mineral resources

Department:
Mineral Resources
REPUBLIC OF SOUTH AFRICA

MINING CHARTER IMPACT ASSESSMENT REPORT

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EXECUTIVE SUMMARY

On the 11th of October 2002, the erstwhile DME (now DMR) together with mining industry stakeholders, including the Chamber of Mines, South African Mining Development Association and the National Union of Mine Workers signed the Mining Charter. Stakeholders agreed to meet after five years to review the progress and to determine what steps, if any, need to be made to achieve the objectives of the Mining Charter.

The DMR has undertaken this assessment to determine the extent to which the objectives of the Mining Charter have been achieved. In particular, the report records progress made against each element of the Charter. Contrary to the good progress made in terms of compliance with HDSA participation in management, examination of other elements paints a gloomy picture.

Although the findings of the report indicate that the Mining Charter is a useful tool to effect transformation, they also illuminate challenges and opportunities in as far as the effective implementation of the Mining Charter is concerned. The shortcomings identified in the report necessitate an urgent need for review.

1. PREAMBLE

This report presents the main findings of the assessment of the Mining Charter conducted by the DMR, with a view to strengthening the effectiveness of the Charter as a policy instrument to effect the transformation of the Mining sector in South Africa. The report provides a snapshot of the South African Mining Charter, details the impact of the Mining Charter or its lack thereof to address the challenges of transformation of the mining sector in South Africa.

In addition, the report delineates the historical background to the South African Mining Charter, spells out the relevant legislation for mining of mineral resources, outlines the statistical account of the progress made by the mining houses with regard to the nine elements of the Mining Charter intended to facilitate the transformation of the mining sector, teases out the contesting relationship between the State and the Mining Sector in South Africa and outlines the limitations or grey areas of the Mining Charter that often leads to different interpretations. In so doing, and while cognisant of what is in the general interest of South Africa and its people, the analysis of limitations provides a scope for solutions towards the transformation of the South African Mining sector.

2. THE MINING CHARTER IN CONTEXT

The South African government, like many other governments globally endowed with abundant mineral resources, has developed market-driven policies to accelerate the pace of the transformation of the mining Sector. Mineral resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans. Mining companies in South Africa have to apply for rights (and permits) to the State for exploration and exploitation of the mineral resources. As a result, the Mining Charter attaches cautiously thought-out conditions meant to accelerate the transformation of the mining sector, which right holders must comply with in order to continue participating in the country's mineral and mining sector. These conditions are imbued with the importance of operating in solid and tested policy directives aimed at avoiding the folly of potential harm through policies that have the propensity to freeze South Africa's economy into a catatonic state of zero progress.

The South African Mining Charter provides for the aspiration that for any meaningful transformation to be attained in the mining industry, transformation should actually permeate through the ranks of the international market as well in the manner that it be a consequence of a broad based economic model for the benefit of all South Africans and for the continued sustenance of the international investor confidence. Therefore, the South African Mining Industry does not operate as an island in isolation from the South African economic landscape.

Recognising that mining was used as a tool to perpetuate the inequalities in favour of a select group in a manner that precluded HDSA's from participating in a meaningful way within the broader South African economic pie in mineral resources, the South African Mining Charter was developed and adopted as a tool to effect broader transformation of the mining sector.

The creation of the Mining Charter in the main is intended to avert the status quo where HDSA's are generally considered as a repository for cheap labour. On the other hand, management and company ownership was a reserved privilege benchmarked along racial lines in South Africa, and to be precise in favour of the minority white South Africans. Therefore, the Mining Charter is derived from the same values of the supreme law of the country, which is, the Constitution of the Republic of South Africa as it is more vociferous on the subject of equality, in inter alia section 9 on equality and discrimination (in the Bill of rights) that talks to redressing historical and social inequalities.

Section 100(2)(a) of the Mineral and Petroleum Resources Development Act [MPRDA] provides that the Minister, inter alia, *"must within six months from the date on which this Act take effect develop a broad based socio economic empowerment charter that will set the framework, targets and time-table for effecting the entry of Historically Disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources".*

To give effect to section 100 (2) (a) and thus promote transformation in the mining sector, stakeholders have developed the Mining Charter which seeks to achieve the following six objectives:

- Promote equitable access to the nation's mineral resources to all the people of South Africa;
- Substantially and meaningfully expand opportunities for HDSA's including women, to enter the mining and minerals industry and to benefit from the exploitation of the nation's mineral resources;
- Utilize the existing skills base for the empowerment HDSA's;
- Expand the skills base of HDSAs in order to serve the community;
- Promote employment and advance the social and economic welfare of mining community and the major sending areas; and
- Promote beneficiation of South Africa's mineral commodities;

The Mining Charter introduced nine (9) elements (incorporating relevant legislation) aimed at redressing past racially discriminatory practices that were perpetuated during the apartheid era to exclude the HDSA's from actively participating in the ownership and management of the mining sector. Stakeholders have agreed to create an enabling environment for the empowerment of the HDSA's by adhering to the following:

- Human resource development (*Skills Development Act 97 of 1998)*
- Employment equity (*Employment Equity Act 55 of 1998*)
- Migrant labour (*Immigration Act 13 of 2002)*
- Mine Community development
- Housing and living conditions
- Procurement (*Preferential Procurement Policy Framework Act 5 of 2000*)
- Ownership and joint venture (*Competition Act 89 of 1998*)
- Beneficiation
- Reporting

Stakeholders recognised that the achievement of the objectives set out in the Charter entails continuous engagement on reporting, monitoring and evaluation and further agreed to review the Charter if required.

3. ANALYSIS OF PROGRESS AGAINST CHARTER ELEMENTS

As a vehicle to redress the socio-economic imbalances of the past, the Mining Charter, as a negotiated instrument, identified nine basic elements to effect the transformation of the South African mining industry. The analysis is informed by the DMRs internal inspection processes and findings from an independent assessment conducted by a consultancy group appointed by the Department. The question that this section answers is as follows: What progress has been made towards the attainment of the objectives of the Charter?

3.1 Human Resource Development

The mining industry is knowledge based, thus requiring greater emphasis placed on skills development. The Charter recognised that the South African labour market does not produce enough requisite skills for the mining industry. Consequently, stakeholders agreed to work together in addressing the inherent skills deficit and adopted measures to effect skills development which would be measured as follows:

(i) Has the company offered every employee the opportunity to be functionally literate and numerate by the year 2005 and are employees being trained?

(ii) Has the company implemented career paths for HDSA employees including skills development plans?

(iii) Has the company developed systems through which empowerment groups can be mentored?

In respect of the abovementioned measures, the assessment yielded the following results:

Functional Literacy: An average of 17.1 percent was achieved.

Career Pathing: An average of 17.1 percent was achieved.

Mentoring of empowerment groups: An average of 11.4 percent was achieved.

The assessment of this Charter element further indicates innate inhibitions against progress on skills development, which include, albeit not limited to lack of management support for staff participating in Adult Basic Education and Training (ABET), as evidenced by recalling of staff from classes to accelerate production, loss of bonuses for ABET attendees and classes arranged after working hours, typically non-proximal to employees residences. Consequently, the prevailing conditions are less attractive for employees to enrol on the programs of skills development. The findings further indicate that the bulk of ABET training beneficiaries are mostly characterised by non-South Africans.

Additionally, investigations of the career pathing and mentoring of empowerment groups measures indicate a disconnect between the plans submitted to the Department of Mineral Resources and actual implementation. The bulk of interviewed mentors and protégés of these programs purport to be oblivious to the plans, as a result of which their participation is limited. Additionally, career plans are typically focussed on development of senior managers at the exclusion of lower level employees.

The companies that are succeeding in the implementation of agreed measures of the HRD element tend to provide sufficient resources and incentives for training.

The continuing paucity of skills in the industry, coinciding with the longest commodity boom, as corroborated by perpetual utterances by the industry captains, bears testimony to the lack of investment in critical skills development. While the original intent of the Charter was to use and expand the existing skills base to contribute to sustainable development of the mining industry, it appears that the implementation of this element has focussed on basic skills development at the expense of developing the requisite skills to effect meaningful transformation of the industry.

Government created the Mining Qualification Authority (MQA) to drive skills development in the mining sector, in terms of the Skills Development Act No. 97 of 1998. Furthermore, the MQA gives credence to the objectives of the Charter by executing Government's undertaking to provide training in mining and entrepreneurial skills. The MQA is also mandated to conduct skills audits, in partnership with the stakeholders, on the basis of which comprehensive skills development strategies were to be developed. The apparent lack of skills resulted in South Africa's mining industry not benefiting nearly as optimally from the commodity super-cycle, owing to poor investment in the development of core skills.

3.2 Employment Equity

As cornerstone of apartheid discriminatory employment practices, the mining industry remained, to a large extent, unreformed at the time of the promulgation of the Charter. Consequently, stakeholders deemed it appropriate to include Employment Equity as an element of the Charter to effect a demographically representative workforce in the mining sector, consistent with the central tenets of the Employment Equity Act No. 55 of 1998 and the Basic Conditions of Employment Act No. 75 of 1997, as amended.

Stakeholders agreed to cooperate in facilitating the achievement of a representative workforce, and adopted the following measures:

(i) Has the company published its employment equity plan and reported on its annual progress in meeting that plan?

(ii) Has the company established a plan to achieve a target for HDSA participation in management of 40percent within five years and is implementing the plan?

Has the company identified a talent pool and is it fast tracking it?

(iv) Has the company established a plan to achieve the target for women participation in mining of 10percent within the five years and is implementing the plan?

Employment Equity Plans and reports

Only 37 percent of mining companies have developed Employment Equity (EE) plans, while a lesser number of companies have published these plans. There is no evidence of EE reports (either audited or unaudited) submitted to the Department of Mineral Resources. These findings demonstrate the intransigence and lack of commitment by the industry to transform.

HDSA participation in management

An average of 26 percent of mining companies achieved a threshold of 40 percent of HDSA participation at management level, while the average achievement for the industry is 33 percent. It has to be noted that HDSA participation includes white women participation, which currently stands at 10 percent. However, it was further established that a large number of HDSA's occupy middle management positions while an insignificant number of HDSA's are in key decision making positions.

Women participation in mining

The results reveal that only 26 percent of mining companies have complied with the 10 percent women (inclusive of white women) participation in mining. However, the average rate of women participation is 6 percent, the bulk of whom are represented in support functions with less than 1 percent in core management positions, a large proportion of which represents a preserve for white women.

Talent pool identification and fast tracking

An average of 83 percent of mining companies have not identified talent pool, while only 17 percent are in the process of fast tracking those identified for management positions.

Employment patterns in the mining industry reflect that the majority of HDSA still occupy lower levels of employment and the targeted 40 percent of HDSA participation in management, as espoused in the Charter, has not yet been achieved.

The Human Rights Commission report dated 4th November 2008 confirms the afore-mentioned findings relating to the lack of compliance with the employment equity targets in the mining companies, in terms of race and gender representations. This observation is corroborated by the findings of the 9th Employment Equity Commission report, which highlight that white South Africans (female and male) continue to occupy top management positions and earn more than blacks regardless of skills and experience.

The assessment further revealed the prevalence of racially discriminatory practices in the mining industry, which impacted negatively on the progress towards attainment of equitably transformed workplace.

The lack of investment in HDSA skills development by the industry has created a limited pool of expertise required to effect meaningful gender and racial representation. As a result, retention of a few skilled HDSAs in companies has proven to be a challenge. There is evidence that progress on employment equity remains minimal, with most mining companies developing equity plans for regulatory compliance purposes.

3.3 Migrant Labour

Since the mining industry was developed on the blood and sweat of both South African and migrant labourers, the signatories to the Charter deemed it necessary to make special provision to ensure non discrimination of migrant labourers.

The following measure was adopted to assess progress made in regard to this element:

Has the company subscribed to government and industry agreements to ensure non-discrimination against foreign migrant labour?

This element appears to have been significantly complied with, consistent with the objects of the Immigration Act No. 13 of 2002. This is illustrated by the benefits enjoyed by immigrant workers in terms of skills development. However, evidence of agreements to promote non-discrimination entered into between companies and government was not readily available.

3.4 Mine Community Development

Minerals exploration and mining activities are located in remote and under-developed areas of the country. Mining activities in South Africa, which extend beyond a century, have led to the proliferation of mining ghost towns, due to poor mining practices of the past' which were inconsistent with sustainable development principles. To ensure the achievement of the triple bottom line, particularly the socio-economic dimension, stakeholders agreed to pursue community upliftment programmes to support communities within which mining takes place as well as labour sending areas. It was agreed that this element would be measured as follows:

Has the company cooperated in the formulation of integrated development plans and is the company cooperating with government in the implementation of these plans for communities where mining takes place and for major labour sending areas?

Has there been an effort on the side of the company to engage local mine community and labour sending area communities? (Companies will be required to cite a pattern of consultation, indicate money expenditure and show a plan)

The assessment indicates that 63 percent of companies engaged in consultation processes with communities, while 49 percent of companies participated in the formulation of Integrated Development Plans (IDP) in mine communities. However, only 14 percent of companies extended their participation in the development of IDPs for labour-sending areas. A mere 37 percent of companies showed proof of expenditure in accordance with commitments set out in approved Social Labour Plans (SLP). The rest of the companies implement corporate social responsibility projects and report these as part of their contribution to IDPs.

Despite seemingly high compliance levels in terms of community consultation, there is no evidence of a direct link between the proposed and implemented community development projects as far as the needs of affected communities are concerned. This is a result of inefficient consultation process, poor or lack of collaboration with communities and lack of alignment to established Local Economic Development (LED) frameworks. The disjuncture between consultation and collaboration with affected communities minimises the developmental impact of the mining industry on communities, as corroborated by the poor correlation between SLP commitments and related expenditure.

The assessment further identified the narrow empowerment approach of handpicked individual disguised as representing the broader interest of host communities.

The industry expressed a need for a uniform approach to SLP models countrywide, contrary to the unique development requirements of every community. This proposal contradicts international best practice of the same mining companies operating in developed countries where significant investments are made towards community development projects, which address specific needs of those communities prior to the commencement of mining activities.

A model of integrated resource management, which is characterised by mining companies intending to develop projects within the same proximity through pooling of their respective resources in pursuit of high impact development within the host communities, has been proven successful.

3.5 Housing and Living conditions

The appalling living conditions under which black mine workers were made to live before the advent of democracy led to a myriad of social ills, including the destruction of the social fabric of communities, substance abuse, as well as the contraction and spread of diseases, particularly HIV/AIDS. These conditions necessitated stakeholders' intervention to promote humane living conditions for affected workers. To address the situation, stakeholders agreed to implement redress mechanisms which would be measured as follows:

For company provided housing has the mine, in consultation with stakeholders established measures for improving the standard of housing including the upgrading of hostels, conversion of hostels to family units and promoted home ownership options for mine employees? Companies will be required to indicate what they have done to improve housing and show a plan to progress the issue overtime and is implementing the plan?

For company provided nutrition has the mine established measures for improving the nutrition of mine employees? Companies will be required to indicate what they have done to improve nutrition and to show a plan to progress the plan over time and is implementing the plan?

The assessment indicates that 26 percent of the mining companies have provided housing for the employees, while 29 percent have improved the existing standards of housing. The results further indicate that 34 percent of companies have facilitated employees' access to home ownership through various schemes. In addition, 29 percent of companies have offered nutrition to employees or have established plans to effect improved nutrition. The majority of mines have moved away from the hostel systems, as a result of which 9 and 6 percent of companies have achieved upgrading of hostels as well as conversion of hostels to family units, respectively. The mining industry has made reasonable progress towards the creation of descent housing and living conditions for mine workers through the various schemes. However, despite the reduction of the number of occupants from 16 to 4 persons per unit, this occupancy rate remains unacceptably high. Accordingly, inspection of most hostels further revealed unhygienic living conditions that hostel dwellers are subjected to. The upgrading as well as the conversion of existing hostels into family units remains unacceptably low.

Less than a third of the mining companies make nutritional provision for their employees. Inspections have revealed that nutrition is typically outsourced to service providers with inadequate expertise, characterised by former employees of the mining companies. The assessment also revealed a conspicuous absence of adequate facilities for employees to prepare their own meals.

Further, the assessment found that most mining companies have resorted to giving workers “living out allowances”. The unintended consequence of the aforementioned is the proliferation of informal settlements. It is common knowledge that informal settlements in South Africa often provide a conduit or cesspool of crime, substance and alcohol abuse, and the spread of diseases.

The housing and living conditions standard gazetted in April 2009 was developed by the Department of Mineral Resources (DMR) in consultation with industry stakeholders and the Department of Housing (Housing Act No. 107 of 1997). This policy sets out various standards and guidelines to enable industry to accelerate the attainment of requisite levels of humane living conditions for mining sector employees, consistent with international best practices.

3.6 Procurement

While political freedom has been achieved in South Africa, economic freedom remains elusive to the majority of its citizens. South Africa continues to display two economies that are divided along racial lines. Procurement of capital goods involving huge sums of capital funds managed and dispensed by the mining industry continues to be dominated by non HDSA companies. The procurement element of the Charter is a deliberate intervention by stakeholders to create new avenues for HDSA supplier participation in the mainstream economy, to bridge the divide between the two economies, as espoused in the Broad Based Black Economic Empowerment Act No. 53 of 2003. The mining stakeholders adopted this element of the Charter and agreed to the following measures:

Has the mining company given HDSA’s preferred supplier status?

Has the mining company identified current level of procurement from HDSA companies in terms of capital goods, consumables and services?

Has the mining company indicated commitment to a progression of procurement from HDSA company over a three (3) to five (5) year time frame in terms of capital goods, consumables and services and to what extend has the commitment been implemented?

The assessment illustrates that 89 percent of companies have not given HDSA companies preferred supplier status, while 80percent have not indicated commitment to the progression of procurement from HDSA companies over a 3-5 year time-frame. The current reported level of procurement from HDSA companies averages a mere 37 percent of companies, although companies could not always ascertain the ownership and management control status of their HDSA suppliers.

Procurement of capital goods, consumables and services managed and dispensed by the mining companies continues to be skewed in favour of their preferred untransformed suppliers to the detriment of HDSA companies.

HDSA companies largely benefit from procurement contracts for the provision of consumables and non-core services such as providing cleaning facilities, toilet paper and other trivial activities.

The value of HDSA procurement expenditure as a percentage of total procurement remains below 3 percent, consistent with the insignificant provisions of preferred supplier status to HDSA companies. There is no evidence that stakeholders have identified levels of procurement from the HDSA companies and developing HDSA procurement capacity as per their undertaking at the time of adopting the Charter. This demonstrates lack of commitment by mining companies to advance the procurement element of the Mining Charter. The pervasive resistance by the industry to meaningfully engage the services of HDSA companies continues to delay the achievement of broader economic freedom.

3.7 Beneficiation

Mineral value addition is a deliberate government intervention to facilitate a paradigm shift from a resource based to knowledge based economy. This intervention is premised on the comparative advantage assumed by the country from its mere endowment with mineral resources to developing a competitive advantage which should meaningfully contribute to the accelerated economic growth. Recognising the significant opportunity presented to South Africa by introducing mineral beneficiation programmes, stakeholders embraced the introduction of this element and agreed on the following measures:

Has the mining company identified its current level of beneficiation?

Has the mining company established its baseline level of beneficiation and indicated the extent that this will have to be grown in order to qualify for an offset?

Although the above measures have not been achieved, there has been pockets of local beneficiation of the country's mineral resources, albeit in an uncoordinated manner. To create an enabling environment to effect coordinated beneficiation in South Africa, Government has introduced the Precious Metals Act No. 37 of 2005 and the Diamonds Amendment Act No.29 of 2005, which led to the establishment of the South African Diamond and Precious Metals Regulator (SADPMR) and the State Diamond Trader (SDT). Further, the development of the beneficiation strategy has sought to create a broader framework to promote increased local value addition, consistent with other programmes of government such as the National Industrial Policy Framework.

The review of the Mining Charter presents an ideal opportunity to strengthen the beneficiation element of the Charter, which should be aligned to the country's mineral beneficiation strategy. South Africa should not permit continued exportation of mineral resources for beneficiation elsewhere, to the detriment of local skills development, creation of descent jobs, increased Gross Domestic Product (GDP) value addition per capita and contribution to economic growth.

3.8 Consultation, Monitoring, Evaluation and Reporting

Recognising that the achievement of the objectives of the Charter requires an ongoing process of consultation, monitoring, evaluation and reporting, stakeholders agreed on mechanisms to ensure that the objectives of the Charter are achieved. Mining companies further undertook to report on an annual basis, as per the provisions of section 28(2)(c) and section 29 of the MPDRA. The following measure was agreed upon by stakeholders:

Has the company reported on an annual basis its progress towards achieving its commitments in its annual report?

Assessment shows that 37 percent of companies have audited reports, while only 11 percent purport to have submitted their annual progress report to the DMR.

It is apparent that a large proportion of mining companies with audit reports has not subjected the Mining Charter compliance data to an independent audit framework. Accordingly, there is absence of coordinated mechanisms within the Department of Mineral Resources (DMR) to effectively monitor and evaluate progress against the Mining Charter targets on an annual basis. There is also lack of adherence by stakeholders to the provisions of section 28(2)(c) and section 29 of the MPRDA, as well as stringent enforcement systems.

The amount provided for in section 99 of the MPRDA as a penalty for non compliance with the provisions of section 28(2)(c) and section 29 of the MPRDA is preposterously inadequate.

3.9 Ownership and Joint Ventures

The perpetual marginalisation of the majority of South Africans, facilitated by the exclusionary policies of the apartheid regime, prevented black people from owning the means of production and from meaningful participation in the mainstream economy. As a result, the majority of South Africans still provide a source of cheap labour. This necessitated a deliberate intervention to redress this situation, in line with clause (3) of the Freedom Charter, which states that: "*The National wealth of our country, the heritage of South Africans shall be restored to the people. The mineral wealth beneath the soil… shall be transferred to the ownership of the people as a whole*". It is through the prism of this perennial document that the ownership element of the Mining Charter was adopted by all stakeholders to facilitate the transfer of ownership to HDSAs. Stakeholders adopted the following to measure compliance with this element:

Has the mining company achieved HDSA participation in terms of ownership for equity or attributable units of production of 15percent in HDSA hands within 5 years and 26percent in 10 years?

Upon the adoption of the Mining Charter, stakeholders made the following undertaking: "*The industry agreed to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5 years. Participants agreed that beyond R100 billion - industry commitment in pursuance of the 26 percent target, on a willing seller willing buyer basis, at fair market value, where the mining companies are not at risk, HDSA participation will be increased*".

The assessment revealed that the current net asset value of the South African mining industry averages R2 trillion, indicating that the 15 percent HDSA ownership threshold requires no less than R300 billion to accomplish (in 2009 terms). The industry's stated commitment of R100 billion to facilitate HDSA ownership represents 5 percent of the current net asset value of the mining industry, which falls far short of the agreed 15 percent empowerment target envisaged within 5 years. However, the assessment further recognises the limitations of the absolute value of commitment as well as the compounded annual growth of the industry's net value, which ought to have been factored in at the time of the commitment.

Analysis of the available data shows that aggregated BEE ownership of the mining industry has, at best, reached 9 percent. There are several empowerment vehicles that constitute BEE ownership, viz.: Women in Mining, Employee Share Ownership Schemes (ESOPS), Community Trusts, Anchor Partners and Special Purpose Vehicles (SPV). Regrettably, the reported level of BEE ownership is concentrated in the hands of anchor partners and SPV's, representing a handful of black beneficiaries, contrary to the spirit and aspiration of both the Freedom Charter and the Mining Charter.

Despite the noble intention of the empowerment vehicles (ESOPS and Community Trust) to effect the broad ownership transformation envisaged in the Mining Charter, a closer examination of these vehicles highlights the pervasive constraints presented in the form of non equitable distribution of benefits inherent in their implementation and such benefits being extended to non HDSA, which remains proverbially problematic.

The underlying empowerment funding model has resulted in the actual ownership of mining assets intended for transformation purposes being tied in loan agreements. Accordingly, the net value of a large proportion of empowerment deals is negative, due to high interest rates on the loan and moderate dividend flows, compounded by the recent implosion of the global financial markets. The rapacious tendencies of the capital markets have consistently thwarted the intended progress towards attaining the goals of transformation, as embedded in the Charter.

The assessment shows that the structure of most empowerment deals is insidiously effected at operational (mining rights) levels, which allows for ring-fencing of transformation at holding company level. Such undesirable practices perpetuate a culture and focus on regulatory compliance at the expense of fundamental transformation of the mining industry, including albeit not limited to deracialising the corporate profiles and ownership of mining companies.

The assessment also points to a structural malaise in BEE deals focussed solely on economic interest, which is not representative of the true ownership transfer of mining assets to HDSA's. As a result of these structural weaknesses, the BEE companies end up in an invidious financial position, as evidenced by the swift mass exodus of these companies, which coincided with the global financial crisis.

The realisation of the benefits of BEE deal-flows to HDSA beneficiaries is delayed by elusive structuring of these deals. The nature of most BEE deals is such that the repayment terms for the HDSA continue beyond the Life of Mine (LOM). There are often onerous conditions attached to agreements to discourage HDSA participation. A majority of empowerment deals are structured with a lifespan ending 2014, contrary to the object of this element, which sought to achieve these targets as a baseline of transformation. Some companies have used what they call the **"pool and share"** method, which is their own creation and features nowhere in the Charter. Through this method, established mining companies enter into joint ventures with black owned companies and each party brings resources into the deal based on the close proximity of their operations "geographically".

The profits are shared on the basis of who has what percentage of the reserves brought into the deal. Effectively, the BBBEE ownership in such an arrangement is based on how much reserves each party brings into the deal. In essence such companies are not empowered and should not claim credit on the basis of attributable units of production since they did not give up any of their reserves for the benefit of black owned company and their racial profile remains unaltered.

Lack of HDSA representation at empowering companies' boards limits their decision making authority and leaves them at the mercy of empowering companies. Consequently, HDSA companies are generally excluded from major decisions relating to investment/divestment and key policies that determine the future direction of the company.

The prevalence of fronting is both an insult and an indictment to the broader objectives of the Mining Charter. This unscrupulous practice sets back the transformation agenda of South Africa and must be condemned in the strongest terms possible. The surreptitious nature of fronting remains a scourge to South Africa's transformation agenda.

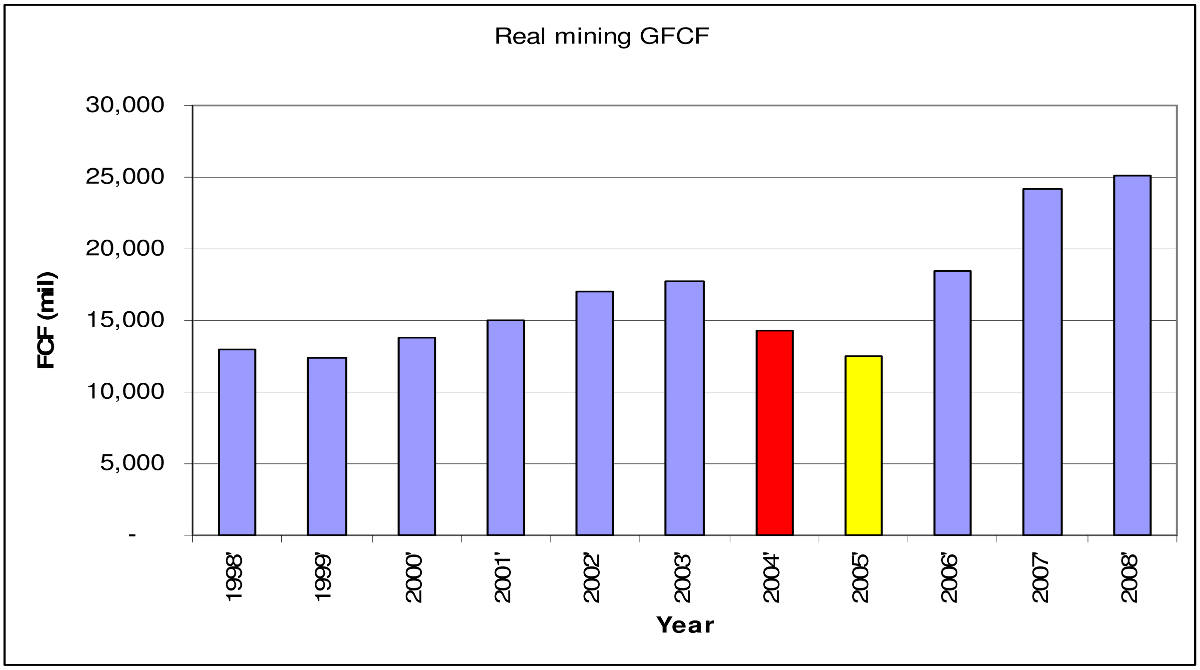
4. IMPACT OF THE MINING CHARTER ON ECONOMIC GROWTH AND EMPLOYMENT

The promulgation of the MPRDA and the implementation the Mining Charter in 2004, replaced the preceding mining regulatory framework which had locked mineral rights in private individuals (including juristic persons). The private individuals were characterized by the previously advantaged minority of South Africans and thwarted momentous prospects of foreign investment flows into the sector. The new regulatory framework vested the custodianship of mineral rights to the State.

The implementation of the Charter also coincided with a protracted declining trend in employment, which tracked the contraction in gold output. The 1986 official statistics of employment in the mining sector was 829 000, marking the beginning of the contraction in employment, which reached a trough of 449 000 in 2004, indicative of a cumulative job losses of 46 percent over this period. The implementation of the Mining Charter enabled diversification of the mining industry in South Africa in terms of a number of commodities mined, volumes produced, revenue generation for the country, especially export earnings which kept the country's balance of payment relatively stable and job creation. Currently, the sector employs 6% of the country's total labour force, with steady growth in employment under the new regulatory regime peaking at 519 000 by 2008 (annual employment growth averaged 4% from 2005 to 2008). However, this number decreased to 494 000 by June 2009, due to the current global financial climate, representing a cumulative loss of 25 000 (Quarterly Employment Statistics, June 2009, StatsSA).

The Gross Fixed Capital Formation (GFCF) in the mining industry declined by respective 20 percent and 12 percent in 2004 and 2005, due to uncertainty of the introduction of the Mining Charter, regional geo-political stability presenting new prospects for mining in competition with South Africa and the recovery of the Rand. The GFCF grew at a much faster pace averaging 24 percent between 2005 and 2008, once the confidence in the regulatory regime was attained.

Figure 1



During the first five years of the implementation of the Mining Charter (i.e. between 2004 and June 2009), the Department of Mineral Resources received over 22 000 applications for new mining rights, mining right conversions, reconnaissance permits and prospecting/prospecting rights, corroborative of the continued investor confidence in the mining sector, created by the new regulatory framework.

The contribution of the South African mining sector to the National Gross Domestic Product (GDP) correspondingly grew from R89 Billions in 2004, to R196 Billions in 2008.

The economic and employment statistics suggest that the new South African mining regulatory framework (the MPRDA and the Mining charter) has reinforced investor confidence in mining sector, contributory to systematic growth in economic performance and opportunities for creation of decent employment for South Africans.

5. CONCLUSIONS AND RECOMMENDATIONS

The first period of the implementation of the current Mining Charter coincided with the longest synchronised commodity boom ever experienced by the mining industry globally. The Charter was developed as a pre-cursor lever to effect sectoral transformation, aligned to the broader national transformation agenda. In developing the Mining Charter, the DME accommodated the diverse interests of various stakeholders, as they lobbied for the protection of their various constituencies.

As an agreement based on concessions by the various stakeholders, the Mining Charter is not without shortcomings. The ambiguity inherent in the current construct of the Charter elements has given rise to various interpretations, which afford the industry an opportunity to exploit intrinsic weaknesses. This has resulted in shocking levels of non compliance.

Consequently, the intended benefits flowing from the mining industry fall significantly below the expectations and aspirations of the majority of South Africans as intended by the Charter. To this extent, there is a degree of criticism levelled against the Mining Charter that in its current form, it is a blunt tool to address the broad based transformation agenda.

Although some of the elements of the Charter allude to the national objectives, there is a need to further align it to the developmental state agenda. However, this raises questions as to whether the state has utilised State Owned Enterprises for the maximum benefit of the nation and what needs to be done to ensure that such utilisation occurs.

It is therefore imperative that the Mining Charter be reviewed to ensure that it remains relevant and true to its original intent, and aligned to the Broad Based Black Economic Empowerment (BBBEE) Act No.53 of 2003 and the Codes of Good Practice championed by the DTI.

While the assessment of the Mining Charter demonstrates a measure of cumulative progress towards the attainment of its objectives as embedded in the elements, it also illuminates some deficiencies in the construct and mechanisms of implementation thereof. The juxtaposition of interpretation of the Mining Charter aligned to the score-card (measures) is blurry. Accordingly, the intent of some elements of the Charter is not adequately articulated. What follows delineates the current limitations intrinsic in the Mining Charter:

Lack of a definition chapter in the Mining Charter:

The lack of a definition section in the Charter allows for various inconsistent interpretations of the provisions of the Charter by the mining sector stakeholders.

The current definition of HDSA:

The current definition of HDSA in the Mining Charter should be aligned to the definition of HDSA's in the Broad Based Black Economic Empowerment Act No.53 of 2003. In addition, the Charter should seek to be more inclusive of vulnerable groupings. For instance, the Mining Charter is silent on the role persons with disabilities, as part of HDSA's, can play within the mining Industry. Yet ironically mining companies have contributed significantly to the increasing number of people with disabilities. In other words, if transformation as espoused in the Mining Charter has to impact in a more meaningful way, the mining sector should create meaningful opportunities for people with disabilities.

Ownership:

While the element captures the recognition by government and industry that one of the means of effecting entry of HDSA's into the mining industry and of allowing HDSA's to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining assets by HDSAs, it only provides the definition of participation in terms of active and passive involvement, the terms of which are not clearly defined. This provides room for ambiguity and different interpretations. For example, the DMR interpretation of ownership includes voting rights, economic interest and net value, while the industry obfuscates interpretation of ownership as HDSA's economic interest, and views net value as an additional ownership criterion. In addition, the absence of criteria for offsetting beneficiation against ownership, as well as lack of clarity on the continuing consequences of previous BEE transactions and the use of attributable units of production require specific attention.

HDSA's in Management (including Women in mining):

Mining companies often employ HDSA's in support services as opposed to core business positions. The core business positions within mining companies continue to be occupied by white South Africans (men and women) the exclusion of HDSA's. The definition of HDSA attribute requires specific attention.

Human Resources Development:

This element recognises that the South African labour market does not produce enough skills required by the mining industry for sustainable growth. However, the element currently places greater emphasis on offering opportunities to become functionally literate and numerate. The conspicuous lack Research and Development in the current Charter requires special attention.

Procurement:

While the Charter identifies procurement as an area of opportunity to contribute to sustainable development of communities, it only identifies three variables of procurement and does not commit mining companies to effectively support the economic growth of HDSA supplier companies across all three levels of procurement.

Recommendations:

The assessment of the Mining Charter has demonstrated that the Charter and its constituent elements for effecting meaningful transformation remain relevant. However, the efficacy of the Charter as an instrument of promoting transformation is blunted to a large extent by the identified shortcomings. It is therefore recommended that the Charter be reviewed to strengthen and sharpen its effectiveness in driving transformation in the industry. It is further recommended that the MPRDA be amended to ensure that non-compliance with the provisions of both the Charter and the Act is severely penalised. In addition, there needs to be greater synergy between the procurement element of the Mining Charter and the procurement element of the DTI Codes of Good Practice.

The BBBEE Act makes provision for the establishment of the BEE Advisory Council to be chaired by the State President. DMR must, in partnership with the DTI and other relevant departments, expedite the establishment of the Council to ensure that transformation issues receive attention at that level. Further, capacity should be built and adequate resources allocated within the department to promote the effective and efficient monitoring and evaluation of compliance with the provisions of the Charter and the MPRDA.