



South African Mining Development Association

Charter Non-Compliance, Transfer Pricing, Lack of Transformation within the Mining Industry
and Achieving the NDP

29 April 2015

Presented to: Department of Trade and Industry Portfolio Committee

Honourable Members, we are also taking further steps to combat financial leakages which deprive our economy of billions of rand through erosion of the tax base, profit shifting and illicit money flows.”

“Action has to be taken to close tax evasion loopholes such as transfer pricing, and profit shifting strategies by SA corporates. I ask that South Africa continue its support for the recent G20 decisions in this regard and the implementation of actions in support of transparency and sharing of information. South Africa must similarly stand firm in the SADC against tax havens.” - **Finance Minister Nhlanhla Nene – 2015 Budget Speech**

What Is Transfer Pricing?

- The term 'transfer pricing' is used to describe arrangements involving the transfer of goods or services, at an artificial price, (usually lower) in order to transfer income from one business to an associated business in a different tax jurisdiction which is often lower
- Some producer companies sell the companies commodities to its marketing divisions at lower than market related prices.
- This results in the exportation of profits to the tax haven off shore accounts and the declaration of low profits and the payment of low tax in the country where the commodity is being produced and exported from. In this case a loss to South Africa
- As Transfer Pricing regulating are tightened in South Africa, more sophisticated forms are developed, such as abuse of Advanced Pricing Agreements

Some Ways To Transfer Price

- Under reporting of commodity prices, in favour of contract pricing or recommended pricing;
- Non-reporting of full range of products sold;
- Inflated expenditure used to reduce profits locally;
- Thin-capitalisation;
- Transfer between two South African based companies which are connected but the transfer is towards the company carrying an assessed loss which is used to reduce prices; and
- Exchange rate misreporting

The Role of Audit & Tax Firms and Finance & Audit Committees of Boards in Transfer Pricing:



- **Do Audit Firms pay attention to Transfer Pricing when issuing clean audits?**
- **Audit Companies should ensure Transfer Pricing does not happen.**
- **Audit Companies please ensure that Board Members, (especially the Finance & Audit Committees) adhere to non Transfer Pricing Rules.**

The Role of Finance Institutions and Banks in Transfer Pricing:



- **Do Finance Institutions and Banks pay attention to Transfer Pricing when managing funds and supplying credit?**
- **Finance Institutions and Banks should not do financial transactions with organizations that are involved in Transfer Pricing.**

The Role of Commercial Law Firms in Transfer Pricing:



- **Do Commercial Law Firms pay attention to Transfer Pricing when structuring deals and drafting contracts?**
- **Commercial Law Firms when advising clients should insist on structuring legal agreements that adhere to non Transfer Pricing Rules.**

The impairment of the direct and indirect contribution of the mining industry to the economy because of Transfer Pricing:

The Mining Sector has a Direct and Indirect contribution to the whole economy as demonstrated by a few of the many sectors of the economy below:

- 17% of GDP (direct and indirect);
- 38% of merchandise exports (primary and beneficiated mineral exports)
- 19% of private sector investment
- 11.9% of total investment in the economy
- 50% of volume of Transnet's rail and ports
- 16% of formal sector employment (direct and indirect)
- 94% of electricity generation via coal power plants
- 40% of electricity demand
- 37% of country's liquid fuels via coal
- Accounts for R78-billion spent in wages and salaries.
- **NB - The above figures of the direct and indirect mining contribution to the South African Economy are artificial and misleading because the genuine figures have been eroded through transfer pricing.**
- **The whole economy is therefore denied the opportunity of sustainable growth.**
- **Rapid Economic Transformation Is Sabotaged Through Transfer Pricing.**
- **An Erosion Of The National Development Plan Through Transfer Pricing.**

Transformation of minerals industry: Section 100.(2) (a) of the MPRDA

100. (2) (a) To ensure the attainment of Government's objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes 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.

SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWEREMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting	
				2010	2011	2012	2013	2014		
1	Reporting	Has the company reported the level of compliance with the Charter for the Calendar year	Documentary proof of receipt from the department	Annually						Y/N
2	Ownership	Minimum target for effective HDSA ownership	Meaningful economic participation	26%						Y/N
			Full shareholder rights	26%						
3	Housing and living conditions	Conversion and upgrading of hostels to attain the occupancy rate of one person per room.	Percentage reduction of occupancy rate towards 2014 target.	Occupancy rate of one person per room						Y/N
		Conversion and upgrading of hostels into family units	Percentage conversion of hostels into family units	Family units established						
4	Procurement & Enterprise Development	Procurement spent from BEE entity	Capital goods	40%						5%
			Services	70%						5%
			Consumable goods	50%						
		Multinational suppliers contribution to the social fund	Annual spend on procurement from multinational suppliers	0.5% of procurement value						
5	Employment Equity	Diversification of the workplace to reflect the country's demographics to attain competitiveness.	Top Management (Board) level	40%						3%
			Senior Management (Exco)	40%						4%
			Middle Management	40%						3%
			Junior Management	40%						1%
			Core Skills	40%						5%
6	Human Resource Development	Development of requisite skills, incl. support for South African based research and development initiatives intended to develop solutions in exploration, mining, processing, technology efficiency (energy and water use in mining), beneficiation as well as environmental conservation and rehabilitation	HRD expenditure as percentage of total annual payroll (excl. mandatory skills development levy)	5%						25%

SCORECARD FOR THE BROAD-BASED SOCIO-ECONOMIC EMPOWEREMENT CHARTER FOR THE SOUTH AFRICAN MINING INDUSTRY

ELEMENT	DESCRIPTION	MEASURE	COMPLIANCE TARGET BY 2014	PROGRESS ACHIEVED BY					Weighting	
				2010	2011	2012	2013	2014		
7	Mine community development	Conduct ethnographic community consultative and collaborative processes to delineate community needs analysis	Implement approved community projects	Up-to-date project implementation	Implementation of projects will serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects.					15%
8	Sustainable development & growth	Improvement of the industry's environmental management	Implementation of approved EMPs.	100%	Annual progress achieved against approved EMPs.					12%
		Improvement of the industry's mine health and safety performance	Implementation of the tripartite action plan on health and safety	100%	Annual progress achieved against commitments in the tripartite action plan on health and safety.					12%
		Utilisation of South African based research facilities for analysis of samples across the mining value chain	Percentage of samples in South African facilities	100%						5%
9	Beneficiation	Contribution of a mining company towards beneficiation (this measure is effective from 2012)	Additional production volume contributory to local value addition beyond the base-line	Section 26 of the MPRDA (percentage above baseline)	The beneficiation strategy and its modalities of implementation outline the beneficiation requirements per commodity extracted in South Africa.					-
TOTAL SCORE									100%	

Y/N applies to pillars that are ring- fenced.

Legend

	0-25% (Gross non-compliance)
	25-50% (Non-compliance)
	50-75% (Marginal to acceptable performance)
	75-100% (Excellent performance)

Recommendation

- We commend the President for not signing the MPRDA amendment bill and by so doing allowing the mining stakeholders to further contribute to the creation of a bill that meaningfully address all stakeholder's interests and expectations.
- **NB:** The recent proposed court case is unnecessary because the unsigned Bill by the President allows mining stakeholders to address the clauses of the Bill that are of concern. Eg:
 - The current Wording in the Mining Charter is:
 - Achieve a minimum target of 26 percent ownership to enable meaningful economic participation of HDSA by 2014:
 - For HDSA ownership without debt the word *unencumbered net value* should have been included eg:
 - Achieve a minimum target of 26 percent (unencumbered net value) ownership to enable meaningful economic participation of HDSA by 2014:
 - **The Once Empowered Always Empowered: Ownership Element of the Mining Charter **Should not be allowed through the following clause:****
 - **The continuing consequences of all previous deals concluded prior to the promulgation of the Mineral and Petroleum Resources Development Act, 28 of 2002 prior to 2002 would be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.**

Recommendation

TRANSFER PRICING:

- Effective legislation should be implemented to abolish transfer pricing and charter non compliance and resistance to the BBBEE Codes of good practice and hence addressing Resource Curse, Service Delivery Protests and Xenophobia.
- The extent, type and impact of commodity price manipulation in the mining sector and the economy as a whole must be investigated and addressed by the Government of South Africa to ensure that revenue that is destined for South African Stakeholders is not eroded out of the country.
- The extent, type and impact of commodity price manipulation of raw materials to be beneficiated by manufactures of South African Minerals must be investigated by the government of South Africa through section 26 (3) of the MPRDA, to ensure that the illicit outflow of capital and incorrect reflection of income from raw materials sold is prevented and hence curbing transfer pricing.
- The role of local and foreign marketing agents and traders and their impact on the mining sector must be investigated to avoid transfer pricing and legislation should be implemented to abolish transfer pricing
- The role and benefits of companies with primary listing off-shore as well as non listed foreign companies must be investigated and effective legislation must be implemented to avoid transfer pricing.
- We trust that the Davis Tax Commission established by National Treasury will address the illicit outflow of capital through tax erosion and transfer pricing.

MINING CHARTER - 1st May 2014 CHARTER COMPLIANCE YEAR FOR ALL MINING COMPANIES:

- 1ST OF MAY 2014 ALL MINING COMPANIES SHOULD HAVE BEEN CHARTER COMPLIANT as per section 100(2)(A) of the MPRDA
- All mining stakeholders that adhere to Section 100 (2)(a) of the Mineral and Petroleum Resources Development Act (MPRDA) will automatically be Mining Charter complaint.
- Charter Compliancy will contribute to the National Development Plan , Rapid Economic Transformation and the Sustainability and Growth of the South African Economy.
- By enforcing the Charter Compliancy Implementation from the 1st of May 2014, the mining industry stakeholders and in particular the mining producers will be embracing the National Development Plan's Vision for 2030 from 2014.
- The Department of Mineral Resources has all the powers to enforce the law by using the clauses in the MPRDA that will penalize and address charter non compliancy and defaulters of the law.
- We urge the department to be proactive in enforcing that the MPRDA and Charter compliancy should be adhered to by stakeholders.

Recommendation

THE ALIGNMENT OF THE MINING CHARTER WITH DTI'S B-BBEE CODES OF GOOD PRACTICE

- The alignment of the Mining Charter with DTI's B-BBEE Codes of Good Practice has not been made.
- We suggest that the immediate alignment of the Mining Charter with DTI's B-BBEE Codes of Good Practice must be done as it is long overdue to address transfer pricing and charter non-compliance, resource curse, service delivery protests and xenophobia by mining stakeholders.

BENEFICIATION AN ENGINE FOR ECONOMIC GROWTH

- Section 26 (3) of the MPRDA states that “any person who intends to beneficiate any mineral mined in the Republic outside the Republic may only do so after written notice and in consultation with the Minister”
- Section 26 (3) of the MPRDA can be used to assist government in determining the true value of the commodities being transferred to the end user/consumer/beneficiaries to address transfer pricing and charter non-compliance.
- Section 26 (3) of the MPRDA will also enable the DMR to encourage foreign companies to beneficiate locally, when those companies seek written approval from the ministry to beneficiate offshore.
- Companies that are in breach of section 26 (3) should be penalized for sabotaging beneficiation and industrialization of the South African Economy.
- **Government Should**
 - **Abolish transfer pricing, Avoid making loans in a negative credit rating environment.**
 - **Create a meaningful tax environment that will prevent the erosion of capital**

MINERALS AND MINING DEVELOPMENT BOARD

- We are aware that the Minister is in the process of establishing the Minerals and Mining Development Board as per sections 57 to 68 of the MPRDA. We look forward to robust stakeholder participation in the board.
- The Minerals and Mining Development Board consists of all Mining Stakeholder leaders and will assist in collectively addressing the challenges of charter non-compliance, transfer pricing and the achievement of the NDP.

The Minister should not approve or give consent to Section 11 of the MPRDA (listed below) if Stakeholders are in breach of section 100 of the MPRDA and any other Mining Legislation

Transferability and encumbrance of prospecting rights and mining rights - Section 11 of the MPRDA

11. (1) A prospecting right or mining right or an interest in any such right, or a controlling interest in a company or close corporation, may not be ceded, transferred, let, sublet, assigned, alienated or otherwise disposed of without the written consent of the Minister, except in the case of change of controlling interest in listed companies.

(2) The consent referred to in subsection (1) must be granted if the cessionary, transferee, lessee, sublessee, assignee or the person to whom the right will be alienated or disposed of—

(a) is capable of carrying out and complying with the obligations and the terms and conditions of the right in question; and

(b) satisfies the requirements contemplated in section 17 or 23, as the case may be.

(3) The consent contemplated in subsection (1) is not required in respect of the encumbrance by mortgage contemplated in subsection (1) of right or interest as security to obtain a loan or guarantee for the purpose of funding or financing a prospecting or mining project by—

(a) any bank, as defined in the Banks Act, 1990 (Act No. 94 of 1990); or

(b) any other financial institution approved for that purpose by the Registrar of Banks referred to in the Banks Act, 1990 (Act No. 94 of 1990), on request by the Minister,

if the bank or financial institution in question undertakes in writing that any sale in execution or any other disposal pursuant to the foreclosure of the mortgage will be subject to the consent in terms of subsection (1).

(4) Any transfer, cession, letting, subletting, alienation, encumbrance by mortgage or variation of a prospecting right or mining right, as the case may be, contemplated in this section must be lodged for registration at the Mining Titles Office within 30 days of the relevant action.

The Minister should not approve or give consent to Section 11 100 of the MPRDA , if Mining Stakeholders are in breach of Section 26 of the MPRDA and any other Mining Legislation

Mineral Beneficiation

26. (1) The Minister may initiate or prescribe incentives to promote the beneficiation of minerals in the Republic.

(2) If the Minister, acting on advice of the Board and after consultation with the Minister of Trade and Industry, finds that a particular mineral can be beneficiated economically in the Republic, the Minister may promote such beneficiation subject to such terms and conditions as the Minister may determine.

(3) Any person who intends to beneficiate any mineral mined in the Republic outside the Republic may only do so after written notice and in consultation with the Minister.

Below are a few legislative clauses of the MPRDA that the Minister can use as punitive measures to Stakeholders that are in breach of the Legislation

Minister's power to suspend or cancel rights, permits or permissions Section 47 of the MPRDA

47. (1) Subject to subsections (2), (3) and (4), the Minister may cancel or suspend any reconnaissance permission, prospecting right, mining right, mining permit or retention permit if the holder thereof—

- (a) is conducting any reconnaissance, prospecting or mining operation in contravention of this Act;
- (b) breaches any material term or condition of such right, permit or permission;
- (c) is contravening the approved environmental management programme; or
- (d) has submitted inaccurate, incorrect or misleading information in connection with any matter required to be submitted under this Act.

(2) Before acting under subsection (1), the Minister must—

- (a) give written notice to the holder indicating the intention to suspend or cancel the right;
- (b) set out the reasons why he or she is considering suspending or canceling the right;
- (c) afford the holder a reasonable opportunity to show why the right, permit or permission should not be suspended or cancelled; and
- (d) notify the mortgagor, if any, of the prospecting right, mining right or mining permit concerned of his or her intention to suspend or cancel the right or permit.

(3) The Minister must direct the holder to take specified measures to remedy any contravention, breach or failure.

(4) If the holder does not comply with the direction given under subsection (3), the Minister may act under subsection (1) against the holder after having—

- (a) given the holder a reasonable opportunity to make representations; and
- (b) considered any such representations.

(5) The Minister may by written notice to the holder lift a suspension if the holder—

- (a) complies with a directive contemplated in subsection (3); or
- (b) furnishes compelling reasons for the lifting of the suspension.

Below are a few legislative clauses of the MPRDA that the Minister can use as punitive measures to Stakeholders that are in breach of the Legislation

Minister's power to suspend or cancel permits or rights – Section 90 of the MPRDA

90. The Minister may cancel or suspend any reconnaissance permit, technical co-operation permit, exploration right or production right in accordance with the procedure contemplated in section 47.

Below are a few legislative clauses of the MPRDA that the Minister can use as punitive measures to Stakeholders that are in breach of the Legislation

Orders, suspensions and instructions - Section 93 of MPDRA

93. (1) If an authorised person finds that a contravention or suspected contravention of, or failure to comply with—

(a) any provision of this Act; or

(b) term or condition of any right, permit or permission or any other law granted or issued or any environmental management programme or environmental management plan approved terms of this Act, has occurred or is occurring on the relevant reconnaissance, exploration, production, prospecting mining or retention area or place where prospecting operations or mining operations or processing operations are being conducted, such a person may—

(i) order the holder of the relevant right permit or permission, or the person in charge of such area, any person carrying out or in charge of the carrying out of such activities or operations or the manager, official, employee or agent of such holder or person to, take immediate rectifying steps; or

(ii) order that the reconnaissance, prospecting, exploration, mining, production or processing operations or part thereof be suspended or terminated, and give such other instructions in connection therewith as may be necessary.

(2) The Director-General must confirm or set aside any order contemplated in subsection (1)(a) or (b).

(3) The Director-General must notify the relevant holder or other person contemplated in subsection (1) in writing within 60 days after the order referred to in subsection

(1)(a) or (b) has been set aside or confirmed, failing which such order shall lapse.

Below are a few legislative clauses of the MPRDA that the Minister can use as punitive measures to Stakeholders that are in breach of the Legislation

Offences - Section 98 of the MPRDA

98. Any person is guilty of an offence if he or she—

(a) contravenes or fails to comply with—

(i) section 5(4), 20(2), 19 or 28;

(ii) section 92, 94 or 95;

(iii) section 38(1)(c);

(iv) section 42(1) or (2);

(v) section 44;

(vi) any directive, notice, suspension, order, instruction or condition issued, given or determined in terms of this Act;

(vii) any direction contemplated in section 29; or

(viii) any other provision of this Act;

(b) submits inaccurate, incorrect or misleading information in connection with any matter required to be submitted under this Act; or

(c) fails to provide a written notice or consult with the Minister in terms of section

Below are a few legislative clauses of the MPRDA that the Minister can use as punitive measures to Stakeholders that are in breach of the Legislation

Penalties - Section 99 of the MPRDA

99. (1) Any person convicted of an offence in terms of this Act is liable—

(a) in the case of an offence referred to in section 98(a)(i), to a fine not exceeding R100 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;

(b) in the case of an offence referred to in section 98(a)(ii), to the penalty that may be imposed for perjury;

(c) in the case of an offence referred to in section 98(a)(iii) to a fine not exceeding R500 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;

(d) in the case of an offence referred to in section 98(a)(v), to the penalty that may be imposed in a magistrate's court for a similar offence;

(e) in the case of an offence referred to in section 98(a)(vi) and (vii), to a fine not exceeding R10 000;

(f) in the case of an offence referred to in section 98(c), to a fine not exceeding R500 000 for each day that such person persists in contravention of the said provisions;

(g) in the case of any conviction of an offence in terms of this Act for which no penalty is expressly determined, to a fine or to imprisonment for a period not exceeding six months or to both a fine and such imprisonment; and

(2) Despite anything to the contrary in any other law, a magistrate's court may impose any penalty provided for in this Act.

Investors: Partner With Africa In The Long Walk To Economic Freedom

I have walked that long road to freedom. I have tried not to falter; I have made missteps along the way. But I have discovered the secret that after climbing a great hill one only finds that there are many more hills to climb. I have taken a moment here to rest, to steal a view of the glorious vista that surrounds me, to look back on the distance I have come, but I can rest only for a moment, for with freedom comes responsibility, and I dare not linger, for my *LONG WALK HAS NOT YET ENDED*.

(Nelson Mandela)