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Aligning the mining charter with the new empowerment codes

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With the Mineral and Petroleum Resources Development Act (MPRDA) having been in effect for two years this month, Mining Weekly takes a step back to examine the effect the legislation has had on the local mining sector and the progress made in achieving the goals set out in the Act itself (see fact box).

According to the Department of Minerals and Energy (DME), the purpose of the MPRDA and the new-order rights regime can be summarised as substantially and meaningfully expanding opportunities for historically-disadvantaged South Africans (HDSAs); and promoting employment, socio-economic development, security of tenure and sound environmental management. However, questions remain over the extent to which the MPRDA and its accompanying transformation charter are effecting these changes, as well as how the requirements of the Act and charter will stand up to the Department of Trade and Industry's (DTI's) soon-to-be-finalised broad-based black economic-empowerment (BEE) codes of good practice (COGP).

The Act in effect uses the change in the mineral-rights regime (whereby all rights reverted to State control) as a carrot to induce miners and explorers to comply with transformation requirements, in order either to receive new rights or to convert their old rights into 'new order' rights.

In this regard, law firm Cliffe Dekker director Kevin Lester says that some progress is being seen, in that, with a number of rights conversions having been awarded (albeit barely a handful), a consensus is beginning to emerge with regard to what the DME wants to see from applications.

Despite some criticism from the industry over delays and requirements uncertainty, the DME also seems to be showing incremental improvements in efficiency.

This is notwithstanding Deputy Minister Lulu Xingwana's tirade last month, in which she harangued the industry – on both sides of the BEE coin – for making meaningless empowerment deals, attaching conditions that were contrary to the spirit of South Africa's new mining laws, and, in the case of black entities, for selling mining rights to the highest bidder.

"We have now learned to take all BEE deals with a pinch of salt. We intend to get to the bottom of these tricks and also on top of them," she warned enigmatically.

The application process for the conversion of mining rights is generally lengthy and consultative, with continued engagement between the company and the DME, and takes at least a year.

Companies which have already received rights conversions include Harmony Gold, AngloGold Ashanti, Sallies and Diamond Core Resources.

Interestingly, while the deadline for conversion of existing mining rights to new-order rights is April 2009, by mid-April this year, the DME had received only 320 applications for conversion.

The deadline for prospecting-rights conversions – which are less time-consuming at only six months – was the end of last month.

By mid-April, the DME had received 4 400 applications for new prospecting rights but only 320 applications for conversion.

Ownership stealing the limelight

One of the biggest problems with the mining charter, suggests Lester, is that too much emphasis is

placed on empowered ownership – with an industry target of 26% by 2014 – and not enough on the other elements of BEE.

Aside from the ownership requirements, the only other concrete objective is the 40%-HDSAs-in-management target.

“There is nothing for skills, employment equity, enterprise development and so on,” says Lester.

While companies are encouraged to implement broad-based BEE policies across the scope of their operations, a lack of firm targets allows for tokenism in many cases.

This could pose a problem if mining companies were, in the future, compelled to comply with the COGP.

Nonetheless, Lester adds that there is “no question that the mining sector has created a fair deal of value through BEE”.

Anglo American, for example, has set an example with its enterprise-development arm, Anglo Zimele, which it has integrated into its supply chain.

In employment equity, the industry has done well at a top management and director level, and obviously along the lower echelons, “but the ham in the sandwich is still very pale”, quips Lester.

This is confirmed by the results of a survey conducted recently by local executive-search group Landelahni.

CEO Sandra Burmeister says that the research indicates that the mining industry continues to trail other South African sectors when it comes to employment equity.

In 2005, the mining sector, which was the first to conclude and gazette a broad-based BEE charter, had black representation of only 18% in top management (overall for the country was 23%), 29% in senior management (overall 28%) 27% in professional and middle management (overall 53%) and 45% in skilled labour (overall 56%).

While the number of non-engineering black and white executive directors in the mining industry grew significantly between 2001 and 2004, the ratio between black and white remained static at around 13%.

Aside from an increase in non executive director representation, from zero (0,05%) in 2001 to 37% in 2006, the only other noteworthy improvement was at mine-manager level, where, in 2005, there were 11 HDSAs, compared to two in 2001.

Further, at corporate, or ‘head office’, level, most black and women employees were in support positions, such as human resources and communications, Burmeister says.

And in regard to the other elements included in the mining scorecard – skills development, migrant-labour policies, community development, housing, procurement policies and bene-ficiation – the progress, while real, has been, at best, unremarkable.

Big deals, big names

Since the gazetting and implementation of the MPRDA and the mining charter, several large-scale, high-value trans-actions at equity level have been undertaken by key industry stakeholders.

In fact, between January 2000 and November 2005, BEE deals worth some R50-billion were concluded in the local mining industry.

To date, the biggest transaction, by value, was undertaken by Anglo, Kumba and Eyesizwe, which announced their R16-billion deal in October last year.

However, there has been concern that, in the rush to comply, some of the deals may not have been optimally structured, both for shareholder value and to ensure that real empowerment takes place.

Many mining empowerment deals take place at asset level (that is, the BEE partner buys into a mine or project, rather than the company itself), and there have been intimations from some market watchers that most of these structures, when stripped down to basics, could be labelled as fronting.

“When BEE deals take place at asset level, particularly in mining, a large portion of the value chain is lost,” an analyst who did not wish to be named told Mining Weekly.

Further, while the high-profile transactions have otherwise proved reasonably successful, small- and mid-cap miners have had mixed fortunes.

After an initial influx of smaller empowered companies to the industry in 2004, the pace has since slowed dramatically and a number of these companies are no longer participating in the local mining industry.

Access to finance continues to pose a problem for new entrants, and the extended period before any return on investment is seen, owing to the long-term nature of the industry, proves a further deterrent.

The local sector has also been criticised for drawing too heavily from a small pool of (well-known) names when sourcing empowered partners.

Government pressure has been patent for miners to partner with less prolific figures and to include broad-based ownership schemes in the transaction.

Minerals and Energy Minister Lindiwe Hendricks last year went as far as to praise gem-miner De Beers for ensuring that its partner, Ponahalo Investments, was “not made up of the usual suspects”.

Industry has responded to government pressure, but the moves have prompted a backlash from certain parts of the market, which believe that the so-called ‘black oligarchs’ are being unfairly disadvantaged.

Lester also points out that the mining industry has been instrumental in creating a number of the successful black investment groups, business people and entities, including Patrice Motsepe (African Rainbow Minerals), and Tokyo Sexwale (Mvelaphanda) and, indirectly, Shanduka.

“One can draw the distinction between so-called ‘old empowerment’ of the late 1990s and ‘new empowerment’ of the past few years, where old empowerment was undertaken for show and was not much more than a token.

With new empowerment, there is more emphasis on how the new partners will actually bring operational and financial value.

“We need to remember that the mining sector has created a large capacity inside the new empowerment environment,” says Lester.

This, in turn, has allowed for a spillover, which other sectors are now taking advantage of, he points out.

Codes convergence looms

There has been some edginess from the industry and market watchers over what implications the COGP, once gazetted, will have for the MPRDA and especially large-scale empowerment deals which have already been finalised to comply with the sector charter but may not measure up to the DTI’s scorecard requirements.

Lester informs that there was a tentative agreement reached in April last year, between the DTI, the DME and the Chamber of Mines, to the effect that the mining charter be left alone until the rights conversion process is concluded.

In the meantime, the miners were requested by the DTI to bring their procurement and enterprise-development policies in line with the spirit of the codes.

At the moment, only the codes of ownership and management are final and the remaining five elements of the scorecard, which fell into the second phase of the codes of good practice

development process, will only reach Cabinet by July.

It is anticipated that the DTI's final gazetted versions will emerge sometime between June 2006 and January 2007.

"Simply put, the four impacts of the BEE Act on the mining industry are on procurement (government's procurement policy), licensing, the sale of previously-State-owned assets (which would presumably include mineral rights) and public-private partnerships," Lester says.

He says that, while the Chamber had appeared at the April meeting to want to push for exemption from these four requirements, it seems that the DTI views the MPRDA and the mining charter as only governing licensing aspects of the industry.

In this scenario, all other interactions with government would be governed by the COGP.

"So, for example, when **State-owned power utility** Eskom buys coal, then the procurement requirements of the COGP would presumably be applied." New rights applications (once the conversion process closes), procurement and public-private partnerships are expected to be especially problematic areas if (or when) a process begins to reconcile the codes and the mining charter.

Still, Lester adds that all the current arguments on the subject may really be something of 'a storm in a teacup', provided the mining sector is committed to the convergence process.

In the Financial Mail-Empowerdex Top Empowerment Companies 2006, there are no miners in the top ten listed companies ranked by empowerment, but there are four in the top thirty – Merafe Resources (17), Harmony Gold (20), Kumba Resources (25) and AngloGold Ashanti (28).

One of the more conspicuous glitches is the discrepancy in the way in which the charter measures ownership, compared with the COGP.

"Most of the common ownership structures in the mining sector would probably be diluted by some 20% to 30% if the codes were applied," Lester indicates.

For example, many employee share-ownership programmes in mining companies include non-HDSA participants, who are not always credited in the codes.

There is also the tendency among miners to use elaborate structures of 51% ownership carry-throughs, but this is only allowed once by the codes.

"There will undoubtedly be an immediate dilution in the level of recognition for these ownership structures," says Lester.

The codes also place much more emphasis on the inclusion of black women than the charter does, and the charter also appears to recognise control rather than economic value, while the codes present a more balanced set of requirements.

Further, of the big mining deals, a significant proportion of the empowerment partners are still significantly in debt, while, of the 20 ownership points available in the DTI's scorecard, seven of these relate to whether the shares have been paid for.

Further, Lester argues that the high-capital nature of the mining sector, like the financial sector, should merit a decrease in the ownership target.

"There can be no doubt that 25% ownership under the codes is a very different requirement under the charter," he cautions.

At the end of the day, however, Lester believes that, aside from ownership, employment equity and procurement, the industry is not really that far behind what would be required by the COGP.

"It's a little as though we are changing from the imperial system of measurement to the metric and everyone is wondering whether this table is still going to be the same size by the time we are

finished,' he says.



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