

## Structuring Black Economic Empowerment (BEE)

Structuring Black Economic Empowerment (BEE) Transactions in the Mining Sector in South Africa By Darryl Levitt

This paper provides a legal analysis of the current legislation surrounding Black Economic Empowerment (BEE) participation in the mining sector in South Africa. An examination of the current environment would not be complete without a cursory background to recent legislation enacted to address the economic imbalances created by apartheid.

**BACKGROUND**

**1. Political Background** The African National Congress (ANC), the current governing party in South Africa, came to power in 1994, facing massive economic inequalities that resulted from the policy of apartheid, including an economy with a zero growth rate, rising unemployment, ageing and outdated industries, high debt, and very little foreign direct investment. Recognising the need to fundamentally restructure the economy, it adopted the Reconstruction and Development Program (RDP) in the same year. The program was designed to provide an overall economic framework, which would link reconstruction and development in a process leading to sustainable growth in all parts of the economy, with greater equity achieved through redistribution. Black Economic Empowerment (BEE) emerged as a central objective of South Africa's RDP. Historically, major mining houses had a monopoly over the mining industry. Apartheid resulted in black people, mining communities and women largely being excluded from participating in the mainstream of the economy. This led the mining industry to formally declare its intention to adopt a proactive strategy of change, to foster, and encourage BEE and transformation at the tiers of ownership, management, skills development, employment equity, procurement and rural development. Stakeholders in the industry stressed that it was imperative to redress historical and social inequalities as stated by the Constitution of the Republic of South Africa (Act No. 200 of 1993), in inter alia section 9 on equality (and unfair discrimination) in the Bill of Rights.

**2. Legal Background** In March 2003, the Department of Trade and Industry South Africa released a document outlining its strategy for achieving broad-based BEE and this became known as the "Strategy Document". Shortly after this, a Broad-based BEE Bill (the "Bill") was drawn up. In August 2003, the Bill was accompanied by a first draft of a "Code of Good Practice (the "Code"). The Bill, the Code, and the Strategy Document are collectively interpreted together with various industry Charters and enterprise definitions in measuring compliance with BEE objectives. The Broad-Based Black Economic Empowerment Act 53 of 2003 was signed into law by the President of South Africa on 9 January 2004. The benefits of being considered an "empowered company" include access to government funding and obtaining preferential procurement status. It is therefore imperative to understand the definitions of particular forms of empowerment vehicles and the nature of the transaction you are structuring. Although the relevant legislation for purposes of this paper refers to Historically Disadvantaged South Africans (HDSAs), it was predominantly black people that were affected by the exclusionary policies of apartheid and the concept of BEE is therefore the focus of the paper. There are a variety of forms of BEE enterprises and the form of BEE enterprise that is transacted with will determine the extent that a non-BEE enterprise obtains BEE credentials or credits. The forms of BEE enterprise include:

**Black-Owned and Black-Controlled Enterprise** A black-owned enterprise is one where black persons own 50.1% of the equity and where there is predominant management by black persons. Management control refers to board control. 40% of management control by black people should be attained within 10 years. A black-controlled company is one where 50%+1 vote vests in the hands of black people and there is full management control.

**Black-Empowered Enterprise** A black-empowered enterprise is one where at least 25,1 % of the equity is owned by black persons and where there is substantial management control by black persons. Management control in this case refers to executive directors of the enterprise.

**Strategic Partnerships** This refers to a joint venture or other type of alliance where black persons have less than 25% +1 vote of the equity participation in the enterprise and have operational involvement in it.

**Black Women-owned Enterprise** This refers to a situation where black women own at least 25,1% of the equity allocated for black person participation and a similar percentage of management positions in the enterprise.

**Broad-based Empowerment** This is defined as an enterprise, which has an empowerment shareholder representing a broad base of members such as the local community where benefits support a target group of community members. This form of empowerment is achieved through vehicles such as employee share ownership plans, new unit trust type investment vehicles and other community investment and ownership vehicles.

**RELEVANT LEGISLATION** Recent changes in legislation helped bring about opportunities for BEE enterprises to participate in the mining industry. These changes refer to the following:

**1. The Mineral and Petroleum Resources Development Act 28 of 2002 (The New Act)** The New Act, which was assented to by the President on October 3 2002, was formally published in the Government Gazette in October 2002, however, the Act will not come into effect until a date fixed by the President by proclamation in the Gazette. The Minerals Act No. 50 of 1991 (the "Current Act") is therefore still in effect. Since it is anticipated that the New Act will come into force and effect at some point soon in the future, most companies are pre-empting the provisions of the Act and attempting to comply with its provisions. I will therefore discuss the applications of both the New Act and the Current Act. The Current Act presupposes a system of private ownership of mineral resources as opposed to the New Act, which is based on the principle that minerals are a natural resource and as such, the right to prospect and mine them vests in the State. Provision is also made for a prospecting permit to be granted to the holder of mineral rights or such person who has acquired the written consent of such holder. This is what is known as an Old Order Right. Such consents are generally obtained through option agreements entered into with the mineral rights holders. The holder of the mineral rights may be the owner of the land or an undivided portion of the land. In the alternative, in circumstances where the mineral rights had previously been separated from the surface rights to the land due to factors such as devolution of estates, the holder of any of the separated rights would be entitled to a prospecting permit. Consequently, the Current Act enables multiple applications for a prospecting permit for the same piece of property. Once a prospecting permit is granted however, no other application for a permit will be considered by the Department of Minerals and Energy (DME). An application for a prospecting permit must be

accompanied by a satisfactory Environmental Management Program. The New Act sets out a process for conversion of an Old Order Right into a New Order Right. New Order Rights are governed by a system, often referred to as a "use it or lose it" system and does not differ from similar systems in Australia and Canada. The principle underlying this philosophy is to prevent the unreasonable hoarding of mineral rights. Once the New Act becomes effective, all existing mineral rights and title (Old Order Rights as defined in the New Act) will have to be converted into "New Order Rights" within a five year period. Part of the reason for the delay in giving effect to this New Act is that three other items are required to complete a workable system. These are (1) regulations to give effect to the Act, (2) a separate Act dealing with the financial aspects (being prepared by Department of Finance), and (3) an act setting out new provisions for the registration of "mining" titles. It is not yet clear when all of these components will be finalised and enacted.

2. The Broad Based Socio-Economic Empowerment Charter for the Mining Industry (The Mining Charter) and its accompanying Scorecard In the latter part of 2002, the Mining Charter was negotiated with industry stakeholders and was the first significant benchmark for achieving BEE implementation. The 2003 fiscal budget set aside R10-billion to support the funding of new ventures and expansion needs that met empowerment qualifications. The New Act also makes reference to the Mining Charter and stipulates the timetable and targets for transformation. What appears to be clear is that the Charter is not a blueprint, but a rough guide that must be tested on a case-by-case basis. One predominant theme is that the Department of Minerals and Energy (DME) has significant discretion which suggests it will have the power to keep the private sector operating in the spirit of the Charter. In terms of the Mining Charter, every mining company should aim to achieve the following HDSA equity participation targets in the mining industry: a) 15% of the company equity should be transferred to HDSAs within 5 years of the coming into effect of the New Act. b) 26% of the equity of the company should be transferred to HDSAs within 10 years of the coming into effect of the New Act.

3. The Scorecard The Scorecard, as described in the Mining Charter, is a document which companies use to measure compliance with the Charter. The benefits of complying with the Charter include access to government funding and preferential procurement status for public procurement contracts. Compliance with the Mining Charter is calculated on the basis of a weighted average of the criteria as set out in the Charter. The percentage of compliance is used to identify an enterprise as being either, (i) a limited contributor, (ii) a satisfactory contributor, (iii) a good contributor. The seven areas which the Mining Charter attempts to address are: (a) Human Resource Development (b) Employment Equity (c) Community Upliftment and Migrant Labour (d) Housing and Living Conditions (e) Preferential Procurement (f) Beneficiation (g) Ownership and Joint Ventures

4. Definitions of Historically Disadvantaged South Africans (HDSAs) The intended beneficiaries of the New Act and Mining Charter are Historically Disadvantaged South Africans (HDSAs). I shall now explain the definitions of HDSAs. The terms "Historically Disadvantaged South African" or "HDSA" is defined in The Mineral and Petroleum Resources Development Act 28 of 2002 (The New Act) as:

- Any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa Act No. 200 of 1993 came into effect.
- any association, a majority of whose members are persons contemplated in paragraph (a);
- Any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' vote.

The Broad Based Socio-Economic Empowerment Charter for the Mining Industry (The Mining Charter) defines an HDSA as "any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa Act No. 200 of 1993 came into effect." The exact definition of HDSA seems to have slightly different meanings depending on which piece of legislation is referred to and further clarity on the definition is required.

BEE TRANSACTIONS

1. The Types of Equity Ownership Structures Concluded with BEE Enterprises The focus of this paper is on the equity ownership aspect of the Mining Charter and more specifically how the acquisition of equity by a BEE enterprise is financed. Equity ownership is merely one area in which particular attention in the Mining Charter has been focussed. Compliance with BEE ownership requirements can be achieved in a number of ways:

- a) Where a BEE enterprise acquires a majority shareholding position, i.e. 50% plus one share.
- b) Where a joint venture or partnership is structured with a BEE enterprise (25% equity plus one share).
- c) Where broad-based ownership is structured (such as HDSA dedicated mining unit trusts, or employee share ownership schemes).

Patent and Trade-mark Agents

2. The Decision to Acquire Equity at Corporate as Opposed to Project Level

A) Acquisition of a material equity stake in a large mining operation at holding company level The initial equity ownership deals that were concluded with BEE enterprises in the mining sector occurred at holding company level where the BEE enterprise acquired 26% of the shares of a listed company. Structuring this type of transaction continues to be challenging since a BEE enterprise often requests a return on equity where it has put up zero equity finance itself. This could compromise the listed company's share price where the company does not achieve its stated cash flows and the vendor would have to repurchase its shares back at a significant premium to market price. It was common for a vendor to provide vendor finance to a BEE enterprise to acquire an equity stake. Such vendor finance was in the form of a soft loan or subordinated debt. Section 38 of The Companies Act of 1973 (as amended), which prohibited financial assistance, whether directly or indirectly, to acquire a company's own shares was amended to accommodate these types of transactions. The Goldfields-Mvelaphanda transaction is an example of this type of transaction in which Mvelaphanda acquired 26% of the shares of Goldfields. Gold Fields would receive R4, 139 million in cash based on a valuation on a ratio of the Discounted Cash Flow (DCF) value of the South African assets to that of total Goldfields assets, applied to the 30-day Volume-Weighted Average Price (VWAP), of Goldfields. Mvelaphanda Resources' empowerment interest was contracted to be exchangeable into Gold Fields ordinary shares after the expiry of a five-year lock-in period. It was envisaged that the effect of this facilitated cash upfront as a result of finance from a number of sources, at market related prices to develop some of the properties of Goldfields and also that it limited recourse to Gold Fields' balance sheet. To determine the cost of participation of a BEE enterprise at holding level, Net Present

Value (NPV) and DCF models are used as valuation mechanisms. It is common to provide a discount to NPV to make it more attractive for a BEE enterprise to purchase equity. The ability to influence dividend distribution is important where the vendor intends to expand on any of its projects and dividends would need to be retained to carry out a work program. This could impact on the BEE enterprise's ability to service its debt obligations. The BEE enterprise generally defers receipt of its dividend until its debt has been settled. GFI - SA GFI MVELA RESOURCES 85% 15% A recent BEE precedent was established with the completion of the Bidvest deal with Dinatla (a BEE Enterprise). Although this transaction was concluded as a transaction outside the mining industry, it placed BEE shareholders in listed companies where no real transfer of ownership had actually taken place. Arrangements such as Bidvest's 15% deal with Dinatla gave voting rights to the empowerment shareholder, but ownership transfers only in three years, provided Bidvest's share price reached a price where it makes commercial sense for the BEE enterprise to exercise options allocated to it. Meanwhile, Bidvest has attained its empowerment credits since it is generally considered to be "empowered" by virtue of this transaction. This was merely a modification of the Special Purpose Vehicle (SPV) financings used to finance BEE participation in the late 1990's. The transaction was completed by providing non-recourse debt to a BEE enterprise to buy up an equity stake in a listed company. If the value of that equity increased, the debt could be repaid and control would end up in the hands of the empowerment partner. But with poor equity markets, most such structures in the 1990s failed, with the equity reverting to the financiers. This new structure is not much different. Instead of non-recourse debt to acquire equity, empowerment investors were given an option to acquire equity. It is interesting to note that compliance with the Mining Charter is measured at the corporate as opposed to project level and it therefore appears that where a company has achieved HDSA participation in excess of the target in a particular operation or project, then such excess may be utilised to offset any shortfall in its other operations. B) Acquisition of equity in smaller mining companies or participation at project level In these circumstances a major mining company may wish to enter into a joint venture with a BEE enterprise on one of its projects in order to obtain BEE credits. The reasons for obtaining BEE credits include having access to public procurement contracts, as well as being a requirement to convert Old Order Rights into New Order Rights. The cost of entry for a BEE enterprise at project level is generally based on actual costs incurred or to be incurred in developing the property. In some cases the BEE enterprise's contribution to the joint venture are "carried" by the non-BEE joint venture partner. The BEE enterprise's entitlement to its share of the cash flows is reduced in order to compensate the non-BEE joint venture partner for "carrying" it until such time as its share of the development costs is settled. Where it is agreed that the BEE enterprise would be "carried", soft loans from the non-BEE joint venture partner would be provided so that the BEE enterprise is not prematurely diluted. All agreements should be negotiated with a lock-up clause to prevent the BEE enterprise from selling out too early thereby leaving the non-BEE joint venture partner without having satisfied its BEE obligations. The non-BEE joint venture partner should ensure that it has a BEE partner for the duration of the New Order right to ensure ongoing equity requirements are continuously met. The way in which BEE participation is structured will vary according to the particular asset and the accompanying cash flows of the project.

3. What is Fair Market Value (FMV)? The Charter stipulates that the transfer of equity ownership in the industry must take place in a transparent manner and for fair market value. Issues such as the concept of "fair market value", as well as exit mechanisms have not been dealt with fully by the New Act or the Charter. It is doubtful whether fair market value is in fact obtained by a vendor since the market perceives the sale as a forced transfer of assets into the hands of relatively inexperienced players in the industry. Three approaches have been used to arrive at suitable fair market values, namely: • the Market Approach which takes into account the US\$/oz and R/ha methods; • the Cost Approach which accounts for exploration expenditure and farm-in analysis methods; • the Income Approach which is the most widely used method and takes into account a discounted cash flow and net present value method and other technical financial models. A variation of these models could be utilised as there is no consistent approach to valuation methods in these transactions.

4. Other Ways Value can be added to BEE Enterprises One way in which the BEE enterprise can realise early value in their project is through the outright sale of their equity stake or a portion thereof. Should the funder be an operating mining company, it can further advance BEE participation in the project by transferring technical skills to the BEE enterprise. Another way for the BEE enterprise to extract early value from the project is where it receives dividends during an embargoed share sale period. HOW IS BEE PARTICIPATION FINANCED? I shall attempt here to explain the mechanisms used to finance BEE participation. 1. Debt Finance and Project Finance Project finance is a form of non-recourse loan structured in such a way as to repay debt from the cash flows generated by the project, once production is underway. The lender and BEE enterprise risks associated with the project and banks thus take a conservative stance when evaluating the economic viability of a proposal. Project finance is often used to develop a particular component of an established operation (e.g. new equipment, upgrading of a treatment plant). Mining projects are capital-intensive and have an inherently high risk attached and traditional financing is often not available or appropriate. A project must be developed through pre-feasibility and bankable feasibility stages before project finance becomes a viable option. Since most BEE enterprises do not have finance to develop the properties they acquire, there is no asset other than the BEE enterprise's interest in the property itself, which can be given as security. The Special Purpose Vehicle (SPV) finance structure was one method of avoiding the collapse of a company due to the non-performance of one project. The underlying logic of financing a project with debt is that the dividends or cash flows of the underlying asset or project will be able to finance the interest on the debt. The BEE enterprise will be required to provide more security as the ratio of debt to equity financing is increased. 2. Asset Securitization Asset-backed securitization is a mechanism used where a BEE enterprise wants to raise financing using some of the income producing assets which it owns. These assets are pooled and transferred into a SPV. The SPV issues securities to investors, where each issue consists of multiple classes of public and privately placed notes. Payment on securities depends on the cash flows generated by the pooled assets, normally with no recourse against

the original owner. The separation of the original owner from the assets ensures that the investors in asset-backed securities are not exposed to credit deterioration of the original owner. The SPV is structured as an entity that cannot become the subject of a bankruptcy case. SPV financing, once the darling of BEE financing mechanisms has increasingly become unattractive as a funding mechanism to fund managers.

3. Debt with an Equity Kicker Sometimes a lender will require some upside in the appreciation of the equity held in return for providing debt. This is not uncommon and will feature more in an economy where mining projects are progressing into development and there is the possibility that the shares will be floated on the Johannesburg Stock Exchange or other stock exchange. Should the BEE enterprise not meet its debt repayments, the lender's equity position could be ratcheted upwards in proportion to the debt default.

4. Convertible Debt or Convertible Debentures Where a project is expected to yield consistent cash flows, convertible debentures or convertible preference shares could be issued by the BEE enterprise and converted into ordinary shares or preference shares at a given price at a future date. They are a popular means of raising capital when interest rates are high, because the interest, which the BEE enterprise has to pay on them, is lower than on an unconvertible debenture. A fixed rate of interest is payable to debenture holders each year until maturity, and if it fails to pay either the interest or the principal amount of the loan when the time comes, the debenture holders can force the enterprise into liquidation and recover their money from a sale of its assets.

5. Preference Shares Preference shares are shares which give their holders an entitlement to a fixed dividend but which do not usually carry voting rights. Preference shareholders get a fixed dividend which, if not paid, usually accrues until it can be. Preference shares do not usually carry a vote unless dividends fall into arrears. In the event of a winding up, preference shares are usually repayable at par value, and rank above the claims of ordinary shareholders (but behind bank and trade creditors). Preference shares may be issued with the right of conversion into ordinary shares. These are called convertible preference shares.

6. Build Own Transfer or Build Own Operate Here, BEE participation occurs where a particular asset is produced under a build-own-operate-transfer (BOOT) schemes under which an asset is legally owned and operated for a defined period by the private BEE enterprise that constructs them, before being transferred back to the original owner.

7. Flow-through Shares Flow-through shares are a common attractive source of finance for development of projects in Canada and Australia. They are not yet applied in the South African context and their potential is currently being examined. Essentially the tax benefits derived from a company's exploration program, are passed on to investors. Their success has now lead authorities in Canada and Australia to investigate the use of super flow-through shares as a means to attract further investment in the sector.

8. Derivatives Derivatives can also be used as hedging mechanisms to limit downside in a financing structure. Ceilings and floors to an interest or foreign exchange rate can be structured through swaps, options, hedging, or by agreement and more common where a company has expansion plans and desires to limit its risk in a cyclical market.

9. Reverse takeovers (RTOs) or Initial Public Offerings (IPOs) An RTO is similar to going public in that the company becomes publicly traded. However, reverse takeovers are done through an existing "shell" company, generally a defunct or dormant corporation that had a previous life in the public markets and its only asset is cash in the bank. Concerns should include any potential liabilities hanging over the shell from its past life, such as the revised share structure (i.e. number of shares outstanding), any potential creditors and any environmental issues. On the positive side, the shell may have some available cash that could be used for development. In any case, an IPO is not always a suitable exit for BEE enterprises wanting to cash out. The listing expenses can be high, and there will be many requirements for representation and warranties on profits and project development. The shares are generally held in escrow for a fixed time period, meaning that the enterprise will not be able to access its newfound wealth any time soon as it will be embargoed from selling its shares for a period of time. Being a public company carries its own challenges, such as increased reporting requirements and the need to deal with whole new groups of people such as securities regulators, financial journalists and analysts. For a BEE enterprise unaccustomed to the scrutiny that comes with being public, the pressure to perform and to meet revenue expectations can be a serious drain on management's time.

**LISTINGS**

**A) DOMESTIC LISTINGS**

1. The Johannesburg Stock Exchange (JSE) and JSE Alternative Exchange (ALT-X) The JSE has not had an attractive history of successful IPO's involving resource companies. An alternative exchange known as Alt-X has recently been established. Alt-X's aim is to create opportunities for investors of small and medium-sized enterprises (SMEs) especially in the BEE sector. The primary benefits include a listing fee reduced to R20, 000, no profit history required, and a share capital base of no more than R2m. Since less than 1% of the listed equities on the JSE is in black hands, it is understandable that Alt-X is focussing on empowerment companies. It is still a new bourse so we have yet to see the appetite of the South African investor, which has shied away from early stage resource companies in the past. Timing is crucial when listing a company and sufficient equity would need to be offered to the public to create liquidity in the marketplace.

**B) INTERNATIONAL LISTINGS**

1. Listing on the Toronto Stock Exchange Toronto is recognized as the leading stock exchange worldwide for raising finance for development of mining projects. It is the author's view that provided the regulatory issues could be adhered to, listing on Toronto would offer a junior company considering listing on a bourse, more liquidity and ability to raise cash than any other stock exchange. Given the complex exchange control regulations in South Africa, the following structures could be utilized by mining groups in South Africa to raise funds. In return for undertaking to provide capital to develop suitable properties in South Africa, shareholders of the BEE enterprises agree that their joint venture partner would get shares in a Newco, which is formed in South Africa. The BEE enterprise, which has the prospecting or mining licence, transfers its assets to the Newco in return for receiving development capital. A holding company is formed which acquires all the respective shares in the Newco and a British Virgin Islands (BVI) company acquires the shares of the holding company. Finally, a TSX company then acquires the shares of the BVI Company and issues shares to Canadian investors thereby circumventing having to obtain Exchange Control approval.

2. Listing on the London Stock Exchange (LSE) and Alternative Investment Market (AIM) A company that owns South African assets and that is listed on the JSE, may seek approval to list on an

exchange outside of South Africa, such as the LSE. There have been a number of successful listings of South African companies on the LSE. These include Anglo American Platinum Corp PLC and Harmony Gold Mining Company. It does however appear though from Reserve Bank practice that approval for primary offshore listings of South African assets will be denied. Generally, permission for a secondary listing on an exchange outside of South Africa provided the reasons justify it. AIM is the London Stock Exchange's global market for smaller, growing companies and is operated by the LSE. Since AIM opened in 1995, more than 1200 companies have been admitted. Collectively, these companies have raised more than 14 billion US dollars whilst on AIM. At the end of April 2003 there were 705 companies on AIM with a total market capitalization of £10.0 billion. Of these, 51 were international companies, with a combined market capitalization of £1.2 billion. In 2002, there were 60 IPOs on AIM, representing 46 per cent of all the IPOs in Western Europe for the year. Some South African junior mining concerns have considered listing on AIM. Reasons to use the market include (1) a perception that London understands the mining investment climate in South Africa more than North America; (2) it is a fast way to market and raise money. The AIM market does present an easier way to obtain a listing since there are no specific suitability criteria for companies to qualify for AIM. Once admitted to AIM, a company has certain ongoing disclosure requirements and needs to retain a nominated adviser at all times.

**RESERVE BANK ISSUES** The stated purpose of exchange control over direct investment abroad is to prevent the loss of foreign currency reserves through the transfer abroad of real or financial capital assets held in South Africa and to help avoid undue pressures on the country's gold and foreign exchange reserves. A business entity that is 75% or more owned or controlled by non-residents is referred to as an "Affected Entity". This enterprise is subject to restrictions on borrowings as well as the remittance of profits and dividend payments out of South Africa. Where the Affected Entity is not within the capitalization requirements then remittance of profits and dividends must be approved by exchange control authorities. If the Affected Entity meets capitalization requirements then approval need only be obtained from an authorized dealer (usually commercial banks). It therefore makes sense to avoid the cumbersome and lengthy delays of Reserve Bank approvals by commencing with a Canadian company, which then invests in South Africa. Where a South African, who is subject to South African exchange control rules, wishes to invest in a company outside of South Africa, he will first need to obtain a tax clearance certificate indicating that all tax issues have been complied with. Once this certificate is obtained, the investor is allowed to transfer up to invest up to R750, 000,00 into a foreign company. This is done through a Registered Dealer, which is generally a commercial bank in South Africa. The Reserve Bank may require the shares to be sold once they are listed on an exchange and the funds repatriated to South Africa.

**SOURCES OF FUNDING** Some of the sources of domestic funding supporting BEE initiatives in the mining sector include: 1. The New Africa Mining Fund ("NAMF") The New Africa Mining Fund (NAMF) is incorporated in South Africa with the objective of acquiring, investing, controlling, managing and administering a portfolio of investments in junior mining projects on the African continent. The Fund will initially focus on junior mining projects in South Africa. 2. Industrial Development Corporation ("IDC") The core product of the IDC with regard to BEE can be described as the provision of finance and access to equity for the meaningful facilitation on transfer of ownership, management and control of South African industries and emerging entrepreneurs from the black communities. The IDC seeks to align itself with government economic policy such as Small, Medium, and Micro Enterprise (SMME) policy and DTI initiatives on empowerment. The IDC has proven to be a significant provider of funding for BEE initiatives. International Finance Corporation (IFC) as part of the World Bank 3. International Finance Corporation ("IFC") The World Bank's private sector arm, IFC, is preparing to raise \$27-million in subordinated loans to support the purchase of a stake in South African miner Gold Fields, by BEE enterprise Mvelaphanda Resources and could well become a significant provider of funding to facilitate BEE ownership.

**ADDITIONAL POINTS** A New Order Right can be used as security to raise finance. However a funder should bear in mind the provisions of Section 56 of the New Act which makes provision for the lapsing of prospecting or mining rights where the holder is liquidated or sequestered. This reduces the value of the right as security since a BEE enterprise may be liquidated and therefore the funder will not be able to effect transfer of the right without the Minister's consent. In order to achieve compliance with the equity ownership requirements of the Charter, the BEE enterprise must hold title to the assets. Compliance is not attained where finance is given to the BEE enterprise subject to transfer only being effected when the full purchase consideration has been paid. One should make sure that they are dealing with a reputable company with a track record in similar exploration ventures. An initial upfront payment should be negotiated together with a royalty based on operating profit from operations. It is also advisable for holders of old order rights to obtain a permit for their existing projects prior to the coming into effect of the New Act, since the conversion process into a New Order Right could be time consuming and cumbersome. Furthermore, if these holders wait for the application of the New Act to come into effect, they risk rights being lost to astute BEE operators.

**CONCLUSION** There is no doubt that South Africa's mining environment is abundant with opportunities to partner with BEE enterprises. It is just not yet clear whether attaining HDSA target ownership is an ongoing requirement in the sense that equity ownership by a BEE enterprise should not be diluted beyond the targets or whether it is merely a once-off scenario. Naturally this has implications in further rounds of financings. It is most important to minimise the perceived risk of investing in South Africa by ensuring that there are no adverse changes to the Act in terms of changing ownership. Issues such as valuation methods should also be standardised since analysts will remain wary about the potential impact of governing legislation due to a lack of clear-cut guidelines on how targets are to be achieved. There is also no doubt in the value that a BEE enterprise can offer its potential JV partners in terms of speeding up compliance with regulatory issues but this needs to be fully transparent so as to avoid any embarrassment. Given the huge potential of the mining industry in South Africa, it is important to select the appropriate team that understands the landscape of South Africa in order to assist in closing these deals.

**USEFUL TERMS** "ANC"; African National Congress. Current ruling party in South Africa. "BEE"; Black Economic Empowerment "BEE

Bill; A broad-based BEE Bill drawn up the DTI in August 2003 and signed into law on the 9th January 2004  
;BEECOM; Black Economic Empowerment Commission ;Code of Good Practice; A first draft of a Code which accompanies the BEE Bill ;Current Act; Minerals Act No. 50 of 1991 (still in force)  
;DME; Department of Minerals and Energy ;DTI; Department of Trade and Industry South Africa ;HDSA; Historically Disadvantaged South African (as defined in the New Act and the Mining Charter) ;Mining Charter; Broad-Based Socio-Economic Empowerment Charter for the Mining Industry. This is a guiding document and does not have the force of law. ;New Act; Mineral and Petroleum Resources Development Act Of 2002 (assented to on October 3rd 2002 but not yet in force) ;New Order Right; As defined in the New Act as being subject to HDSA equity participation pursuant to the Mining Charter. ;Old Order Right; As defined in the New Act refers to existing mining rights which must be converted to New Order Rights within 5 years of the New Act coming into force and effect. ;RDP; Reconstruction and Development Program. Adopted by the ANC in 1994 and which was the forerunner of BEE programs. ;Scorecard; Forms part of the mining Charter and is used a mechanism for measuring BEE compliance. ;Strategy Document; A document released by the DTI in March 2003 which outlined a strategy for broad-based BEE.