

## DOES MINING CHARTER III REALLY NOT APPLY TO PROSPECTING RIGHTS?

We've seen numerous prospecting rights being granted with an empowerment condition that requires BEE participation, sometimes even up to 51%. The question is, where does this come from and is it reasonable, or even lawful given that Minister Gwede Mantashe has specifically announced that the Mining Charter III does not apply to prospecting rights?

Mining Charter III was published on 27 September 2018 and amended on 19 December 2018. Although it aims to empower previously disadvantaged South Africans and to increase certainty in the mining industry, to encourage both local and foreign investment, it appears to fail in many respects, including creating certainty around empowerment requirements for prospecting.

The Reviewed Mining Charter 2017, published on 15 June 2017, also referred to as the "Zwane Charter", distinguished between empowerment requirements for mining and prospecting rights. In terms thereof, a holder of a mining right was required to have a minimum of 30% shareholding held by black persons, including a corresponding percentage of voting rights, while the empowerment shareholding requirement for a prospecting right was 50% plus 1, which was to include voting rights.

The former minister of Mineral Resources Mosebenzi Zwane's rationale for this appears to have been to ensure the entry of black persons into the industry at a lower cost. The Minerals Council expressed concern of the substantially larger target for prospecting rights, as prospecting does not always result in mining operations occurring and may therefore be short lived and render minimum short- or medium-term returns.

Indeed prospecting often requires substantial financial outlays with no foreseeable cash flow for years to come, if at all. Accordingly, the Minerals Council approached the High Court and successfully



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had the Reviewed Mining Charter 2017 interdicted, where it was superseded and replaced by Mining Charter III.

Unlike the draft published for comment, which expressly excluded prospecting rights, Mining Charter III is completely silent on its application to prospecting rights. This begs the question as to why.

Perhaps the current empowerment requirements are extensive in that they require a 30% BEE shareholding at holder level, distributed as follows: 20% ownership by BEE entrepreneurs, 5% by ESOPs and 5% by community trusts. To include such a burdensome requirement seems irrational and unworkable. Perhaps, on a proper interpretation of the Mineral and Petroleum Resources and Development Act, 28 of 2002, as amended (MPRDA), the lack of any mention of prospecting rights in Mining Charter III leaves the door open for decision makers to apply empowerment requirements with some element of discretion, because once exploration reveals a resource, the exploitation would be economically viable

and Mining Charter III requirements would apply should a mining right be applied for.

So where does the imposition of 51% empowerment of prospecting rights come from?

Section 100(2)(a) of the MPRDA empowers the minister to develop a Mining Charter to set targets for historically disadvantaged South Africans to enter and participate in the mining industry.

Section 17(4) of the MPRDA empowers the minister to grant a prospecting right to a holder conditionally, upon compliance with empowerment conditions as provided for in section 2(d) of the MPRDA, which speaks to the substantial and meaningful expansion of opportunities for historically disadvantaged persons. However, when imposing any such conditions, the minister must have regard to the type of mineral concerned and the extent of the proposed prospecting project.

Accordingly, it is evident that there are circumstances where a holder of a prospecting right may lawfully be called upon to comply with certain empowerment targets as the decision maker may deem suitable having regard to the type of mineral concerned and the extent of the proposed prospecting project. However, we submit that to include empowerment conditions (i.e. 51%) into prospecting rights that are more stringent than those set out in Mining Charter III (i.e. 30%) would be irrational at best.

Including conditions such as the 51% has indeed led to widespread confusion in the mining industry and, in effect, the implementation of the Reviewed Mining Charter 2017 which has been repealed and replaced. Our view is that the minister may lawfully impose empowerment conditions he deems fit, on prospecting rights, however, such conditions must be imposed lawfully and rationally within the current legal and policy framework and should not go beyond what is envisaged in Mining Charter III. ■