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CHANGES WOULD HAVE STIFLED BEE ACTIVITY OF PAST 12 YEARS

By: Mike Teke, President of the Chamber of Mines

The Mining Charter has been an invaluable mechanism to pave the way to a true transformation of the industry and has made a deep contribution to the ongoing deracialisation of SA's economy and society. We are the first to acknowledge that there remains a long way to go before we can say we have completed that journey. But we need to be aware of where we have come from and what we have achieved.

In 1994, almost everything about the industry was strictly racially defined. While legal restrictions on black workers holding skilled jobs had been removed a few years earlier, the number of senior positions held by black people amounted to little more than 1%. Up to 18 people shared each bleak hostel room. Almost no goods and services were procured from black-owned companies. Most black miners were illiterate.

Those areas improved only slowly from the advent of democracy until the charter came into effect in 2004. Since then, we have seen profound changes. By last year, 63%-72% of goods and services, depending on category, were procured from black economic empowerment (BEE) entities — mostly above charter targets.

Historically disadvantaged South Africans now occupy more than 40% of senior management positions and more than 50% in other management categories — including top management — all above the targets set in 2010. And they occupy 75% of core skilled jobs. This does not yet reflect SA's demographics (and there is the issue of women in mining too). But considering where we came from 20 years ago, progress has been remarkable.

Today, all workers in mine-owned accommodation live, at worst, in single quarters. Many occupy their own homes. Due in part to the well-intended voluntary living-out allowance introduced through collective bargaining in the late 1990s, we have issues in some regions of miners living in poor-quality informal accommodation. That, along with the entire migrant labour system, requires co-operative work by the industry, the government, organised labour and civil society to remedy.

What about ownership? We live in a world where the great bulk of mining shares are owned not by individuals or their companies, but by huge financial institutions including pension funds, local and foreign. These include the retirement and other savings of local people, black and white, and of others living all over the world. The vast bulk of shareholdings — probably more than 95%, particularly in respect of larger companies — are held by these institutions.

The only significant exceptions are the entrepreneurs, employees and community trusts that have been participants in BEE transactions. The fact that South African mining companies have succeeded in putting together more than R200bn in empowerment schemes, which have at this point delivered

R159bn in value to recipients — entrepreneurs, employees and community trusts — says a great deal about the commitment and thought that has gone into initiating these transactions over the years. Their reach has been extensive.

We now have a situation where many of the shares allocated in these transactions have been sold — cashed in. It is those share sales that have been the source of the large majority of the R159bn in flows of value to BEE entities. Dividend flows have made up only a small proportion of those flows, particularly in the past several years. Since 2008, the decline in commodity prices has had a major impact on the magnitude of dividends declared by mining companies. Some have cut their dividends completely, not only in SA, but internationally.

If the government had told the industry 12 years ago, when the charter first came into effect, that it was planning to create a rule — as it seeks to do in the amended draft of the charter — that companies would have to maintain their empowerment levels at 26%, transactions would have been structured very differently. Instead of giving black entrepreneurs the right to transact their holdings (usually after a qualifying period of a few years), they would have been prevented from doing so at all. Unless, perhaps, they sold to other BEE entities that would have had guarantees that their racial ownership structures would not change.

That would have created a two-tier share market, with BEE shares being worth substantially less than standard shares, for which the market is infinitely larger. Imagine what would have been the fate of all the successful BEE entrepreneurs, who have been able to build their businesses through wise business strategies, shifting from one company to another, sometimes not in mining, to maximise returns? They would have spent the past 12 years handcuffed, passive and unable to use their entrepreneurial and strategic investment skills to build value for themselves and their companies. Employee and community trust shareholders would have received relatively little.

The R159bn in value flows would have been instead a small fraction of that amount, because it would mostly have been limited to dividend flows.

This is the kind of scenario the draft amendments to the charter would create. It would go further were it to be implemented in its current form. It would require existing shareholders of companies that have previously met their 26% target to agree to the further dilution of their holdings through another round of BEE transactions. Even if times were good, that would represent an injustice and an immense strain on value. In the current straitened financial circumstances, it would be profoundly damaging to those investors and to SA's reputation as an investment destination.

We are confident it won't come to that. At worst, our application for a declaratory order will proceed, and we legitimately hope that the courts will find against the validity of any attempt to implement a measure of retrospective impact. After all, since 2004 the Department of Mineral Resources has been giving its approval to transactions that enable BEE entities to sell their shares. Had they not, the entrepreneurs, employees and community trusts that have benefited from those sales would have been up in arms.

That would be an outcome we could live with, but first prize is a sensible outcome reached through engagement between the government, other stakeholders and ourselves. By all means let us discuss how better to structure future transactions in a manner that could — within the constraints of market movements — deliver even better value and do more to encourage entrepreneurship, economic growth and job creation. We would have expected the department to begin this discussion before the publication of the draft, and we have registered our dissatisfaction that it did not. Nonetheless, we stand ready for that discussion.

But we have no choice but to resist by all means at our disposal any outcome that drives away domestic and foreign investors, puts BEE entrepreneurs in straitjackets and blocks the flow of value to them and all the others we are seeking to empower.

**This article may be viewed online at http://www.bdlive.co.za/opinion/2016/04/21/changes-would-have-stifled-bee-activity-of-past-12-years*