

# LEGAL PROCEEDINGS RELATING TO THE MINING CHARTER

## DECLARATORY ORDER



### BACKGROUND

In March 2015, then Minister of Mineral Resources, Ngoako Ramatlhodi announced that the DMR and the Chamber would jointly pursue a declaratory order, seeking clarity on the assessment of the ownership element of the Mining Charter, particularly in respect of the continuing consequences of previous BEE deals. It subsequently became clear that the legal mechanism available to the parties, required a clear applicant and respondent, with an identifiable and clear point of dispute, and so a joint approach was not possible. The Chamber continued with declaratory order process on the same basis, and in alignment with the original intention.



### CHAMBER POSITION

The Chamber's view is that the 'continuing consequences' clause of the original charter envisaged a situation where empowerment credits would be sustained. The Chamber believes that it does not serve the interests of empowerment to impose a permanent lock-in or similar restriction on BEE entrepreneurs and other beneficiaries. Had a permanent 'lock-in' been envisaged and imposed, we would have had a situation of far less empowerment than has currently been achieved, with many black mining entrepreneurs who have built major companies having been restricted from making the decisions that enabled them to do so. Further, investors would not have supported these transactions.



### COURT PROCEEDINGS

The Chamber's application for a declaratory order was heard by a full bench of judges - Justices Peter Mabuza and Tina Siwendu and Acting Judge Frans Barrie in the High Court of South Africa in November 2017. Judgment was reserved. The Chamber is awaiting the outcome of this hearing, and it is hoped that this will be received in the first quarter of 2018. Irrespective of the outcome, it is possible that this matter will continue to be contested in higher courts for some time to come.



# #NotOurCharter

## MINING CHARTER REVIEW



### BACKGROUND

The 2004 and 2010 Mining Charters were, in effect, social compacts that were developed after extensive negotiations between all social partners.

On 15 June 2017, following limited consultation with the industry, the Minister of Mineral Resources imposed the unilaterally developed Reviewed Mining Charter (RMC). It is the Chamber's view, which is broadly supported and shared by analysts, investors, unions, NGOs and others, that in its current form, the DMR's charter will jeopardise the viability of an industry that is already under significant pressure. This will threaten the economic contribution of the industry, curtail investment and, ultimately cost the country jobs and livelihoods.



### CHAMBER POSITION

The Chamber's views are articulated here ([www.notourcharter.co.za](http://www.notourcharter.co.za)). Among the issues contained in the Mining Charter which are of concern are:

#### 1% of revenue to be channelled only to BEE shareholders:

The RMC requires that "the holder of a new mining right must pay a minimum of 1% of its annual turnover in any given financial year to BEE shareholders prior to and over and above any distributions to the shareholders of the holder, subject only to liquidity and solvency requirements. The Chamber argues that the MPRDA affords the Minister no power to require this, that it is in contravention of the Companies Act and of the Constitution. Further, the requirement is simply not feasible. In 2016, the mining sector paid dividends totalling R5.9 billion while 1% of turnover amounted to R5.8 billion. If this requirement were

to be imposed, it would mean that 98% of dividends would have to be paid to BEE shareholders, which will significantly undermine existing shareholders and will bring new investment to a complete standstill.

#### 10 years to write off of BEE shareholdings:

The RMC requires that, in respect of new mining rights, the required 30% black ownership needs to vest in full within 10 years. To the extent that dividend flows do not fully account for that full vesting, the balance owing by the black shareholder should be written off by the issuing company. The MPRDA does not afford the Minister the power to require this, it contravenes the Companies Act and the Constitution.

#### The Mining Transformation

**Development Agency (MTDA):** The RMC requires that payments be made to the MTDA by:

- foreign companies (1% of revenue);
- mining companies (40% of the 5% of payroll previously dedicated to skills training); and
- mining companies (dividend streams of community shareholdings).

The MTDA is a contravention of the Constitution, given that all monies paid to national government must be paid to the National Revenue fund unless reasonably excluded by an act of Parliament. The RMC is not an act of Parliament. Each of the three proposed revenue streams carry a number of additional legal flaws. Further, the Chamber is concerned about the potential for poor governance and maladministration of the MTDA as its objectives and proposed governance structures remain undeclared.



### COURT PROCEEDINGS\*

Resorting to legal action has always been a last resort approach for the Chamber and its members. However, given the 'bad faith bargaining' approach taken by the DMR and the significantly adverse impact that the implementation of the RMC in its current form would have on the industry, the Chamber has been forced to seek legal recourse. The Chamber of Mines' application for two orders - a judicial review and a setting aside of the RMC will be heard before the North Gauteng High Court on 19 to 21 February 2018. The matter will be heard by a full bench comprising Judge-President Mlambo and Justices Kollapen and Basson.

\* Seven other applicants, each of whom is seeking to review and set aside the RMC for various and sometimes different and conflicting reasons are participating in the proceedings, as well as two amici namely the NUM and Solidarity, both of whom make differing submissions.