

Masihambe, Masenze oku

# **A NEW SHARED VISION FOR MINING IN SOUTH AFRICA: Towards enduring transformation in our sunrise industry**

**Key aspects of the 2018 Mining Charter: A new approach**

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## ACRONYMS

BBB-EE Act:	Broad-based Black Economic Empowerment Act 53 of 2003
BBB-EE:	Broad-based Black Economic Empowerment
DMR:	Department of Mineral Resources
DST/NRF SARCHI:	Department of Science & Technology / National Research Foundation South African Research Chairs Initiative
DTI:	Department of Trade and Industry
HLC:	Housing and Living Conditions
IDP:	Integrated Development Plan
MPRDA:	Mineral and Petroleum Resources Development Act 28 of 2002, as amended
SLP:	Social and Labour Plan
SONA:	2018 State of the Nation Address



# 1 INTRODUCTION

In the 2018 State of the Nation address (2018 SONA), the honourable President Cyril Ramaphosa acknowledged the “massive unrealised potential for growth and job creation” in South Africa’s mining industry. He urged for the industry to be viewed as a “sunrise industry”: one in which mining companies, unions and communities take the revival in commodity prices as an opportunity to work together, “in a genuine partnership” to “grow the sector, attract new investment, create jobs and set the industry on a new path of transformation and sustainability.”

Such a partnership, the honourable President said, must be “underscored by trust and a shared vision.” To achieve such trust, and forge a shared vision, it is key that the Mining Charter becomes a “truly ... effective instrument to sustainably transform the face of mining in South Africa.”

We understand the honorable President’s incitement - phrased so eloquently in the words of Hugh Masekela - to avail ourselves of being sent, to say *Thuma Mina* to the building of a prosperous country, free of poverty and strife - as an invitation to contribute to moving South Africa forward as a nation, diverse in every way, but united in its goal for prosperity under the constitutional values of dignity, equality and freedom. Our response to the honourable President Ramaphosa’s call, *Thuma Mina*, is encapsulated by the superscript of this document, *Masihambe, Masenze oku*.

As researchers at the DST/NRF SARChI Chair (“the Chair”) for Mineral Law in Africa (MLiA), we are committed to the goals of informing the development of policy and strategy in the extractive sectors on the African continent and of attempting to alleviate and address deficiencies in the policy and regulatory frameworks governing mineral resources. The Chair’s research is envisaged to make an impact on the laws and policies that direct investment practices into the mining sector, to improve sustainable and ethical decision-making. These goals align with the vision, expressed in the 2018 SONA, for a renegotiated **Charter for Empowerment in the Mining Industry**



**(“Mining Charter”)** that will result in lasting and sustainable transformation of the mining industry.

We understand the urgency with which our country must address the material conditions of people living under the triple curse of poverty, inequality and unemployment. These “evil triplets” are of great concern to our nation, in the mining sector no less than in any other. The Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”) already is committed to eradicating the blight of the evil triplets in our mining sector. The finalisation of the Mining Charter provides a further opportunity to rethink the ways in which our Constitution’s imperative of transformation can be achieved through mechanisms that promote shared growth.

This memorandum deals with some of the most pressing issues we believe need to be addressed in finalising the Mining Charter. We comment briefly to the extent that these issues are within the expertise of our researchers. Our team consists of researchers who are trained and experienced in matters of mineral and mining law; as well as members with many years of experience in the drafting of policies, legislation and implementation strategies in South Africa and other parts of Africa.

This memorandum is primarily concerned with suggestions for ensuring proper systems to benefit the people and communities bearing the impact of mining activities whilst simultaneously bringing about investor certainty within the mining industry. In our view, a prerequisite for the successful and enduring realisation of this goal is dependent on, amongst others, the establishment and effective operationalisation of coordinated multisector multi-stakeholder partnerships, consisting of government, the mining industry and mine communities.

**The guiding question is how radical socio-economic transformation in the mining industry can be achieved through shared and inclusive growth.**



We believe that the trust that must exist among all stakeholders in the mining industry, and the shared vision needed to propel our “sunrise industry” forward, must be founded on a *coherent and reliable system of rules that foster equality and prosperity*. This is what can transform the mining industry into a tool for sustaining enduringly equitable and inclusive growth.

The memorandum is structured into nine sections. The Introduction (Section 1) is followed by an overview of the foundational values underpinning the Mining Charter and observations on the legal nature of the Mining Charter (Section 2). Section 3 deals briefly with the nature of the Mining Charter. Section 4 deals with the coherence of applicable instruments. It is followed by Section 5, an overview of radical socio-economic transformation. Section 6 focuses on how to ensure enduring socio-economic community development and discussion of whether the Mining Charter and the Social and Labour Plan (“SLP”) should be merged or aligned to one another. Section 8 lists a number of matters requiring further attention. Section 9 gives an overview of the proposed way forward.

**The memorandum concludes with an assurance that the team remains committed to continue participating in this process, and would be profoundly honoured if the Government of the Republic of South Africa were to consider involving us in all its endeavours aimed at finalising the Mining Charter and the drafting of concomitant 2018 Mining Charter Regulations.**

## **2 FOUNDATIONAL VALUES UNDERPINNING THE MINING CHARTER**

For the final Mining Charter to fulfil the challenge of being a protocol for the partnership between all stakeholders in the industry, as envisaged by the 2018 SONA, its foundational values need to be clearly expressed. The values that should inform the final Mining Charter are found, primarily, in the Constitution and the conglomerate of



laws dealing with transformation and empowerment, such as the Preambles of the Broad-based Black Economic Empowerment Act 53 of 2003 (BBBEE Act) and the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). These instruments represent the legislated value framework for empowerment in the mining industry.

Even in the more focused context of empowerment within the mining industry, the overarching constitutional foundational values of dignity, equality and freedom are the ultimate signposts. They operate within an organisational context that should be characterised by the basic principles of our constitutional order. The distinctive features of the constitutional order specifically relevant here, are the support for a developmental state, which gives content to the imperative of social welfare as the expression of the ideals of social justice, within a framework underpinned by the rule of law (often referred to as the legality principle).

### 3 LEGAL NATURE OF MINING CHARTER

The legal nature of the draft 2018 Mining Charter is uncertain. Although the Mining Charter is intended to be aligned with the Generic BBB-EE codes administered by the Department of Trade and Industry, the legal nature of the final Mining Charter must be *sui generis*.

While the final Mining Charter needs to comply with the generic legal requirements as set out in BBB-EE Act and its subordinate legislation (as well as all other relevant legislation, including those focusing on transformation), it is not to be regarded as an ordinary sector charter for the purposes of the BBBEE Act. It must remain subject to administration by the Department of Mineral Resources (“DMR”), in terms of the MPRDA.

To ensure that the final Mining Charter is both legally binding on all parties and enforceable by Government, the Charter must be published by notice in the



Government Gazette. This, of necessity, implies that the Mining Charter must be formulated as regards both substance and form in a manner that complies with current legal drafting conventions applicable to subordinate legislation.

## 4 COHERENCE OF APPLICABLE INSTRUMENTS

The MPRDA aims to address previous disadvantage and broaden access to the mining sector by giving effect to the constitutional mandate, in s 25(4) of the Constitution of South Africa, 1996, of achieving more equitable access to all South Africa's natural resources. The MPRDA and the Mining Charter, along with other tools, such as the SLP and Housing and Living Conditions ("HLC"), are the instruments through which such access is to be achieved, and such disadvantage addressed in the mining sector. Further contributing provisions are found in various other, more general instruments, such as the municipal Integrated Development Plans ("IDPs") and general legislative frameworks, such as that of the BBB-EE Act. State custodianship is the model through which to implement these objectives (s 3, MPRDA).

Several structural shortcomings may impede the likelihood of successful execution of the aim to achieve equitable access and address disadvantage:

Both the SLP and the Mining Charter set out to promote the same objectives of the MPRDA. They both aim to promote employment and economic welfare, as per section 2(f) of the MPRDA. Human resources development and employment equity, which are primarily regulated in terms of the Employment Equity Act 55 of 1998, are integral to both instruments. There are, however, several instances of overlap and/or duplication in the SLP and the Mining Charter. Matters are even more complex cases where where a municipal IDP (mandated by the Local Government: Municipal Systems Act 32 of 2000) contains contributing provisions.





The following is a typical example of such overlap and/or duplication:

- (i) The Mining Charter's aim of transforming the mining industry is endorsed by section 100 and 2(c) and (d) of the MPRDA. It is also the objective of the SLP to transform the mining industry, but the MPRDA's provisions do not similarly endorse this aim.
- (ii) Both the SLP and Mining Charter oblige mining companies to assist in the development of mining communities. This should support socio-economic development in mining areas, thereby promoting section 2(i) of the MPRDA. The SLP requires mining companies to create Local Economic Development Programmes providing for infrastructure and poverty eradication projects, in line with municipal IDPs, and, in addition, such programmes must also address housing and living conditions. The 2017 Mining Charter reiterated the imperative for the mining company to contribute to infrastructure and poverty alleviation projects, and stated that the contribution must align with the IDP and the SLP, but did not indicate how such alignment was to be achieved. The 2018 Mining Charter requires the submission of a separate plan for housing and living conditions.

In addition to these duplicated requirements, s 100 of the MPRDA mandates the creation of the Housing and Living Conditions framework, and as mentioned above, legally mandated municipal IDPs may play an important role.

**At least four different instruments are thus relevant at any given time to assess compliance by mining companies. Measuring and monitoring compliance is complicated by this quadruplication.**

An important aspect of finalising the Mining Charter with the goal of implementing a plan for radical socio-economic transformation through shared and inclusive growth, should be finding means to unify and/or align the requirements at present imposed by varying instruments such as the Charter, SLPs, the MPRDA and IDPs, read with relevant principal and subordinate legislation.



Beyond seeking alignment within the internal complex of the MPRDA, Mining Charter (including the scorecard), SLPs, Housing and Living Conditions and municipal IDPs, the final Mining Charter also needs to be aligned with legally binding instruments on international, African and regional level. The final Mining Charter must also be fully coherent with, and aligned to, the Constitution of the Republic of South Africa, 1996, as well as all transversal legislation (e.g. the Promotion of Administrative Justice Act 3 of 2000 (PAJA)) and relevant transformation-focused legislation (e.g. principal and subordinate BB-BEE legislation).

In addition, it is suggested that steps should be taken to ensure that, amongst others, all parts of the final 2018 Mining Charter (including the score card) are in all respects internally coherent. Within this context, the following non-exhaustive list contains a number of key matters that need to be internally aligned (and where necessary, expanded):

- Sustainable development of mining communities, land use/land occupying communities and sending communities;
- Sustainable development and growth;
- Employment equity;
- Housing and living conditions of especially mining communities, but also of the land use/land occupying communities and sending communities;
- Human resource development of mining communities, land use/land occupying communities and sending communities;
- Ownership;
- Procurement as well as supplier and enterprise development; and
- Beneficiation of the removed minerals.

## 5 RADICAL SOCIO-ECONOMIC TRANSFORMATION

Recognising the need for radical socio-economic transformation, the subsections below suggest ways in which the final Mining Charter could achieve such transformation by committing to an agenda of shared and inclusive growth. It deals with ringfencing of BEE shares (section 5.1); and suggests a model for implementing increased BEE shareholding (section 5.2); while proposing a vehicle for the formalisation of the partnership between the three key stakeholders involved, namely Government, mining companies and mining communities (section 5.3).

### 5.1 ENTRENCHING EMPOWERMENT FOR TRANSFORMATION: RINGFENCING BEE SHARES

Bearing in mind that the purpose of empowerment is transformation, and that transformation should be enduring, it is proposed that the final Mining Charter provides for ringfencing of so-called BEE shares. The proposal is for inclusion of a provision in the final 2018 Mining Charter that those BEE shares that have been obtained by empowerment entities and/or individuals by means of e.g. (a) a discount (compared to the then prevailing open market share price) and/or (b) the postponement of full or partial payment for such shares (e.g. through a loan or future dividends), may only be transferred to other BEE entities and/or individuals.

In as far as this proposed approach could be argued not to be in line with the provisions of the Companies Act 71 of 2008 that regulate the open transfer of shares, an amendment (if necessary) of said Act may be considered. Such a limitation may be justifiable in terms of the proportionality principle as set out in section 36 of the Constitution, read with relevant BB-BEE legislation and the concomitant Broad Transformation Charter.



## 5.2 INCREASING AND EXPEDITING TRANSFORMATION: RAISING THE OWNERSHIP BAR TO 30%

The draft 2018 Mining Charter states that the prescribed empowerment shareholding percentage must be increased from the current 26% to 30%. It is suggested that the final 2018 Mining Charter must specifically provide for a phased process, the implementation of which would support investment in, and expansion of, mining activities in South Africa.

The current draft 2018 Mining Charter (the formulation of which does not comply with current legal drafting conventions) does not provide for a such a phased approach when it states:

“2.1.1.1 An existing right holder who achieved and maintained a minimum of 26% **BEE** shareholding at the date of publication of the Mining Charter, 2018, shall be recognised as compliant and must within a period of 5 (five) years from the date of coming into effect of the said Mining Charter, supplement **BEE** shareholding to a minimum of 30%.”

It is suggested that the following formulation will ensure the above-mentioned phasing of compliance with the set target of 30% within a period not exceeding five (5) years:

“2.1.1.1 An existing holder, who after the coming into operation of the Mining Charter of 2018 (hereinafter the 2018 Charter) has maintained a minimum of 26% Black Person shareholding, is required to increase its Black Person shareholding to a minimum of 30% within a transitional period not exceeding five (5) years: Provided that the following minimum shareholding must be effected as follows:

- (a) 26% by the end of the first financial year after the commencement of the Charter in the event that the 26% Black Person shareholding has not yet been effected at the date of the commencement of the 2018 Charter;
- (b) 27% by the end of the second financial year after the commencement of the 2018 Charter;
- (c) 28% by the end of the third financial year after the commencement of the 2018 Charter;
- (d) 29% by the end of the fourth financial year after the commencement of the 2018 Charter; and
- (e) 30% by the end of the fifth financial year after the commencement of the 2018 Charter.

- 2.1.1.1.1 The increase in Black Person shareholding contemplated in in paragraph 2.1.1.1 must be in proportion to the shareholding distribution contemplated in paragraph 2.1. of the 2018 Charter.
- 2.1.1.1.2 Non-compliance with any of the minimum targets contemplated in in paragraph 2.1 constitutes an offence as contemplated in this Charter, the MPRDA, the Broad-Based Black Economic Empowerment Act 53 of 2003 or any other relevant legislation.
- 2.1.1.1.3 On conviction of an offence as contemplated in in paragraph 2.1.1.1.2, the penalties provided for in the 2018 Charter or such other legislation, as the case may be, apply.”

### 5.3 FORMALISING STAKEHOLDER PARTNERSHIP IN MINE COMMUNITY DEVELOPMENT

Mining plays an important role in local and national economic growth. The mining industry is also increasingly identified as a sector through which to achieve social responsibility and sustainable development. It is an industry in which the different stakeholders play definite roles, and in which the relations between these different stakeholders, i.e. government, mining companies and communities and their (governance structures), need to be clearly discernible.

The interests and expectations of government, mining companies and communities are not the same, and may even be at odds with one another. Whereas mining communities may be more concerned about security and sustainable development issues, mining companies may be mainly focused on business and generating profit. Government’s concerns might be on service delivery in the short term, and creating viable communities in the long term, while community governance structures should be concerned about protecting their constituencies against harm and exploitation.

The point is that for mine community development, more is required than simply the government’s input, or simply the contributions that mining companies can make. Mine community development requires a multi-stakeholder approach that takes into account how mining operations impact the communities affected on various levels, be that



economically, socially or environmentally. Those impacts will determine the nature and extent of development initiatives and the respective roles of each of the stakeholders.

All stakeholders generally agree that mining has a positive impact in the economic sphere. However, the inevitably concomitant negative consequences in the social and economic domains have an impact on how stakeholders (especially affected communities) perceive mining. Thus, the effects of mining and related externalities affect the way in which stakeholders understand mine community development.

Because of the invasive process of extracting minerals, the perception has been that mining companies solely owe the responsibility of mine community development to the local community. Nothing could be further from the truth. The responsibility to develop mining communities must be shared by all stakeholders. The responsibilities of each set of stakeholders differ, however, based on position and interest. Acknowledging the shared but varied responsibility will make it easier and more practical for stakeholders to account for issues that face communities as a result of mining. **It is important to define the roles of government and the mining industry clearly**, to avoid overlap between roles or, conversely, the forming of cracks in what should be a cohesive approach to mine community development. If roles are not clearly delineated, a mining company could too easily be tasked with taking on Government's role in terms of community development and other community-focused initiatives, while Government abdicates its powers and functions to the private sector.

The key roles and responsibilities of the three main stakeholders (government, mining companies and mining communities) in sustainable mine community development include (but are not limited to) the following:

**(i) Government:** It is Government's ultimate responsibility to ensure that mining communities benefit from the development, while also ensuring that the interests and rights of stakeholders are protected. This responsibility must see government establishing policies that support local development. At a national level, government

must establish an enabling environment that supports and facilitates mine community development. The state must also participate in the governance of mine community development programmes, acting as an advisory and monitoring entity. Government should aim to establish a robust framework for mine community development, throughout the entire mine lifecycle.

At a local level, government should play a more supportive role, encouraging and ensuring community development negotiations between the community, mining company and other stakeholders, and seeing through the implementation of all agreements and initiatives.

**(ii) Mining Companies:** It is generally expected that mining companies should contribute to the development of the mining community by providing, *inter alia*, financial support towards the development process. To this extent, mining companies must provide all relevant information relating to its commitments and what it can and cannot do. Managing expectations in this way, assists mining companies to build relationships with the communities concerned in good faith.

Similar to government, mining companies are expected actively take part in the governance and implementation of the mine community development programmes and honour related agreements and commitments. Mining companies should also make it their business to respond to the grievances and complaints of communities and other stakeholders.

**(iii) Mining Communities:** Local community groups also have an important role to play in the mine community development programme, and that is to openly participate in negotiations and identify what the needs and priorities of the community are. Communities can enhance the development programme through their knowledge of local background, content and values. The involvement of local communities also ensures the integration of vulnerable people and their needs in the development process. Traditional and other community governance structures should also be involved in the planning and implementation of development programmes.

Community groups should also play a vital role in participating in the formulation of development programmes and advising DMR on various key issues (e.g. the granting of mining rights, approval of SLPs, etc.). On addition, their participation in the monitoring and evaluating of development programmes will play an important role in guaranteeing the success of community development initiatives.

Taking the above into account, there is a clear **need for coordinated multi-sectoral multi-stakeholder partnerships**. It is proposed that the cooperation of these three key stakeholders should be formalised by means of the compulsory establishment, at local (mine) level, of a coordinated multi-sectoral (government) multi-stakeholder (mining company, mining community and other stakeholders) partnership entity. Such formally established coordinated multi-sectoral, multi-stakeholder partnership entities should be set up in a manner that would fully comply with the African Union prescribed requirement of ensuring mutual accountability in all development-focused initiatives.

## 6 ENSURING ENDURING SOCIO-ECONOMIC COMMUNITY DEVELOPMENT

As regards socio-economic development, the current definition in the MPRDA of “broad-based economic empowerment” stipulates that the socio-economic development of mining communities should be focused on “communities immediately hosting mining operations, affected by the supplying of labour to mining operations” (s 1, MPRDA). Below, the sections set out the array of people forming part of the communities affected by mining (6.1 below) and then suggest ways of addressing the overlapping interests through merger/alignment of the final Mining Charter and the SLP (6.2 below).

### 6.1 AFFECTED GROUPS

Broadly speaking, four types of communities/groups of people live in mining affected areas. Sometimes these four groupings can intersect:





**(i) Mineworkers (employees) and their on-site families:** As residents of an area where mining takes place, mineworkers and their families are directly affected by the activities of the mine. They are furthermore directly dependent, for basic infrastructure, on the mine and the local government authority. As employees of the mining company, mineworkers benefit from employment equity, human resources development, employment shareholding schemes and housing and living conditions in terms of the Mining Charter. For purposes of this document, employees at the mine are considered part of this group in matters relating to mine community development.

**(ii) Communities in labour-sending areas:** As a result of current and historical labour migration, areas other than those immediately proximal to mining operations are also affected by such mining operations. These so-called “sending areas” experience a breakdown in community structures and a depletion of skills required for local development in those areas. The definition of broad-based socio-economic empowerment clearly stipulates that labour-sending areas should benefit from socio-economic development. The definition of “mine community” in the 2010 and 2017 Mining Charter include labour-sending areas, thereby confirming that mining companies should include labour-sending areas in their mine community development projects. Labour-sending areas, however, are often not situated in close proximity to the actual mining areas. This affects the feasibility of mine community development projects launched by a mining company for such an area; especially since mine community development should be linked with the IDP, which is drafted to have local application.

**(iii) Land-holding (often traditional) communities:** The recognition and protection of some form of property rights is generally regarded as one of the preconditions for sustainable development to take place. The foundations for sustainable development of mining communities include: the protection of the security of tenure and other land interests of poor people living in rural mining areas; and proper compensation for using communally owned land for mining. At present, the

MPRDA regulates the rights of owners and other parties with interests in land where mining takes place. These interests are also intrinsically linked to land reform in South Africa and regulated by the relevant, applicable legislation. Land-holding communities also require access to basic infrastructure and services.

**(iv) Other groups and/or individuals:** Since the focus of mine community development is the amelioration of the effects of mining, there are often also other persons living in and around the mining operations who may not form part of one of the three above-mentioned community categories. Examples are, amongst others, land owners, lessees, other land users, and occupiers. The formulation of mine community development in the Mining Charter should therefore also make provision for these groups/individuals.

## 6.2 MERGER OR ALIGNMENT: MINING CHARTER AND SLP

The Mining Charter should serve as a means of integrating and coordinating the policy and regulatory frameworks dealing with transformation and development of mining communities. External coherence and alignment of the Mining Charter, in general, has been addressed above. Compliance and cooperation in terms of municipal IDPs should also be addressed in a clear and meaningful manner. Internally, the provisions of the SLP should be aligned with the empowering provisions of the Mining Charter, as provided for under the element, mine community development.

The 2010 Mining Charter provided for alignment with municipal IDPs, but made no mention of the SLP. The draft 2017 Mining Charter referred to the mining company's responsibility in terms of SLP and the IDP, but it also added further duplicating and contradictory obligations on mining companies. Duplication and contradiction are inevitable, since the areas addressed by the SLP and the Mining Charter overlap to a large extent.



Currently, compliance with the SLP and the Mining Charter is measured separately, even though compliance with both these instruments broadly pursues the same goal. Mining companies have to duplicate certain processes to comply and mining communities do not know which commitments made by the mining company are binding. Such a situation creates uncertainty for all stakeholders involved. Since the draft 2018 Mining Charter proposes to classify mine community development as a ring-fenced element, clarity as to what is expected of a mining company should be provided.

**The following is suggested:**

- (i) The duplication and interaction between the SLP, IDP and the Mining Charter can be clarified using the “mine community development” provision in the Mining Charter as a means to consolidate, in one provision, all the separate provisions stipulating a holder’s obligations towards the development of a mining area.**
- (ii) Alternatively, the Mining Charter and the SLP system should be combined into one system. The drafting of and compliance with the SLP may be included as one of the requirements to be met by a mining company as part of sustainable socio-economic mine community development.**

The granting of the mining right in terms of the MPRDA should only take place after the SLP has been submitted. It is therefore imperative that the requirements set out in the SLP and the final Mining Charter are formulated in such a manner that an applicant for a mining right can comply with such requirements at application stage. It is further proposed that the final Mining Charter should differentiate between the requirements at application stage and requirements after 5, 10 etc. years. If the monetary size of the mining company’s contribution to mine community development should be stipulated, such stipulation should apply to both the SLP and the Mining Charter. The formula for determining the monetary size should be unambiguous and not arbitrary.



**It is further proposed that the approved SLP should be coordinated with the relevant municipal IDP.** The responsibility for coordinating the creation and implementation of the SLP in line with the IDP should lie at ministerial level. Within this context, the SLP should provide the substance for sustainable mine community development in terms of the final Mining Charter. Whereas the SLP system is curtailed by a number of limitations that require addressing, one of the key advantages of the SLP system is that it allows for flexibility. Such flexibility ensures that development initiatives are contextualised, thereby ensuring suitability for a specific mining area (and the relevant communities).

**It is further proposed that the SLP should set out a comprehensive definition of “mine communities”** (see discussion above). Provision should also be made for mining communities to take ownership of development initiatives already at the planning stage and for the enforcement of compliance by mining companies.

To manage the overlap between the Social and Labour Plan (“SLP”) system and the final 2018 Mining Charter, an alignment must be achieved between the two systems. This can be done by imposing a single regulating instrument for both systems. **It is thus proposed that the final 2018 Mining Charter serves as point of coherence in this regard, but that the flexibility afforded by the SLP system should be embraced in the Mining Charter.** By incorporating the SLP provisions as part of mine community development in the final 2018 Mining Charter, the principles of the SLP will effectively also be elevated to the status of subordinate legislation.

## **7 MATTERS REQUIRING FURTHER ATTENTION**

Having perused the 16 June 2018 (Draft) *Broad-Based Socio-economic Empowerment Charter for the Mining and Minerals Industry, 2018*, the MLiA team is of the view that there are a number of matters that require further attention (by means of clarification, reformulation and/or inclusion) for purposes of finalising the 2018

Mining Charter. Matters that should be considered for inclusion in the drafting of the final version of the Mining Charter include, but are not limited to, the following:

1. The role of international, African and regional instruments, creating obligations and/or commitments for South Africa. Key examples or, amongst others, the *UN SDGs, Agenda 2063* and the two 2014 *Malabo Declarations*.
2. References to the recently approved African-wide arrangements (*AFTA - African Free Trade Agreement*) promoting the free movement of people, services and goods across borders.
3. The international human rights framework.
4. Explicit references to relevant socio-economic rights (in the South African Bill of Rights) vesting in mining, hosting and sending communities and individuals.
5. Locating the *Mining Charter* also within the context of key international, African, regional and South African frameworks for, amongst others -
  - the recently enhanced view of sustainable development (with the emphasis on the so-called 5 Ps),
  - climate change
  - resilience
  - the requirements for good corporate governance as set out in, amongst others, the *King IV Report on Corporate Governance for South Africa* (November 2016)
  - the recent international focus on coordinated multi-sector multi-stakeholder partnerships.
6. References to relevant parts of *the National Development Plan (NDP)* and the current (2014-2019) transversal *Medium Term Strategic Framework (MTSF)*, as well as to other key transversal policies, statutory and strategic frameworks.
7. Uniformity as regards the use of the term “demographics”, which sometimes means only demographics generally, while sometimes it refers to national or provincial demographics.
8. Recently published related (draft and final) BB-BEE charters such as the *Amended Code Series 000: Framework for Measuring Broad-Based Black*



*Economic Empowerment - Statement 000: Youth Employment Service* (issued under section 9 of the BB-BEE Act (GN 502 in GG 41866 of 28 August 2018).

9. A consolidated overview of the role, powers, functions and responsibilities of DMR within the context of the *Mining Charter*.
10. A consolidated overview of the roles, powers, functions and responsibilities of other national government departments, provincial government departments, municipalities, as well as public entities and other organs of state within the three spheres of government, within the context of the *Mining Charter*.
11. The need for, and the framework for, establishing collaborative partnerships between mines and the relevant (a) government institutions and public entities within the three spheres of government (national, provincial and local), (b) other organs of state, (c) the private sector and (d) civil society.
12. Arrangements for non-South African mining employees, their non-South African dependents (whether being part of the mining community or part of the sending community), as well as the sending communities from which these (non-South African) mining employees originate (e.g. Lesotho).
13. Exclusion of non-South African mining employees in the election of a structure (“elected by qualifying employees” (see definition part (a) of “Trickle dividend”), and, by implication, exclusion of benefiting from the “trickle dividend”.
14. A uniform approach to the distinction between –
  - mining communities
  - host communities
  - sending communities
 and the allocation and the sharing of benefits between these three categories of communities.
15. Provision of detail of what is expected of mines during each of the transitional years.
16. The duration of a mining right (e.g. par. 7(e)).
17. The exact meaning of paragraph 2.1.1.6 in respect of current existing mining rights which are up for renewal:

“The recognition of continuing consequences shall not apply to an application for a new mining right *and renewal of the mining right into any such recognition*”

18. Clarification of the form and extent of representation by host communities and qualifying employees on the board or advisory committee of a (mining) right holder (par. 2.1.3.5).
19. Provision of a consolidated list of all reports, focus and due dates to be submitted to DMR.
20. Provision of uniform templates for all reports to be submitted to DMR.
21. Inclusion of definitions of all relevant all terms (such as South African Public Academic Institutions, Science councils, research entities, junior miners, transitional period, etc.).
22. Clarification of the calculation of the additional 5% skills development levy and the beneficiaries thereof (par. 2.3(a)).
23. Clarification whether non-South African employees are to be included in the minimum threshold of Black Persons (e.g. par. 2.4 and 2.4.6), and how this is to be calculated taking into account the requirement that said threshold must be “reflective of the provincial or national demographics”.
24. Inclusion of an obligation to review existing (approved) Social and Labour Plans, and the compulsory alignment thereof with the final *Mining Charter* (par. 2.4.7).
25. Clarification of circumstances which may allow deviations from *Mining Charter* targets dealing with boards and executive/top management within the context of addressing employment equity measures (par 2.4.7).
26. Clarification of the term “mining community” in par. 2.5 as the (draft) *Mining Charter* refers elsewhere to three categories of communities (mining, hosting and sending communities). The par 2.5 term “mining community” includes  
“communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, Metropolitan municipality and/or district municipality”.

27. Inclusion of an obligation to ensure that those areas that are not used for mining purposes should be used to its full potential (e.g. for agricultural purposes, etc.) by hosting communities and/or other land users.
28. Inclusion of an obligation that all appropriate steps must be taken by mining companies to ensure that the environment, water sources, air quality, natural vegetation and surface land are not negatively affected by mining operations.
29. Inclusion of arrangements as regards the relationship between (a) the holders of mining (and prospecting) rights, and (b) landowners, lessees and other land occupiers (in addition to hosting communities).
30. An indication when the DMR review of the *Social and Labour plan Guidelines* will be completed, and the amended *Guidelines* (including targets and timelines) will be published (par. 2.5).
31. An indication when the DMR review of the *Housing and Living Conditions Standard for the Mining and Minerals Industry* (developed in terms of section 100 MPRDA) will be completed, and the amended *Standard* will be published, and to what extent it will be aligned with the policy, statutory and strategic human settlement frameworks of the (national) Department of Human Settlements (par. 2.6).
32. An amendment of the title of par. 2.6.2 (“Principles of working conditions”) as par. 2.6 refers to “Housing and Living Conditions” (and not to working conditions).
33. An indication of the extent that the DMR system for the monitoring and evaluation of the *Mining Charter’s* implementation by individual right holders is aligned with, and complies with, the transversal RSA Government-wide M&E System (par. 5)
34. As it is proposed that the *Mining Charter* should be published by notice in the Government Gazette, to have a binding legal effect, it is suggested that the paragraph dealing with interpretation should follow immediately after the section on definitions (par. 11).



## 8 PROPOSED WAY FORWARD

If the above approaches and proposals are in principle worthy of consideration, we would like to submit that next steps should, amongst others, include the following activities:

### 1. Finalisation of the 2018 Mining Charter

- (a) Further, concerted, efforts to align, in a coherent manner, the contents of the draft 2018 Mining Charter with:
  - (i) the approach, identified matters and proposals contained in this memorandum;
  - (ii) relevant sections of the BB-BEE Act; and
  - (iii) other relevant instruments.
- (b) Incorporation of relevant comments on the draft 2018 Mining Charter received during the consultation period provided for by government.

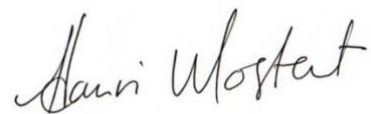
### 2. Drafting of Mining Charter Regulations

- (a) Preparation of the first draft of a comprehensive set of regulations (“2018 Mining Charter Regulations”) to give detailed effect to the implementation modalities of the finalised 2018 Mining Charter. These regulations should give content to the detail of the final 2018 Mining Charter, so as to ensure that the Charter’s provisions are legally enforceable, administratively implementable and capable of being monitored and evaluated (audited) by government on a quarterly or by-annual basis. Said regulations should also impose sanctions, which should include enabling government to take appropriate interventions steps; and in appropriate cases, impose sanctions. The 2018 Mining Charter Regulations must also enable government to monitor and evaluate compliance on a quarterly or half-yearly basis. They should also specify the scorecard targets and concrete performance indicators, expected outputs, outcomes and impacts, detailed reporting, and the taking of remedial steps, if and when required.

- (b) Wide-ranging inclusive consultation with all stakeholders (including, but not limited to, mining communities, sending communities and landholding communities) on the 2018 Mining Charter Regulations.
- (c) Finalisation of the 2018 Mining Charter Regulations.

3. Publication of the final Mining Charter and the 2018 Mining Charter Regulations by means of Notice in the *Government Gazette*.

**We would like to give the assurance that we remain committed to continue participating in this process, and would be profoundly honoured if the Government of the Republic of South Africa were to consider involving us in all its endeavours aimed at finalising the Mining Charter and the drafting of concomitant 2018 Mining Charter Regulations. To that extent, we would welcome the opportunity to provide technical, substantive and legal drafting support to the Department of Mineral Resources on the activities outlined in this memorandum, as well in respect of any other related matter.**



Signed: Prof Hanri Mostert  
on behalf of the Drafting Team

Cape Town, 31 August 2018

