What you need to know about the 2018 Mining Charter

Following the approval of the Mining Charter 2018, Gwede Mantashe, the minister of Mineral Resources, revealed that the Mining Charter is the culmination of seven months of intensive engagements with stakeholders in the industry, including mining companies, investors, mining communities, labour, financial institutions and the legal fraternity.

Mantashe, he believes that the 2018 Mining Charter represents a consensus among stakeholders involved in the process.

Any new mining right, granted after the coming into effect of the 2018 Mining Charter, must have a minimum of 30% BEE shareholding, applicable for the duration of the mining right. The 30% BEE shareholding must be made up as follows:

- A minimum of 5% non-transferable carried interest to qualifying employees;
- A minimum of 5% non-transferrable carried interest to host communities, or a minimum 5% equity equivalent benefit. Equity equivalent refers to 5% equivalent of the issued share capital, at no cost to a trust or similar vehicle set up for the benefit of host communities.
- A minimum of 20% effective ownership in the form of shares to a BEE Entrepreneur, a minimum of 5% which must preferably be for women.

In addition, a mining right holder is expected to invest a minimum 5% of the leviable amount (excluding the statutory skills development levy) on essential skills development - including science, technology, engineering and mathematical skills, graduate training programmes and research and development initiatives.

Mining Charter III approved
Allan Reid 27 Sep 2018

Soria Hay, head of corporate finance of Bravura, an independent investment banking firm specialising in black economic empowerment ownership transactions, notes that while some positive progress has been made, striking the delicate balance between growth and transformation remains elusive. Hay says that the key areas of the mining charter that will have a large impact for the industry are those of ownership and procurement.

Soria Hay, head of corporate finance of Bravura

Once empowered always empowered recognised to some extent

In terms of ownership, companies that have undertaken historical transactions with 26% BEE ownership, will have the 26% recognised under the 'once empowered, always empowered' condition, even if the BEE owners have sold their shares.

In order to maintain their mining rights, these companies need to top up to 30% ownership by adding a further 4% under any structure, as the 2018 Mining Charter does not prescribe how this should be achieved.

Firms that have not reached 26% will also have to top up to achieve the 30% ownership provision. There is a clearly-defined five-year transition period to enable full compliance.

For a company that has had prospecting rights and now applies for new mining rights, timing is of the essence. If the application has been lodged before the 2018 Mining Charter is promulgated, the old system will apply, but if it is after the 2018 Mining Charter is finalised, the new requirements will need to be met.

In April this year, the North Gauteng High Court ruled in favour of the principle of 'once empowered, always empowered' after the Department of Mineral Resources had challenged the provision. This is vitally important for mining companies.

Hay states: "Companies entered into transactions in good faith and at significant cost in order to comply with the then-required levels of black ownership. The once empowered ruling recognises this. Were these previous transactions not to be recognised, additional cost pressures would certainly have a negative impact industry-wide. As it is, the new levels of ownership will require additional investment so as to meet the 30% BEE level.”

Mineral Resources focuses on gas and oil

20 Sep 2018

Free carried stakes and 5% levy on salaries creates financial burden

The financial impact of compliance with the new ownership levels is yet to be tested.

Hay warns that there are numerous issues to consider, including costs related to supplementing BEE shareholding and the free carried 5% shareholding each for host communities and qualifying employee shareholders.

The minister insists that mining companies commit to a 5% free carried stake for each of communities and employees so that value can accrue to them immediately. The challenge here will be that there could be additional costs given that mine employees and communities cannot be asked to pay for these stakes.

Hay cautions, “Companies may have to provide 10% of its equity free of charge to these groups. It also has to pay the 5% of payroll that needs to be paid as a levy, in addition to the 1% which is normally paid. This is whether a company is profitable or not, or is cash-flow-positive or not. The company might still have to provide a discount to the BEE Entrepreneur should they not have sufficient capital to purchase their 20% share. From an investor’s perspective, this translates into big costs, before you even reach positive cash flows on a mine.”

Hay explains further: “South Africa has never prescribed in the BEE codes before that a percentage of ownership must be given away for free to any participant. Previously there was the requirement to help black participants to buy a stake, and that was done through either vendor finance or bank third-party financing, or a combination thereof. This is the first time that BEE legislation in South Africa prescribes that this carried stakes for the communities and the employees, must be free.

“This means that they get the percentage participation but they don’t have to pay for it. For instance, say, a mine costs R1 billion to develop, then R100 million of that cost these participants will in essence get for free, and the 90% shareholders need to pay the full R1bbn, not only their proportionate amount.”

A mining right holder is expected to invest a minimum 5% of leviable amount (excluding the statutory skills development levy) on essential skills.

Unrealistic procurement expectations

The procurement provisions are extremely onerous and quite problematic, says Hay. Firstly, a minimum of 70% of mining goods must be manufactured or assembled in South Africa and of this, 21% needs to be supplied by black businesses.

Secondly, 80% of procured services, whether professional or technical, must be local. To confirm local content, goods must be procured in line with a standardised product identification coding system being developed by the Department of Tradeand Industry. Hay says that for some goods and services, these limits are impractical and unworkable. “An understatement here would be to say that there is a dearth of local companies able to produce the capital goods required for the mining sector.

Nearly all capital equipment is imported at this point. Building manufacturing know-how and capacity would take time, but if companies are not compliant with this, in terms of the prescriptions, their mining rights could lapse or be withdrawn. On this point it seems as though the Minister has not considered the major unintended costs and even safety consequences of a blanket requirement such as this.”

Conclusion

There is little doubt that companies should begin preparing for implementation of the 2018 Mining Charter. Hay is convinced that it is better to have certainty now, through having the 2018 Mining Charter finalised, rather than having months, even years, of protracted discussions during which time there is continued uncertainty.

“For individual companies and the economy, certainty is necessary for investment and growth. It remains to be seen whether this Charter will now be contended in court, however,” concludes Hay.