



Incorporating BEE into the new mineral law framework for the South African mining industry

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Synopsis

Since 1994, South Africa has been the subject of international attention, especially in regard to its transformation initiatives, which aim to redress the post-apartheid imbalances. Mining, as a major employer and one of the major industries in South Africa, has been the focus of the government's Black Economic Empowerment initiative with the introduction of the Minerals and Petroleum Resources Development Act and the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry. The historical background to South Africa's transformation and the role of the mining industry are pivotal to an appreciation of certain aspects of the Minerals and Petroleum Resources Development Act and the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry. The issues around Black Economic Empowerment and the enabling of a smooth transition to the South African mining industry of the future are explored in this paper.

Introduction

South Africa (SA) has had a colourful history since European occupation¹. The new democracy established in 1994 ushered in changes to the way South Africans deal with their natural resources, especially minerals. SA has aligned itself with the balance of international practice to mineral rights ownership and has adopted the concept of national sovereignty over natural resources (NSONR). As was recently commented by Botha:

Mining has always formed the backbone of South Africa's economy and, in the last ten years of democratic rule, the industry has continued to play an important role as a foundation of growth and development in the country³.

Although it is a 'foundation of growth and development', the industry itself has been subject to change. This is mainly due to the Black Economic Empowerment (BEE) initiative of the government to transform the industry from a restricted sector to a more broad-based and representative one. In fact, Anglo American's Trahar, when commenting on BEE, said:

Indeed the success of SA depends on the success of BEE⁴.

With mining leaders considering BEE critical to the success of South Africa, this study considers the issues surrounding BEE and their effects on the mining industry in SA.

This article considers aspects of the historical development of SA's legal system⁵ and the rising need for the empowerment transformation initiatives instituted by the government. The issue of BEE and the way in which certain aspects of both the Mineral and Petroleum Resources Development Act⁶ (MPRDA) and the Broad-Based Black Economic Empowerment Act (BBBEE Act)⁷ affect the mining industry is considered. The issues raised and comments on the outcomes of government initiatives are presented together with a number of recommendations for consideration⁸.

Historical background

Development of the South African legal system

Prior to the era of colonization, Africa was regarded as a 'dark continent'—being seen as something wild and untamed. However, in 1652 the economy of the southern tip of the continent was changed when van Riebeeck established a Dutch colony at the Cape on behalf of the Dutch East India Company (DEIC). This colony was to serve as a stop-over for Dutch ships en-route to the spice lands of the East. The Dutch occupation of the Cape finally ended in 1806 when the British re-occupied the territory they had held between 1795 and 1803⁹. With this re-occupation, English settlers arrived at the Cape in 1820,

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increasing English influence and authority at the Cape. British rule did not rest well with the earlier Dutch settlers (also referred to as 'Boers') who in 1837 moved further inland in what became known as the Great Trek. This resulted in the formation of the Boer republics of Natal, Transvaal and Orange Free State¹⁰. It should be noted that Natal was initially a Boer republic following their triumph over the Zulus at the Battle of Blood River. However, the British annexed Natal in 1843¹¹. As a result, there were two Boer republics (Transvaal and the Orange Free State) where Dutch law prevailed; and two British colonies (Cape and Natal) where English law prevailed¹².

During the Dutch occupation of the Cape, Roman-Dutch law applied. This continued during the British occupation where Roman-Dutch law was regarded as the common law of the Cape, though English law greatly influenced it¹³. In 1910, the four territories joined to form the Union of South Africa with a unified legal system that incorporated the legal systems of the previous territories. Thus the jurisdiction in the Cape was extended to the rest of the country so that, Roman-Dutch law was the common law with an English law influence¹⁵.

The formation of the Union of SA did not lessen the animosity between the Afrikaners (the new term to refer to the Boers as they spoke the Afrikaans language) and the English neither did it diminish the number of restrictions being imposed on non-Europeans by successive governments. The numerous strikes in the gold and coal mines between 1913 and 1922 were mainly driven by the need for recognition by the white trade unions. This culminated in white miners engaging in a mass strike action in 1922 in protest against blacks doing jobs previously done by whites¹⁶.

Smuts, the prime minister at that time, engaged the army to quell the strike, which resulted in him being voted out of office in 1924 and being replaced by Hertzog as prime minister. Hertzog introduced a range of legislation to preserve white dominance in the Union, a practice which Smuts continued when he returned to power in 1939¹⁷. Upon re-attaining office, Smuts joined the Second World War alongside Britain against Germany. This intervention was opposed by the Afrikaners, which led to Smuts losing the elections in 1948, paving the way for the National Party¹⁸.

The policy of apartheid

When the National Party came to power under Malan in 1948, it conceived and implemented the policy of apartheid. However, as pointed out above, racial discrimination was already present in SA at that time¹⁹. In essence, apartheid was characterized by blacks (the African, Coloured and Indian races) being treated as subservient to the white race. This included restrictions on categories of occupations in which they could participate, the places they could live, the standard of education received, and so on. These restrictions were imposed to the point that 'homelands' were created for Africans, called the TBVC (Transkei, Bophuthatswana, Ciskei and Venda) states. These 'independent states', though part of SA, were regarded as separate territories and were used by the South African government to deepen racial segregation²⁰.

Such treatment was frowned upon by the international community and resulted in SA feeling the sting of exclusion from the international arena as well as facing various trade restrictions and sanctions²¹. After 1990, however, SA was allowed back into the international community when the South African president, de Klerk²², released Nelson Mandela from prison and unbanned various liberation movements²³. This paved the way for SA's first democratic elections in 1994 when it voted the African National Congress (ANC) to power with Mandela as the first black, democratically elected president.

The new legal disposition and mining

Subsequent to the 1994 elections, the new government implemented several BEE initiatives to 'redress the past imbalances' and provide for greater participation by previously disadvantaged groups in the new dispensation. As Kohler stated:

Government views BEE as central to its economic – transformation agenda, which is designed for bringing about significant increases in the number of black people who manage, own and control the country's economy, as well as significant decreases in income inequalities²⁴.

This is consistent with the Freedom Charter of the African National Congress (ANC)²⁵, which makes special provision for the mining industry. According to the Freedom Charter:

The national wealth of our country, the heritage of South Africans, shall be restored to the people; The mineral wealth beneath the soil . . . shall be transferred to the ownership of the people as a whole.²⁶

These notions of the Freedom Charter were re-iterated in the Reconstruction and Development Programme (RDP) of the ANC government²⁷, a document that makes special mention of the mining industry and expresses the belief that sustainable use of SA's minerals can be achieved by the transferring private mineral rights to the government²⁸. Pursuant to the Freedom Charter, Article 1.3.6.1. of the government's Mineral Policy states that:

- (ii) 'Government's long-term objective is for all mineral rights to vest in the State for the benefit of and on behalf of all the people of South Africa.
- (iii) State-owned minerals rights will not be alienated.
- (iv) Government will promote minerals development by applying the 'use-it or lose-it'/'use-it and keep-it' principle'²⁹.

This policy was given legal recognition when the MPRDA was promulgated and became effective in May 2004³⁰. The MPRDA serves as a legislative expression of the RDP's vision of the mining industry of SA and confirms one of its main aims, namely, 'to mobilize all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future'³¹. Although the mining industry was initially apprehensive of the MPRDA³², the two-year delay provided time for the mining industry to digest and accept the tenets of the Act³³. Furthermore, the delay allowed the industry to assess the implications and the impacts of the legislation, which has developed into a more positive attitude toward BEE policies.

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A feature of the MPRDA is that it amended the common law right of landowners to minerals in that it transferred the custodianship of minerals to the State³⁴. Accordingly, severed mineral rights no longer vest in the landowner but in the State, who holds them as custodian for the peoples of SA³⁵.

Subsequently, the Broad-Based Socio-Economic Empowerment Charter for the Mining Industry³⁶ (the Mining Charter), which aims at ensuring greater participation of blacks in the mining industry, was concluded³⁷. This document reflects the common position of the Department of Minerals and Energy, the Chamber of Mines, the South African Mining Development Association and the National Union of Mineworkers. A scorecard for the mining industry was also developed to monitor the progress of a mining company in achieving BEE goals as envisaged in the Charter³⁸.

The issue of BEE is an emotive subject in SA, but is considered to be essential if SA is to fully shed all the vestiges of its apartheid past³⁹. However, the mining industry has played a pivotal role in SA, and is regarded as 'a gold mine, literally and figuratively'⁴⁰. In addition the industry is engaged in activities that involve the development of non-renewable resources, impacts on the environment and society, making it highly sensitized to external influences and opinion. As the Chamber of Mines of SA stated:

By its nature, mining can have a deleterious effect on the land, the water, the flora, the fauna and the communities surrounding the mine⁴¹.

The sensitivities associated with mining suggest that BEE initiatives should be undertaken with sufficient caution so as not to drive away foreign investors, particularly those who have already committed to developing new operations in SA, and, at the same time, to attract new investors to the industry.

The issue of BEE

Companies and the Constitution

Most mining ventures in SA are owned by companies, entities that have their own rights and obligations recognized in the Constitution⁴². The Constitution, in its Bill of Rights⁴³, prohibits discrimination and guarantees many rights, which include the rights to equality⁴⁴, life⁴⁵, privacy⁴⁶, freedom of expression⁴⁷, freedom of association⁴⁸, freedom of trade, occupation and profession⁴⁹ and property⁵⁰. Although the Constitution makes provision for certain non-derogable rights, the constitutional rights can be limited. It should be noted that all legislation emanating from Parliament must comply with the tenets of the Constitution. If it does not, then in terms of Section 167 of the Constitution, the Constitutional Court can strike down the law as being unconstitutional⁵¹.

In SA, it is trite law that a company has a separate legal personality from its members. This was demonstrated by Lord Halsbury in the famous case of *Salomon versus Salomon and Co. Ltd*⁵². Legislation, during apartheid, even excluded companies where non-whites held the majority of the shares from owning property. Hence the race of the shareholders was imputed to the company⁵³. Later, The

Group Areas Act⁵⁴ made reference to a 'disqualified company' where the 'controlling interest is held or deemed to be held by or on behalf or in the interest of a person who is a disqualified person'⁵⁵; that is, a black person⁵⁶. This has, to an extent been remedied by the Constitution. In terms of Section 8(4) of the Constitution, a company, being a juristic person, is entitled to the rights as enshrined in the Bill of Rights. As such, companies would be able to make use of the Constitution to protect their rights should they be violated in any way⁵⁷.

Definitions and terminology

According to Section 1 of the BBBEE Act⁵⁸, 'broad-based black economic empowerment' means:

the economic empowerment of all black people including women, workers, youth, people with disabilities and living in rural areas through diverse but integrated socio-economic strategies⁵⁹.

Thus BEE initiatives are aimed at transforming the economic milieu of SA to be more integrated, more inclusive and more representative of the peoples of the country. Without the interventionist role of government, using its legislative power to promote transformation, it could take decades before blacks participate as effective drivers of the economy. However, government must also ensure that transformation does not damage the economy, thereby harming the very people it aims to help. As the name suggests, BEE is geared to benefiting black people. Section 1 of the BBBEE Act provides that the term 'black people' is:

a generic term which means Africans, Coloureds and Indians.

The MPRDA makes reference to the Historically Disadvantaged Persons (HDPs) and defines this group as being:

any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect⁶⁰.

This definition encompasses both people and companies that have been discriminated against. On the other hand, the Mining Charter makes reference to 'historically disadvantaged South Africans' (HDSA) and 'HDSA companies'⁶¹.

Though different, read together it could be regarded that the MPRDA and the Mining Charter refer to the same group of persons. However, the necessity for and the reasons for the provision of different definitions in the BBBEE Act as compared to the MPRDA and Mining Charter is unclear. Although a wide definition is provided for HDPs it could refer only to South Africans who had previously been discriminated against. Conversely, the limited definition of 'black people' provided in the BBBEE Act, could include all black people, whether African-American, Nigerian, Zimbabwean or Congolese who had previously not been directly disadvantaged by SA's discriminatory laws. Although the preamble to the BBBEE Act reflects a need to promote the 'effective participation of the majority of South Africans in the economy', it does not indicate (neither by definition nor by objective) that it promotes the interests of black South Africans. This apparent oversight of the Act should be

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investigated to establish the intention of the legislature as to who it intends to benefit, since the term 'black people' is used interchangeably with 'HDP's'⁶². Public comments by officials are significantly different from the legal wording contained in a statute, where the interpretation of the definition plays an important role in determining its applicability. If this apparent discrepancy is real, then legislation and policies aimed at HDPs could apply to citizens of other African countries as well.

Solace can perhaps be obtained from the Mining Charter that defines Broad-Based Socio-Economic Empowerment as: *a social or economic strategy, plan, principle, approach or act, which is aimed at ... redressing the results of past or present discrimination based on race, gender or other disability of historically disadvantaged persons in the minerals and petroleum industry, related industries and in the value chain of such industries . . .*⁶³

Although this definition does not refer to BBBEE, it can be interpreted to favour HDSAs. Furthermore, Article 2 also highlights the discrepancy between definitions in the BBBEE Act compared to those provided in the MPRDA and the Mining Charter. Definitions in the latter two documents are much wider than that of 'black people' defined in the BBBEE Act. The ambiguity thus begs the question as to whether the MPRDA and the Mining Charter are to be the sole considerations for the mining industry, to the exclusion of all other BEE enactments and initiatives. It should be remembered that the Mining Charter represents a negotiated consensus among all the stakeholders and cannot be easily disregarded. If the BBBEE Act is given preference, it could mean that a South African company, controlled by HDPs, loses out on an empowerment deal when competing with companies controlled by non-South Africans. Lester and Mackenzie state that:

*Charters represent nothing more than a sectoral part (pact) with government to realize the objectives of BEE. To the extent that those charters incorporate a scorecard and BEE indicators, these are only of relevance to the adopting sector*⁶⁴.

To clarify the terms, it is suggested that the term 'Historically Disadvantaged Persons' in the MPRDA be amended to 'Historically Disadvantaged South African Persons' (HDSAPs) with the definition in the BBBEE Act being amended to reflect this same definition. In making these changes it should not be forgotten that broad-based black economic empowerment is the economic empowerment of all black people including 'women, workers, youth, people with disabilities and living in rural areas through diverse but integrated socio-economic strategies'⁶⁵.

The constitutionality of BEE

In terms of the Constitution (Section 22), a company would have the right to enter into an economic activity of its choice and have the freedom to associate with whomever it chooses (Section 18). By prescribing ownership and the conducting of business, BEE restricts the company in these two aspects. However, as alluded to above, this restriction on the company's right to economic activity and freedom of association is permissible if, in terms of Section 36, it were of

general application in an open and democratic society. The limitation of these rights of the company would obviously not benefit the economy of the country. However, if it were aimed at redressing the past wrongs, then it would perhaps be more acceptable.

The Mining Charter is not the only charter aimed at transforming the economic state of affairs of the country. There is, *inter alia*, the Financial Services Charter⁶⁶ aimed at the financial sector, The Charter of Empowerment and Transformation in the Tourism Industry⁶⁷ aimed at the tourism industry and the Charter for the South African Petroleum and Liquid Fuels Industry⁶⁸ aimed at the petroleum industry. In addition, Section 6(2)(a) of the Employment Equity Act⁶⁹ provides that it 'is not unfair discrimination to take affirmative action measures'. In addition, Section 14(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act⁷⁰ provides that it 'is not unfair discrimination to take measures designed to protect or advance persons . . . disadvantaged by unfair discrimination'. In light of the above, it can be concluded that BEE is indeed constitutional.

Empowerment versus enrichment

A recent debate has challenged the BEE initiative as being an enrichment exercise, instead of an empowerment exercise. As Archbishop Tutu commented:

*What is black empowerment when it seems to benefit not the vast majority, but a small elite that tends to be recycled? Are we not building up much resentment that we will rue later?*⁷¹.

The word 'empower' means to 'give power to' or to 'make able'⁷², elsewhere it means 'give authority or power to'.⁷³ 'Empowerment' is 'the act of conferring legality or sanction or formal warrant'⁷⁴, while enrich means 'to make rich'⁷⁵, or to 'make wealthy or wealthier'⁷⁶ Enrichment has been defined as 'a gift that significantly increases the recipient's wealth'⁷⁷. Thus empowerment has a wider connotation than the narrower term enrichment. An empowerment initiative would therefore seek to benefit a wider range of individuals, whereas an enrichment exercise would benefit only a few⁷⁸, leading to a positive connotation for empowerment, while enrichment has a somewhat more negative connotation.

It has recently been reported that BEE deals have more than doubled as compared to the previous year; however, 72 per cent of the deals involved the top six empowerment companies⁷⁹. With six companies sharing 72 per cent of R 80 billion, (Eighty-billion Rand) one wonders if BEE is actually enriching or empowering. As it is, the *Business Day* reported that a Deloitte Human Capital survey indicated that 73 per cent of companies surveyed were of the opinion that there was a shortage of 'suitable black candidates' for BEE deals⁸⁰. This shortage of suitable candidates suggests that white companies, seeking to conclude BEE deals, will target the few suitable candidates. Mining companies are particularly hard pressed in view of the time limit on compliance for the industry. According to Morgan:

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That South Africa would benefit politically and socially from a more equitable distribution of wealth than that left by apartheid is indisputable, as is the government's electoral mandate to deliver it. However, the effectiveness of the means can and should be challenged. A few previously disadvantaged individuals acquiring widespread mining interests, funded largely by the 'sellers', is not very equitable⁸¹.

Walde, commenting prior to the promulgation of the MPRDA, warned against the creation of a black business elite. In making a comparison between SA's empowerment initiative and the privatization process in Russia, he cautioned against the creation of 'oligarchs' in SA⁸².

The enrichment outcome is potentially possible in regard to the ownership objective of the Mining Charter. However, the new mineral law framework contains other instruments that have the potential to significantly broaden empowerment. These are the social and labour plan requirements when applying for mining rights⁸³, preferent mineral development rights for communities⁸⁴ and prevention of sudden mine closure causing economic hardship and social disruption⁸⁵. In addition to these statutory provisions, there are also broad-based empowerment provisions in the Mining Charter and its scorecard. These include material benefits affecting the workforce, migrant labour, mining communities, rural development and preferred supplier status to HDSAs when awarding contracts⁸⁶. There is the danger of losing sight of the broad-based objectives of the Charter and over-emphasizing the potential 'enrichment' resulting from the ownership objective. Considering the scope of the MPRDA and the Mining Charter, there can be little doubt that the intention is indeed broad-based socio-economic empowerment.

Impact of BEE on the mining industry

It is interesting to note that as the basic legislation governing the minerals sector, the MPRDA does make provision for certain BEE initiatives. As per Section 2, the objects of the MPRDA include:

- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral . . . resource;
- (e) promote economic growth and mineral . . . resources development in the Republic;
- (f) promote employment and advance the social and economic welfare of all South Africans⁸⁷.

However, seeing that these issues are elucidated upon in the Mining Charter, further discussions hereon would be limited to the Mining Charter.

The Mining Charter

The Mining Charter was created by virtue of Section 100(2)(a) of the MPRDA, which provides for a Broad-Based Socio-Economic Empowerment Charter that will set the framework, targets and timetable for effecting the entry of

historically disadvantaged South Africans into the mining industry. The objectives of the Mining Charter are similar to those of the MPRDA, although it is more specific in that it indicates the strategy for the mining industry and indicates strategies for the implementation of the objectives of the MPRDA. It serves as an agreement between the various stakeholders in the mining industry in giving effect to the transformation aspirations of government. The Mining Charter contains, essentially, a similar definition to the MPRDA's HDPs. However, the Mining Charter is more specific in its references to HDSAs and HDSA companies⁸⁸. It consists of undertakings by all stakeholders in the areas of human resource development, employment equity, migrant labour, mine community and rural development, housing and living conditions of employees and their families, procurement of goods, services and consumables with HDSAs having a preferred supplier status, ownership and joint ventures, beneficiation activities, exploration and prospecting, State assets, licensing of projects, financing for the assistance of HDSA companies, regulatory framework and industry agreements and issues relating to consulting, monitoring, evaluation and reporting.

Human resource development

In his 2005 State of the Nation address, President Mbeki, when commenting on efforts to promote skills development in SA, stated 'It is . . . clear that more work will have to be done to raise the skills level of our people'⁸⁹. It seems that these fears have been shared by the mining industry as well, in that Article 4.1. of the Mining Charter makes provision for skills development. In fact, it seems so important that it is listed as the first undertaking of the industry. Article 4.1. calls on all the stakeholders to work together in addressing the skills gap in the country. Their inputs are required, *inter alia*, in the formulation of comprehensive skills development strategies and providing scholarships to promote mining-related educational advancement⁹⁰. In the opinion of the writers, though all the initiatives contained in the Article are important, the most important is that of education. Education would not only increase the skills of existing employees, it would also create a workforce that is already empowered when they enter the industry. Where a person already has the necessary education, he/she would be able to choose the level of entry in the industry, be it as management, partnering a mining enterprise, or even establishing one's own exploration venture. Education would enable individuals to rise up the corporate ladder at a much faster rate, thus ensuring a greater degree of broad-based empowerment at a quicker rate. Without the necessary skills base, empowerment would progress at a much slower pace than desired. More resources should be made available for the educational component of black empowerment.

Ownership

One of the major features, and perhaps the most contentious, of the Mining Charter is Article 4.7 where the mining companies have agreed to transfer 26 per cent of ownership to HDSAs within 10 years. Seeing that the Mining Charter is accessory to the MPRDA⁹¹, its implementation coincided with

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that of the MPRDA, namely, 1st May 2004. As such, the deadline for this requirement of the Mining Charter would be 1st May 2004. Mantashe believes that this ownership requirement 'would give the historically disadvantaged the much needed critical mass to grow'⁹².

An important corollary that should be noted is that the sale of interests in a mining company would be on a 'willing seller-willing buyer basis, at fair market value, where the mining companies are not at risk'⁹³. Although mining companies have been seriously affected, and placed at risk by the strength of the Rand⁹⁴, it does not seem to have affected the BEE process. It could mean that the mining companies believe in the process of BEE and its rationale and are committed to seeing it succeed. Or perhaps, the mining companies simply wish to get it over and done with as quickly as possible, regardless of the consequences. At this stage it is difficult to determine the exact intention of the mining companies save to say that if the Rand's strength is in fact putting mining companies at risk, then government should implement policies that would relieve mining companies of the ownership deadline or adopt some form of compensation programme for losses sustained by affected mining companies, if any⁹⁵. It is reported that Radebe Chairperson of the South African Mining Development Association (Junior Mining Chamber), felt that the concept of broad-based empowerment should be reviewed, questioning the extent to which this model was sustainable in the mining industry. Radebe was also not optimistic that the BEE targets would be met in the mining industry in the next ten years, but said she hopes that there will be many more BEE companies involved⁹⁶.

Beneficiation

The RDP had envisaged the increase of mineral beneficiation through the use of 'appropriate incentives in order to increase employment and add more value to our natural resources before export'⁹⁷. This vision of the RDP was given effect to by Article 4.8 of the Mining Charter, which requires mining companies to engage in local beneficiation activities, specifically activities beyond mining and processing⁹⁸. The *Mining Journal* comments:

One aspect given greater prominence than before is the option for companies to offset increased beneficiation of minerals within South Africa against the HDSA ownership targets. Increased local beneficiation is an important objective for the government. However, the means of calculation remain unclear⁹⁹.

This has resulted in the Precious Metals and Diamonds General Amendment Bill¹⁰⁰, which is aimed at, *inter alia*, promoting greater beneficiation within the mining industry¹⁰¹. However, it has been reported that government would be considering the commercial viability of beneficiation¹⁰². So it is possible that the implementation of the Precious Metals and Diamonds General Amendment Bill may be delayed or drastically altered.

Financing mechanism

Article 4.12 provides that the industry 'agrees to assist HDSA companies in securing finance to fund participation in an

amount of R100 billion within the first 5 years'. From the language of the Article, it seems that the industry has to play a role as facilitator in obtaining funding for HDSA companies. A relatively new development is the New Africa Mining Fund (NAMF), which is a private equity fund incorporated for 'the purpose of investing in junior mining opportunities in South Africa and the broader African continent'¹⁰³. It is unclear as to whether NAMF has been established pursuant to Article 4.12 of the Mining Charter. It may well be that when financing operations in SA, could comply with BEE requirements. However, this does not make it a BEE financier. Further, by extending operations through the whole of Africa, it does not mean that HDSAs or HDPs would be benefiting. Although the NAMF gives preference to South African companies, other junior companies that are not South African but hail from other countries in Africa could also benefit if their operations are within Africa. This is further complicated by the different definitions of HDSAs and HDPs in the Mining Charter and MPRDA respectively and blacks in the BBBEE Act. Thus a realignment of all the definitions is warranted.

The mining scorecard

Article 4.11 envisages the implementation of a scorecard that would measure the commitments of the stakeholders 'at the level of ownership, management, employment equity, human resource development, procurement and beneficiation'. As commented by Scholes¹⁰⁴, 'The Act is about social upliftment...[it]...tells you what is required by legislation, the Charter explains how to do it and the Scorecard explains how you will be judged'.

The list of questions, as contained in Annexure A of the Mining Scorecard, relates to the issue of human resources development, employment equity, migrant labour, mine community and rural development, housing and living conditions, procurement, ownership and joint ventures, beneficiation and reporting. However, answers to most of the questions can be either yes or no, with no provision being made for any explanations. For example, the Human Resource Development section of the Mining Scorecard contains three questions relating to training, skills development and mentoring to which there are just yes or no responses. With simple yes and no answers, the Mining Scorecard amounts to nothing more than a checklist of company actions. It is possible for a mining company that is serious about BEE to provide a detailed version of the Scorecard, with proper explanations. However, there would be a lack of consistency with the other companies who do the bare minimum, as required. In these times of greater awareness of sustainable development and corporate social responsibility within the industry, potential investors must also be able to look at the Mining Scorecard in assessing the viability of an investment. Any uncertainty would turn potential investors away from SA¹⁰⁵.

The explanatory notes to the questions form the last part of the Mining Scorecard. However, the notes merely restate the provisions of the Mining Charter, where applicable, and do not give an indication to the answering of the questions, nor the scope of the answers required. These notes should be redrafted to provide greater direction to the respondents as regards what is expected of them.

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Conclusion

Natural resources, being an integral part of the land, are usually regarded as belonging to the people that inhabit the land. The people should therefore share in the wealth generated by the mining industry, but apartheid prevented the majority of South Africans from receiving an appropriate share of this wealth. With the advent of democracy a means of more equitably sharing mineral wealth has been adopted, and this has been translated into the government's BEE initiative. BEE will be the major issue in the mining industry for the foreseeable future and local and international investors would do well to support and facilitate the necessary transformations of the South African mining industry.

While it is argued in this article that BEE is constitutional, the sensitivities associated with mineral development suggests that BEE initiatives should be undertaken with sufficient caution to both encourage current investors and attract new investors to the industry. On the question of who should benefit from BEE, the MPRDA and the Mining Charter refer to HDSAs while the BBBEE Act is unclear as to the whether the beneficiaries should be exclusively South African. If the BBBEE Act is given preference, it could mean that a South African company, controlled by HDPs, loses out on business deals when competing with companies controlled by non-South Africans.

Although the enrichment outcome is potentially possible in regard to the ownership objective of the Mining Charter, the new mineral law framework contains other instruments that have the potential to significantly broaden empowerment. Education is identified as the most important empowerment instrument. Education would not only increase the skills of existing employees, it would also create a workforce that is already empowered when they enter the industry.

The urgency shown by the mining companies to comply with the charter requirements demonstrates their belief in the process of BEE. An uncertain aspect of the charter is the credits associated with beneficiation of minerals within South Africa to be offset against the HDSA ownership targets. A shortcoming of the Mining Scorecard is that it amounts to nothing more than a checklist of company actions.

In summary, BEE has been shown to be more of a blessing than a curse. This statement is supported by recent research that revealed 'far from being a risk to a company's value, empowerment can boost a company's share price'¹⁰⁶. The research revealed that, for the period January 2001 to May 2004, there were marked increases in share prices ranging from 11.4 per cent to 13.6 per cent for traditionally white companies. Needless to say, the South African government needs to approach, regulate and administer BEE in mining very carefully. It has been reported that as far as the mining industry's contribution to BEE is concerned, 'it is believed that in the period between 2001 and 2003, 34 deals valued at R16 billion were concluded'¹⁰⁷. As far as the mining industry's contribution to BEE for this period is concerned, it is reported that:

'To date the mining industry has brokered more empowerment deals than any other sector and, last year, some R12-billion-worth of empowerment deals were concluded, representing a significant increase on the R5-billion-worth of deals signed in the two years prior to the release of the mining charter late in 2002'¹⁰⁸.

Recommendations

Although the preamble to the BBBEE Act reflects a need to promote the 'effective participation of the majority of South Africans in the economy', it does not indicate (neither by definition nor by objective) that it promotes the interests of black South Africans. This apparent oversight of the Act should be investigated to establish the intention of the legislature as to who it intends to benefit, since the term 'black people' is used interchangeably with 'HDPs'.

The government should also consider the formation of a steering group on BEE. This steering group could continue well past 2014, when the limits set in the Mining Charter expire. As such, the industry's contribution to transformation would not end in 2014 but should continue until the industry itself is satisfied that it has reached acceptable levels of transformation¹⁰⁹.

Being a part of the Southern African Development Community and the African Union, the government has a responsibility to other member countries to keep them informed of the South African experience should they wish to also implement similar initiatives in a responsible manner.

More resources should be made available for the educational component of BEE in order to effect true empowerment.

The Scorecard merely re-states the provisions of the Mining Charter and does not give an indication to the answering of the questions, nor the scope of the answers required. These notes should be redrafted to provide greater direction to the respondents as regards what is expected of them. Mining companies should provide a detailed account of the Scorecard with proper explanations that defend their status of compliance. A possible new Scorecard could have the following main captions:

Improvement in compliance from previous year. Here the company would have to outline the improvements, if any, from the previous year. If there is no improvement, reasons should be provided.

Parties to empowerment transactions. This would enable government to identify whether the company has engaged new partners or has remained with the previous partners.

Certificate of empowerment. The Scorecard should be accompanied by a certificate issued by the BEE partner detailing the nature of the transaction and confirming the value of the transaction. The BEE partner should also provide details of BEE deals with other companies it has entered into. This certificate would serve to identify all BEE transactions entered into by the BEE partner and thus inform the government, or other analysts, whether enrichment is occurring or not.

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Schedule 1			
Chronological list of laws affecting mining and BEE in SA			
Act number	Act name	Brief description	Date of commencement
Act 16 of 1967	Mining Titles Registration Act	Regulates the registration of mining titles and other rights connected with prospecting and mining	1 October 1967
Act 20 of 1967	Mining Rights Act	Deals with the issue of unwrought precious metals	1 October 1967
Act 61 of 1973	Companies Act	Governs the formation and regulation of companies in SA	1 January 1974
Act 78 of 1973	Occupational Diseases in Mines and Works Act	Deals with the compensation for diseases contracted by persons employed in mines and works	1 October 1973
Act 69 of 1984 (GG 9285, 1; 4 July 1984)	Close Corporations Act	Governs the formation and regulation of Close Corporation, in SA	1 January 1985
Act 56 of 1986 (GG 10291, 1; 25 January 1986)	Diamonds Act	Created the Diamond Board and instituted regulations for the trade in diamonds	1 October 1986
Act 30 of 1989 (GG 11783, 1; 31 March 1989)	Mineral Technology Act	Provides for the continuation of MINTEK (Council of Mineral Technology) and its management by a board	1 August 1989
Act 50 of 1991 (GG 13253, 1; 22 May 1991)	Minerals Act	Regulated the mining industry until May 2004	1 January 1992
Act 66 of 1995 (GG 16861, 1; 13 December 1995)	Labour Relations Act	Amended SA's labour legislation to take account of the provisions of the final constitution, regulate trade unions and streamline procedures for resolution of employment disputes. It also created the Labour Court and the Labour Appeal Court	11 November 1996
Act 29 of 1996 (GG 17242, 1; 14 June 1996)	Mine Health and Safety Act	Deals with the protection of the health and safety of employees in a mining operation	14 June 1996
Act 108 of 1996 (GG 17678, 1; 18 December 1996)	Constitution Act	Contains a Bill of Rights that protects all S. Africans	4 February 1997
Act 55 of 1998 (GG 19370, 1; 19 October 1998)	Employment Equity Act	Achieves equity in the workplace by eliminating unfair discrimination. Also adopts affirmative action measures.	1 December 1998
Act 4 of 2000 (GG 20876, 1; 9 February 2000)	Promotion of Equality and Prevention of Unfair Discrimination Act	Gives effect to the Equality clause (S 9) of the Constitution	16 June 2003
Act 28 of 2002 (GG 23922, (1; 10 October 2002)	Mineral and Petroleum Resources Development Act	Transferred mineral rights from private holders to government as guardian of peoples of SA and makes special provision to benefit historically disadvantaged persons	1 May 2004
Act 53 of 2003 (GG 25899, 1; 9 January 2004)	Broad-Based Black Economic Empowerment Act	Establishes a legislative framework for the promotion of Black Economic Empowerment	21 April 2004

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- The reader should refer to Schedule 1, which provides a chronological list of recent laws affecting mining and BEE in SA.
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- Act 53 of 2003.
- From the above it can be gleaned that this is more of a legalistic study of the topic at hand and would not descend into a political consideration of the merits or demerits of BEE.
- HAHLO, H.R. and KHAN, E. *The Union of South Africa: The Development of its Laws and Constitution*, Cape Town, Juta and Co. Ltd., 1960, p. 5. The first British occupation of the Cape occurred between 1795 and 1803. This was due to France declaring war on Britain and Holland. Britain occupied the Cape to protect the spice route. In 1803 Britain returned the Cape to the Netherlands after entering into the Treaty of Amiens with France. Britain reoccupied the Cape when the war with France resumed.
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17. *Hutchinson's Encyclopaedia*, South Africa www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0019847.html
18. *Hutchinson's Encyclopaedia*, South Africa www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0019847.html
19. *Hutchinson's Encyclopaedia*, South Africa www.tiscali.co.uk/reference/encyclopaedia/hutchinson/m0019847.html
20. These 'states' were re-incorporated into SA upon the demise of apartheid.
21. See: Resolution 1761 (XVII), The Policies of Apartheid of the Government of the Republic of South Africa <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/192/69/IMG/NR019269.pdf?OpenElement> This UN resolution imposed, inter alia, various economic sanctions against SA. This, with other resolutions, was lifted in the period following Mr. Mandela's release from prison and the demise of apartheid.
22. Mr de Klerk was the last white president to serve in SA and the last National Party official to serve in that capacity.
23. Such as the African National Congress, Pan African Congress, United Democratic Front, etc. See: *All Refer*, South Africa: Constitutional Change <http://reference.allrefer.com/country-guide-study/south-africa102.html>
24. KOHLER, S. Empowerment a central theme for mines and suppliers *Mining Weekly*, 20–26 August 2004, p. 26.
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26. The Freedom Charter, www.anc.org.za/ancdocs/history/charter.htm p. 1 See: BIERMANN, J., *Undermining mineral rights: An international comparison Johannesburg*, The Free Market Foundation, 2001. Occasional Paper No. 10. The author expresses the opinion that the system of private ownership, as it existed prior to the Minerals Act, should be retained.
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38. Scorecard For The Broad-Based Socio-Economic Empowerment Charter For The South African Mining Industry www.workinfo.com/BEE/MiningScore.pdf This issue is discussed in greater detail below.
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44. S 9 Act 108 of 1996.
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46. S 14 Act 108 of 1996.
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48. S 18 Act 108 of 1996.
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51. In SA, Parliament makes the laws of the country. A potential piece of legislation is referred to as a Bill. Once a Bill is approved by Parliament it becomes an Act and is law. However, any law passed by Parliament must comply with the principles enunciated in the Constitution. As such, the Constitutional Court, which is charged with the 'enforcement' of the Constitution has the authority to scrutinize the Act, or Bill. If the Act, or Bill, does not comply with the Constitution, the Constitutional Court, in terms of S 167, can strike down the law as being unconstitutional.
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