final form. The repeal of the initial charter will put an end to the 'continuing consequences' principle, and also to a clause saying that the equity or assets transferred for empowerment purposes must be valued 'at fair market value on a willing seller/willing buyer basis'. The revised 2010 charter will likewise be repealed and replaced at this time.[52]

Validity of the 2018 draft

The MPRDA empowers the mining minister to 'develop a broad-based socio-economic empowerment charter'. It does not give him the power to alter, repeal, or replace such a charter. The 2004 charter is, of course, the document that was adopted under this provision. Hence, on the current wording of the MPRDA, the minister has no authority to amend this initial charter, let alone repeal and replace it. The 2018 draft is thus *ultra vires* the minister's powers under the statute.[53]

Ramifications of the draft charter

The 2018 draft is better than its predecessor in some material ways. It scraps the 51% ownership requirement for new prospecting rights, gives more recognition to the 'continuing consequences' principle, and

slightly reduces earlier procurement and employment equity quotas. In addition, it scraps the 100% compliance requirement for skills development and mine community upliftment, instead confining this onerous demand to the ownership element alone.

However, the draft charter still greatly increases the regulatory burden on mining companies in South Africa. Its adoption of a 30% ownership target contradicts all the assurances earlier provided by the DMR that the 26% target was immutable and would not be changed. Now that the DMR has gone back on this pledge, the risk of the ownership target being raised once again – perhaps to 51% next time – looms all the larger.

In addition, some 50% of gold mining companies and 60% of platinum ones are already battling to survive at current mineral prices. The draft charter nevertheless obliges these struggling companies to do additional BEE deals and fulfil a host of costly procurement and other obligations. These requirements will push up their operating costs and increase the likelihood of shafts being shuttered and mineworkers retrenched.

The ramifications are particularly serious for gold mining companies. These are running out of accessible gold-bearing rock and can successfully exploit the country's remaining (and still vast) gold resources only if full-scale mechanisation and round-the-clock operation can be achieved. These resources are generally located at depths of five kilometres or more, which means that traditional mining methods are too dangerous (and also too costly) to deploy. If mechanisation cannot be implemented in time, many gold mining companies will exhaust the ores they can reach by the mid 2020s and will have to scale down dramatically, or even close their operations.[54]

Mechanisation of mining operations in hard gold-bearing rock and at the depths in issue will not be easy to achieve. Hence, gold mining companies are unlikely to succeed in this unless they can commission the best research, employ the people with the best skills and experience, and purchase the best machinery and other equipment from the international suppliers best able to meet their complex needs. But the draft charter will make it more difficult for them to do any of these things. Much of the country's gold wealth may thus remain in the ground because its exploitation is neither feasible nor cost-effective under the charter's additional burdens.

> *Companies thinking of investing in new mines will have yet more reason to stay away – especially as decisions on mining investment are guided 60% by geological attractiveness and 40% by the content of mining policies.*

Companies thinking of investing in new mines will have yet more reason to stay away. South Africa has enormous mineral wealth, of course, which is a major draw card. But decisions on mining investment are guided 60% by geological attractiveness and 40% by the content of mining policies. Prospective investors take careful note of policy differences between countries and tend, in the words of the Fraser Institute's *Mining Index*, to 'shift exploration investment away from jurisdictions with unattractive policies'.

South Africa's policy environment is thus very important. Already, however, the regulatory regime is choking off new investment because:

- the relevant rules are so vague, allowing mining officials to interpret them in different ways at different times, so as to help some companies and hinder others;
- the requirements change far too often, which erodes the predictability that mining companies need before they can risk huge capital investments with long lead times; and
- the demands placed on miners in South Africa are very much more onerous and costly than the requirements in other mining countries.

The upshot, as Barnard Swanepoel, a former chief executive of Harmony Gold, warned at the Junior Mining Indaba earlier this month, is that 'exactly zero' has been spent on greenfields exploration in the past year. Yet without fresh exploration, no expansion is possible and the mining industry will continue to decline.[55]

By contrast, if the regulatory environment were to be reformed, so as to give the country the benefits of certain, stable, and predictable mining policies, then new investment would double, 150 000 more direct and indirect jobs would be generated, and the mining industry would once again start playing a much larger part in boosting the country's dismal rate of economic growth.

A better path to effective transformation

The 2018 draft charter remains a highly damaging BEE instrument. However, it is also very much in line with other BEE policies, which have helped only a small minority (about 15% of black South Africans) while greatly harming the majority. If the country is to achieve a positive form of transformation, it needs to shift away from BEE to a far more effective empowerment policy. This alternative policy is being developed by the IRR and is called 'economic empowerment for the disadvantaged' or 'EED.'

EED would actively promote investment, growth, and employment, which are always the key foundations for prosperity. It would also make growth more inclusive by helping to break down barriers to upward mobility.

Millions of South Africans are currently held back by bad schooling, poor housing, and failing health care. Yet state expenditure in these three spheres totals some R580bn in this financial year alone, and far exceeds what most other developing countries can afford.

Despite this high spending, outcomes are generally dismal. Some 80% of public schools are dysfunctional, while some 90% of public hospitals and clinics fail to comply with basic standards of health care. In addition, the 'RDP' houses provided by the state – despite a massive increase in the housing subsidy from R12 500 in 1994 to R160 500 today – remain small, badly located, and often poorly built. In addition, the housing backlog, at some 2.1 million units, is now bigger than it was in 1994.

> *Ordinary South Africans can be empowered by redirecting much of the R580bn or so now budgeted for a top-down system of state provision into tax-funded vouchers for schooling, housing, and health care. This would promote self-reliance and a more effective use of resources.*

The state's repeated promises to do better have brought little change. Hence, the most effective way to kick-start improvements is to empower ordinary South Africans to start meeting their own needs in these three key spheres.

This can be done by redirecting much of the R580bn or so now budgeted for a top-down system of state provision into tax-funded vouchers for schooling, housing, and health care. These vouchers would go directly to millions of disadvantaged South Africans.

Tax-funded vouchers for meaningful empowerment

Re-directing the education budget would generate vouchers worth some R16 000 per pupil per year. Once parents had been provided with these vouchers – which could be redeemed solely for education – schools would have to start competing for their custom. Failing state schools would be forced to up their game. Many more independent schools would be established to help meet burgeoning demand. The resulting competition would hold down costs and push up quality.

Take housing next. The current housing and community development budget could be re-directed to provide housing vouchers to roughly 10 million South Africans between the ages of 25 and 35. These could be worth roughly R110 000 over ten years, so a couple could pool their money and receive R220 000 over a decade. A couple earning R6 000 a month could devote R1 500 (25%) of that to housing, which would boost their housing budget to some R400 000 over ten years.

Such sums would help people gain mortgage finance or enable them to start building their own homes. Families would no longer have to wait endlessly on the state to provide them with a small (and probably

defective) RDP house. Delivery would accelerate, while dependency would diminish and self-reliance increase.

Re-directing the health care budget could provide health care vouchers, worth some R10 000 a year, to roughly 10 million households. People could then join the low-cost medical schemes that have been proposed (at premiums of some R200 per person per month), or take out ‘combination’ health insurance policies offering both hospital and primary care. Again, this would expand competition, increase efficiency, and help contain costs.

Since all households would want maximum value from their vouchers, tax revenues would be far better spent. The voucher system would also widen individual choice, build self-reliance, inject a new dynamism into the economy, and bring real benefits to millions of people now marginalised and destitute. Tax-funded vouchers for education, housing, and health care are thus integral to EED and are a key factor distinguishing it from BEE.

An EED policy would rest on three prongs: the voucher system; an emphasis on economic growth as the overarching priority; and an EED scorecard that rewards the private sector for contributing to growth and effectively empowering the truly disadvantaged.

An EED charter for mining

Under an EED mining charter, companies would earn EED points for their contributions in four categories: economic, labour, environmental, and community. Given the overarching importance of growth, their economic contributions would count the most.

> *In the economic sphere, mining companies would gain EED points for foreign direct investment (FDI) attracted, capital invested (especially in greenfields projects), minerals produced, dividends declared, goods and services procured (from local suppliers of their choice), and contributions made to tax revenues, export earnings, and R&D spending.*

In the **economic** sphere, mining companies would gain EED points for foreign direct investment (FDI) attracted, capital invested (especially in greenfields projects), minerals produced, dividends declared, goods and services procured (from local suppliers of their choice), and contributions made to tax revenues, export earnings, and R&D spending.

In the **labour** sphere, companies would earn EED points for jobs maintained and expanded, for salaries and PAYE paid, and for initiatives to improve skills, health, and mine safety, among other things.

As regards the **environment**, companies would obtain EED points for reducing electricity and water consumption, minimising rock and other waste, treating polluted water, rehabilitating land, remediating other environmental damage they have caused, and contributing an affordable levy to a fund to be used in countering pollution from abandoned and derelict mines.

As for their **community** contributions, companies would earn EED points for topping up the education, housing, and health care vouchers of poor households in mining communities, or for helping to improve provision in these three spheres. (Companies could earn EED points, for instance, for helping to develop innovative ways of turning polluted mine water into potable water, for the benefit of mine communities.)

The need to shift from BEE to EED is becoming increasingly urgent. The ANC’s allies have long been using the predictable shortcomings of BEE to push for ever more state ownership and control. The South African Communist Party (SACP), the Congress of South African Trade Unions (Cosatu), and the ANC Youth League have all criticised BEE for failing to generate ‘more egalitarian outcomes’. This assessment is accurate, of course, but these organisations then go on to claim that the remedy for the failures of BEE lies in nationalising land and ‘strategic’ sectors, including the mining industry.

The ANC has now resolved (both at its Nasrec conference in December 2017 and via a recent decision of its national executive committee) to amend relevant laws, including the Constitution if needs be, to allow expropriation without compensation (EWC). This, of course, is a proposal for nationalisation under a more palatable name. Though the ruling party constantly suggests that EWC will be confined to land alone, the Constitution in fact defines property as 'not limited to land'. So too does the Expropriation Bill of 2015, which the ANC now wants to amend to allow for EWC and then push through Parliament as quickly as possible. Unless this definition of property is changed (and the ANC shows no intention of doing so) then EWC is likely in time to extend to assets of many other kinds, including mining ones.

> *With the mining industry still largely in the doldrums and the draft charter's fundamental flaws readily apparent, it is time to revive investor confidence, kick-start growth in a vital sector, counter the EWC threat, and re-ignite prospects of a better life for millions of South Africans by shifting away from BEE and embracing an EED charter for mining instead.*

The policy choices are becoming stark. The country can keep on with current BEE policies in mining and elsewhere, but these will do little to foster growth or expand opportunities for the disadvantaged. All South Africans will then reap a bitter harvest as the economy falters still further, joblessness worsens, and the use of EWC expands – thereby curtailing any realistic prospect of upward mobility and inclusive prosperity.

By contrast, a shift to EED in mining (and elsewhere) would free the economy from the leg-iron of ever more damaging BEE requirements. It would also empower the majority in a way that BEE interventions – and the 2018 draft charter, in particular – will never be able to achieve.

With the mining industry still largely in the doldrums and the draft charter's fundamental flaws readily apparent, it is time to revive investor confidence, kick-start growth in a vital sector, counter the EWC threat, and re-ignite prospects of a better life for millions of South Africans by shifting away from BEE and embracing an EED charter for mining instead.

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