

# 'Once empowered always empowered' victory may be a hollow one

The Chamber of Mines emerged victorious when the High Court ruled last week that South African mining companies aren't required to top up black ownership levels if they have previously met the minimum requirements. The court case concerned the interpretation of the so-called 'once empowered always empowered' principle contained in the original Mining Charter (2002) and the 2010 version.



Soria Hay, head of corporate finance, Bravura

The Department of Mineral Resources (DMR) argued that the ownership element of the 2002 and 2010 charters should be a continuous compliance requirement for the duration of the mining right, while the Chamber of Mines, representing mining companies, held the view that black ownership is a once-off requirement. The High Court ruled that empowerment deals did not need to be topped up once a company had reached the 26% black ownership level and mining companies could not be penalised for falling below this level.

It was initially thought that this matter would be settled out of court. However, the Chamber of Mines approached the court after agreeing with former Mineral Resources Minister, Ngoako Ramatlhodi, that the differences in viewpoints about the continuing consequences of past empowerment deals could only be resolved through a declaratory order by the court.

The Chamber of Mines argued that the 2002 and 2010 charters did not stipulate the need for mining companies to perpetually keep empowerment levels at 26% once the original black shareholders left. They argued perpetual ownership would impose costs on all parties, which raises the hurdle for investment. The DMR argued that true empowerment could only be achieved by topping up empowerment levels to maintain the 26% level stipulated in the charters if the black shareholders sold their stakes and dissolved the respective companies' ownership status.

## Court finds in favour of 'once empowered always empowered principle' in the mining industry

The High Court found that once a mining right had been granted, with the DMR satisfied that the company had met the obligations to secure such a right, "the holder thereof is not thereafter legally obliged to restore the percentage ownership to the 26% referred to in the original charter and in the 2010 charter where such a percentage falls below 26%". Unless the obligation had been spelled out in the mining right. The same ruling applied to companies that had converted old-order rights to new-order rights in terms of the Mineral and Petroleum Resources Development Act, which transferred all mineral

ownership from private hands to the custody of the state in 2002.

Mining rights granted by the DMR, invariably includes the stipulation that the right holder must remain 26% black. This High Court victory may therefore be a hollow one for most mining companies, says Soria Hay, head of corporate finance at Bravura.

She explains that the dispute over 'once empowered always empowered' was revived last year after then Mineral Resources Minister, Mosebenzi Zwane, published a third version of the Mining Charter that required companies to maintain the minimum ownership level (which was increased to 30%) in perpetuity. This meant that if a BEE partner had exited a partnership or if shares were sold to someone who was not historically disadvantaged, then the mining company would have to top up the BEE ownership level back to 30% within a 12-month period.

This version was furiously criticised by the mining industry and the implementation of the charter was suspended. President Cyril Ramaphosa pledged to find a solution to the dispute over the draft charter, and he appointed Gwede Mantashe, a veteran of the industry, as the new mineral resources minister. The talks on the next draft of the Mining Charter have started, with DMR opting to use the controversial draft third charter as the basis for negotiations.

## **Court questions the legal standing of the 2010 Mining Charter**

A crucial aspect of the declaratory order is the fact that it clearly holds the view that the 2010 charter (the so-called Mining Charter 2) may not even have valid legal status. "The arguments presented to this court proceeded from the premise that the 2010 Charter was validly issued. The chamber did not seek any declaration regarding the validity of the 2010 Charter. In the circumstances of this matter, however, granting relief that refers to the 2010 Charter is warranted. That should not be understood to suggest that the 2010 Charter was validly issued."

These comments are particularly relevant given the fact that there is a requirement to avoid conflict between empowerment requirements in the mining industry on the one hand, and the provisions of the Codes of Good Practice published in terms of the Broad-Based Black Economic Empowerment Act, 2003, Hay says.

The South African government have opposing views on this. The Department of Trade and Industry (DTI) is of the opinion that the Codes of Good Practice published in terms of the Broad-Based Black Economic Empowerment Act should take precedence over the Mining Charter. The DMR on the other hand is of the opinion that the Mining Charter is a separate piece of legislation, and that the codes have no bearing on the mining sector.

## **What do the DTI Codes say about once 'empowered always empowered'?**

"The codes contain the requirement that all sector charter scorecards have to be aligned with the codes or stand to be declared null and void. The codes do recognise the 'once empowered' always empowered principle to a limited extent, with a calculation formula which determines the points that can still be earned after BEE shareholders have exited. In practice, though, this formula does not lend itself to many ownership points remaining after such exit. Therefore, companies are

essentially required to re-empower themselves when their black-owned partners divest of their investments in order to continuously maintain the required black ownership levels,” she says.

The requirement for black ownership has been identified as one of the three priority elements under the codes. The B-BBEE scorecard targets 25.1% black ownership and minimum compliance with the ownership element of at least 40% (i.e. 10%) has been set as the sub-minimum for ownership. Failure to adhere to the sub-minimum of ownership requirements will automatically downgrade the company by one level.

## **Increased regulatory uncertainty**

“The declaratory order is hailed by commentators as providing much needed clarity in an uncertain regulatory environment. In fact, this development may even lead to greater uncertainty in the medium to long term. A strong mining industry requires a solid foundation. South Africa’s current mining policy and stakeholder relationships have created a frail industry which has become unnerving to investors.

“The 2018 Budget Speech recognised the need to eliminate policy uncertainty to catalyse investment to rebuild trust and create an enabling environment for investment. Immediate measures are needed to establish policy certainty in key areas, including measures to improve the attractiveness of the mining sector for investment. Mining companies will still need to navigate the South African ownership minefield with caution, to ensure the best outcome for their stakeholders (including their community and their employees),” Hay concludes.

For more, visit: <https://www.bizcommunity.com>