



Legislating social responsibility and the standing of the Mining Charter in achieving this aim

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In South Africa where investment in infrastructure and communal amenities can significantly improve the quality of living of ordinary people, there can be little resistance to the need to legislate social change and no surprise at the importance of the Mining Charter.

The South African mining industry has a social impact

More than 500 000 people are employed in the South African mining industry. In most instances, mining operations are situated in remote areas with under developed infrastructures and often provide the only source of formal employment in these areas.

As a rule of thumb, for every one person employed in the mining industry, eight to ten people benefit economically from such employment. Therefore, its overall economic value and the mining industry's potential to make meaningful, positive changes to the social wellbeing of communities, can scarcely be discounted.

Mining resources are non-renewable in nature and it is generally accepted that the economic benefits associated with the exploitation of these resources should be balanced with the social and environmental needs of society.

It follows that in a country with deep mining roots and a need for significant social upliftment, eyes turn to the mining industry to breach the gap and to bring about an immediate improvement, which often cannot be achieved as quickly by other means.

Does the MPRDA have a social aim?

One of the objects expressed in section 2(h) of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (MPRDA) is to promote social and economic development and so to give effect to Constitutional principles.

The new mineral law dispensation in South Africa has brought about a fundamental paradigm shift. The mineral wealth of the country belongs to the people of South Africa and the State is now the custodian thereof. This is a significant departure from the Roman-Dutch principles of private ownership and exploitation of mineral resources.

As an inevitable consequence of this custodianship, the Minister has the duty to administer the mineral dispensation with a social conscience. She is expressly tasked by section 3(3) of the MPRDA to ensure that there is sustainable development of the country's mineral resources while promoting economic and social development.

It is most significant that sustainable development, economic participation and social upliftment are given top priority. These concepts are interlinked in any responsible

mineral dispensation. To neglect the one is to ignore the others.

In line with this aim, section 100 of the MPRDA provides that the Minister must ensure that a broad based socio-economic empowerment charter is developed which will set the framework for entry of historically disadvantaged South Africans into the mining industry as well as to give effect to the Government's objectives of redressing social inequalities. It is expressly provided that the Charter must set out how the objectives expressed in section 2 of the MPRDA will be achieved.

The aim is clear – the Minister is tasked with putting together a Charter that will address, amongst other aims, social disparity which arose because of the exclusionary policies and practices of the past; and ensure that the exploitation of the country's mineral wealth does not only benefit the select few, but that a devolution of social development results.

The Charter was amended and in many instances re-written in September 2010 following consultation with industry stakeholders. Unlike its predecessor, the Charter has become more prescriptive in its aims and it would appear more powerful in demanding compliance therewith.

What is the standing of the Charter in legislating social development?

In much the same manner as the Minister is empowered by section 107 of the MPRDA to publish regulations, she is empowered and compelled to publish the Charter.

It can be argued that the Charter is no more than a policy document containing the goals to be achieved by the mining industry in the foreseeable future. But this ignores the flavour of subordinate legislation added to the Charter – particularly in its revised form. It is accepted in certain circles that the Charter has the standing of law. The Charter itself provides that any failure to comply with its provisions will render the mining company in breach of the MPRDA.

Very often, conditions of economic empowerment of mining right holders are written into their mining rights and so become conditions thereof. Section 47 provides that where right holders breach the MPRDA or any condition of such rights, the Minister may revoke the rights. Before the Minister may consider a revocation of rights, she must follow due process.

Although one can split hairs as to whether compliance with the Charter is included in the concept of compliance with the MPRDA, it is an argument without an audience. As the issuing and renewing of rights under the MPRDA fall within the power of the Minister, and Government clearly wants to see transformation and social upliftment in the mining industry, any mining company who discounts the Charter does so at its peril.

What social responsibilities are required under the Charter?

Two of the most prominent social aims of the Charter are mine community development and housing and living conditions of mine workers. It is not insignificant that these concepts were expressly incorporated into the Charter. Considering that the South African mining industry is labour intensive and that it impacts greatly on the communities in which it operates, giving priority to such development is not out of place.

The Charter defines a community to be a coherent, social group of persons with interests or rights in a particular area of land and which they exercise communally in terms of an agreement, custom or law. A mine community is the community where the mining takes place and includes the labour sending area.

Mine communities form an integral part of mining development. The Charter's aim is to ensure a meaningful contribution towards community development is made. Force is given to this principle by expressing this obligation in what is coined, "the social licence to operate". One understands that if the State is the custodian of the minerals and it must

administer the mining of those minerals for the benefit of all South Africans, it is not too much of a leap to regard this interplay as a social contract between the mining company and its community.

And so the Charter underscores the need for community development. Mining companies are required to identify projects for their contribution to community development and the financial investments therein must be proportional to the size of the mining investment.

In addition to community development, the Charter highlights that human dignity and privacy for mineworkers are the hallmarks to enhance productivity and to expedite transformation in the mining industry in terms of housing and living conditions. Mining companies are compelled to improve standards of housing and living conditions - and here the Charter gets specific in requiring the following by 2014:

- ▶ convert and upgrade hostels to family units;
- ▶ attain an occupancy rate of one person per room; and
- ▶ facilitate home ownership options for mine workers.

Making a real difference

So often we are bombarded by the airy fairy promises of change by politicians - promises that are forgotten almost as quickly as the ink dries on the ballot paper.

But in a country where improvements to infrastructures and communal amenities can bring an immediate, direct and significant change to the daily existence of ordinary people, the aims of the Charter do not seem out of place. One cannot understate the mining industry's ability to bring about that change directly and where it is most needed.

So, as much as mining is our past, it holds the key to our sustainable future.

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Wessel Badenhorst is a director in Werksmans' Commercial Department. He has in-depth expertise in the increasingly complex field of mining law, with specialist knowledge of mining health and safety, environmental and employment legislation as well as mining-related litigation. Wessel is well-versed on the intricacies of the Mineral and Petroleum Resources Development Act (MPRDA); the Mine Health and Safety Act; the National Environmental Management Act (NEMA); the National Water Act; and the Atmospheric Pollution Prevention Act. He is also able to comment on trends in mining-related fatalities, and health and safety best practice. Wessel has BCom and LLB degrees from the Universities of Johannesburg and South Africa respectively. He also practiced as an advocate at the Johannesburg Bar for number of years.

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