



Evaluation of the application of legal provisions on local content and sub-contracting in South Africa

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Improved human conditions through good
governance of the region's resources.

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South Africa: Evaluation of the application of legal provisions on local content and sub-contracting

Introduction and background

This paper examines local content policies and laws in South Africa's extractive industries sector. The use of local content requirements (LCRs) in the extractives sector has gained traction over the past two decades as resource-rich countries try to develop and deepen economic linkages between the extractives sector and the rest of the economy. In this regard, an increasing number of countries have introduced or re-introduced local content policies (LCPs) or LCRs intending to stimulate the use of local factors of production, such as labour, capital, supplies of goods and services, to create value in the domestic economy and hence expand the indus-

trial sector.

South Africa, as one of the resource-rich countries, has also passed laws and policies to give effect to LCRs and LCPs. South Africa's local content experience is unique given its history of apartheid, disposition, and inequality, and as a result it has the most complex local content and procurement legislation and framework (Maponga and Musa; 2020). The LCP requirements include employment quotas, ownership requirements, procurement targets, mandatory expenditure on training, and supply chain development.

The South African extractive sector

In South Africa, the state is the custodian of all mineral and petroleum resources and has a duty to administer these resources for the benefit of all South Africans. It must do so in accordance with the provisions of the Constitution, which is the supreme law of the country, and all legislation and conduct of organs of state must be consistent with it (Section 2, of the Constitution, 1996). For the current discussion, this means that any policies or laws enacted to give effect to local content in the sector must be consistent with the constitution.

Mining in South Africa has always been an enclave industry, albeit with a substantial impact on the rest of the economy. Mining has not contributed its full potential to the South African economy due to large gaps between mining and manufacturing, the separation of the production of minerals and manufacturing (Turok;

2013). Turok notes that manufacturing has been subjected to extraordinarily high prices for raw material inputs such as steel, thus making local manufacturers uncompetitive internationally and even locally. In addition, most of the mineral resources are being exported unprocessed, instead of processing and converting them to higher value products in South Africa by local entrepreneurs before export (or even for use locally) (Turok; 2013). There is a low level of beneficiation, and trade with most parts of the world is characterised by the export of raw materials and the import of manufactured goods. The historical exclusion or lack of participation of Black South Africans and local communities in the mining sector has robbed the majority of opportunities, stifling the economic growth and socio-economic development of many communities (Kgole and Odeku; 2019). The local content procurement policies and legisla-

tive framework are aimed at addressing these challenges and ensuring that the use of mineral resources translates into meaningful economic transformation and job creation, entrepreneurship, and development, particularly of the previously disadvantaged people who were deprived and denied access to equal participation in the country's mineral resources during the apartheid regime.

The South African Minerals Policy White Paper of 1998 defines beneficiation as the successive process of adding value to raw minerals from their extraction through to the sale of finished products to consumers. The mining and minerals policy frameworks that regulate

mineral exploration, mining, beneficiation, and related downstream industries are based on the constitution. The Mineral and Petroleum Resources Development Act (MPRDA) is the legal framework that governs minerals and mining activities in South Africa (28 of 2002). The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (the Mining Charter), The Beneficiation Strategy 2011 and the Codes of Good Practice for the Minerals Industry (Mining Code) and other legal instruments relevant to the mining sector (including the Precious Metals Act) (37 of 2005) set out South Africa's local content aspirations, targets and requirements.

The MPRDA

The first point of reference when discussing local content in the SA mining sector is the MPRDA, which seeks to promote equitable access and sustainable development of the nation's mineral and petroleum resources to all the people of South Africa. It is the foundation of the Mining Charter which gives effect to its creation in Section 100 (2)(a) (MRPDA). The Act was enacted with the aim of conducting significant reforms in the mining industry of South Africa following the democratic transition in 1994. It came into effect in 2004 with the aim of establishing an enabling environment to foster the development of the mining industry and to transfer sovereignty to the state overall mineral and petroleum resources. The main objectives of the Act are:

- to facilitate equitable access and to develop mineral resources;
- to promote substantial and meaningful economic participation of historically disadvantaged population; and
- to ensure that holders of mining rights contribute to the socio-economic development of areas in which they operate.

The MPRDA, defines beneficiation to include four stages: primary, secondary, tertiary, and final. Generally, beneficiation is regarded as the transformation of a mineral (or a combination of minerals) into a higher-value product, which can either be consumed locally or exported. Each of the four stages may provide an opportunity to beneficiate to greater value, for domestic or export use. The case for an increased role for manufacturing in the beneficiation of minerals is therefore compelling. The South African Minerals Council (SAMC) is, however, opposed to this as it compromises the separation between mining and manufacturing. The SAMC argues that mining is driven by inherited comparative advantages, such as mineral deposits or natural beauty, while manufacturing depends on competitive advantages (Turok; 2013). It is crucial that key stakeholders in the mining industry adopt a positive outlook on the current beneficiation programmes and to realise the potential value that can be unlocked for the economy.

The concept of socio-economic empowerment, as defined in the MPRDA, is further supported by the following laws:

- The Preferential Procurement Framework Act (No. 5 of 2000);
- The Employment Equity Act (No 55 of 1998),
- The Competition Act (No. 89 of 1998) including Amendment Act No. 35 of 1999 and subsequent amendments; and
- The Skills Development Act (No. 97 of 1998), Skills Development Levies Act of 1999 and the National Skills Development Strategy.

The Mining Charter

The Mining Charter is a broad-based socio-economic empowerment charter for the mining and minerals industry.

The Mining Charter, arguably the most important piece of legislation when discussing local content procurement in the mining sector, was designed to deal with racial inequalities in access to resources and economic opportunities. It is also seen as a tool for the redistribution of wealth and the strengthening of local participation in the mining sector (Maponga and Musa; 2016). The Charter, promulgated in 2004 and revised in 2010, focuses on the need for accelerated transformation of the mining sector as well as creating an enabling environment for the economic empowerment of historically disadvantaged South Africans (HDSAs). It covers elements such as sustainable development and growth of the mining industry; employment equity in the mining sector; beneficiation of mineral commodities; ownership and joint ventures; mine community development; procurement and enterprise development; and consultation, monitoring, evaluation and reporting (The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry of 2004).

The Charter requires that mining companies open up to HDSAs and procure 40 per cent

of capital goods, 70 per cent of services and 50 per cent of consumables from 'Black Economic Empowered' companies; that they implement a minimum of 40 per cent HDSA demographic representation workforce; and invest in skills development and career paths for HDSAs (Department of Mineral Resources; 2009). Furthermore, multinational corporations which sell goods to the South African mining industry must pay 0.5 per cent of their annual income into a socio-economic development fund to be spent on communities.

The 2004 Mining Charter was reviewed in 2009 by the Department of Mineral Resources, (Parliamentary Monitoring Group; 2010) to assess and track the progress made by the Charter in achieving the transformation objectives and targets set out by the Charter. The review recognised or found that the mining industry had not met most of the targets set out in many of the key indicators of the transformation of the Charter (Department of Mineral Resources; 2011). The challenges identified in the report included the lack of commitment by mining companies to advance the procurement element of the Charter, and career plans that are typically focused on developing senior managers at the expense of lower-level employees (Department of Mineral Resources; 2011).

Mining Charter III 2018

The current Mining Charter III aims to promote investment and competitiveness, drive transformation, remove barriers to sustainable growth, and improve effective implementation of the Charter. The current Charter requires that a minimum of 70 per cent of total mining goods procurement spending be on South African manufactured goods. The 70 per cent shall be allocated as follows:

- (i) 21 per cent spent on goods produced by companies owned and controlled by historically disadvantaged persons.
- (ii) 44 per cent spent on goods produced by broad-based black economic-empowerment (BBBEE) compliant companies; (The Broad-Based Black Economic Empowerment Act No. 53 of 2003) and
- (iii) 5 per cent spent on goods produced by women or youth-owned companies.

Similarly, the Charter requires that 80 per cent of the total spent on services be sourced from South African firms, with the following allocation:

- (i) 50 per cent spent on services provided by companies owned and controlled by historically disadvantaged persons.
- (ii) 10 per cent spent on services supplied by BBBEE-compliant companies.
- (iii) 15 per cent of services supplied by women-controlled companies.
- (iv) and 5 per cent of services supplied by youth-controlled companies. (Department of Mineral Resources; 2018: 16)

These targets and requirements have been criticised for being too onerous on mining companies and for deterring investors.

Procurement

With regards to the procurement of goods and services, the Mining Charter III sets out even more stringent regulations regarding procurement for holders or sub-contracting companies. It encourages both downstream and side stream value addition. Mining Charter II (promulgated in 2010) contained the following regulations regarding procurement:

- Procure 40 per cent of capital goods from BEE entities by 2014.
- Ensure that multinational suppliers of capital goods annually contribute

a minimum of 0.5 per cent of annual income generated from local mining companies towards socio-economic development of local communities into a social development fund from 2010.

- Procure 70 per cent of services and 50 per cent of consumer goods from BEE entities by 2014.

The procurement provisions of the Mining Charter are already in force, creating the basis for rapid demand expansion for locally man-

ufactured capital and consumable goods as well as services required to sustain the mining industry (Department of Mineral Resources; 2011). The BEE entities as envisioned in Mining Charter II are companies that comprise of 25 per cent plus one share ownership by historically disadvantaged South Africans. Mining Charter III extensively alters the requirements for procurement as follows: mining companies are required to report their levels of compliance with the Mining Charter on an annual basis. In monitoring and evaluating compliance, the government will consider material constraints that may prevent the achievement of set targets (Mining Charter, Art. 2.9.)

The Mining Charter also includes a scorecard to facilitate compliance with the Mining Charter. The scorecard measures progress on nine empowerment elements, including reporting, ownership, procurement, enterprise development, and beneficiation. The scorecard lays out what is to be measured and the targeted levels of compliance, and assigns a weight to each element. Compliance considers the entirety of the scorecard. Non-compliance with the provisions of the Mining Charter and the MPRDA render the mining company in breach of the MPRDA and subject to the possible suspension or cancellation of rights, permits or permissions (Mining Charter, Art. 3). Furthermore, a Social and Labour Plan must be submitted with an application for a mining or production right, together with an annual compliance report. The plan must include commitments for local procurement. The Mining Charter prescribed local content procurement goals that were enforceable by the Department of Mineral Resources (DMR) (Section 74 of the MPRDA).

The Mining Charter scorecard is the second procurement compliance document that exists. This scorecard has similar requirements to the BBBEE scorecard, so the two are in the process

of being streamlined. The key difference is that the Charter scorecard is mining-specific, while the BBBEE scorecard applies to all businesses in South Africa. A low score on either scorecard may not have any direct legal consequences, although in practice it will be difficult to conduct business in South Africa since procuring from a supplier with a low BEE score affects the score of the buyer. Thus, when a mining company procures from a business with a low BEE score, mining companies are lowering their own public BEE scores; as a result, they generally prefer suppliers with high BEE scores.

The Mining Charter III is currently the subject of litigation between the SAMC and the Minister of the Department of Mineral Resources and Energy, the SAMC is aggrieved by various clauses in the Charter (Minerals Council South Africa v Minister of Mineral Resources and Another (20341/19) [2020] ZAGPJHC 171). Anglo American is supportive of the SAMC in embarking on this litigation. It has been noted or cautioned, (Herbert Smith Freehills; 2018) that the local content procurement requirements imposed by Mining Charter III may violate South Africa's international obligations under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). Under the GATT, South Africa is obliged to afford imported products "treatment no less favourable than that accorded to like products of national origin", and thus not to apply any regulatory measures that afford preference or protection to domestic products over imported products (Article III (1) and (4) of the GATT). It is evident from the ongoing litigation that legal certainty is required in South Africa's local content framework and that the effective implementation of local content policies and laws requires buy-in and willingness from mining companies.

The current legislative framework on local con-

tent does not make provisions to safeguard against corruption, bribery and other related crimes because of the misuse of preferential treatment and support to local businesses inherent in LCPs (Mckune; 2013). As an unintended

consequence, political elites end up unduly benefiting from the LCPs (The Risk & Compliance Portal; 2020).

The Beneficiation Strategy 2011

The Beneficiation Strategy 2011, outlines a framework that will enable an orderly development of the country's mineral value chains through the promotion and enhancement of local beneficiation, thus ensuring South Africa's mineral wealth is developed to its full potential for the benefit of the entire population. The beneficiation strategy provides a framework that seeks to translate the country's sheer comparative advantage inherited from mineral resource endowment into a national competitive advantage. The strategy is aligned to a national industrialisation programme, which seeks to enhance the quantity and quality of exports, and promote the creation of decent employment and diversification of the economy, including the promotion of the green economy. Ten strategic mineral commodities have been identified in the Beneficiation Strategy for the Minerals Industry of South Africa (Department of Mineral Resources; 2011). In addition, the beneficiation strategy for the industry is focused on developing mineral value chains and facilitating the expansion of beneficiation initiatives at home, up to the last stages of the value chain. It furthermore seeks to move forward development through the optimisation of linkages in the mineral value chain, and to facilitate economic diversification, job creation and industrialisation (Department of Mineral Resources; 2011:13). The Department of Trade and Industry has a Mineral Value-Chains Strat-

egy project which will develop a strategy and action plan to advance backwards and forward beneficiation in mining. It includes strategies to increase the backward value-addition (local content) of the mining sector (from exploration, through mining, concentration, smelting and refining to beneficiation) (Department of Trade and Industry; 2013). South Africa has prioritised five mineral value chains in the strategy. These are energy commodities, iron and steel, pigments and titanium production, autocatalytic converters and particulate diesel filters, and jewellery fabrication.

However, as observed in the South African beneficiation strategy, the region faces many challenges in deepening beneficiation and exploiting mineral value chains due to a shortage of critical infrastructure, limited research, development and innovation (RDI), inadequate skills, market access constraints, and limited access to raw materials due to long-term contracts and pricing mechanisms. Nonetheless, these linkages, when fully developed, internalise the mineral value chains that can benefit the local economy and citizens. A right holder shall submit an annual Mining Charter report and provide proof of local content for mining goods in the form of certification from the South African Bureau of Standards (SABS) or any other entity designated by the Minister (Bhengu; 2016).

Codes of Good Practice

The Codes of Good Practice developed under the MPRDA created a sector-specific version of the generally applicable codes of good practice promulgated under South Africa's Broad-Based Black Economic Empowerment Act. Though conceptually similar, it is different, which has created uncertainty for companies over the codes with which they must comply. The Department of Mineral Resources also developed the Codes of Good Practice for the mining industry in April 2009 to facilitate the effective implementation of legislation. The codes create more specific procurement targets for the pe-

riod between 2015 and 2019, and are designed to give preference to suppliers that are more than 30 per cent owned by black women as well as small, medium and micro-enterprises in order to develop new and sustainable businesses (The Code of Good Practices; Art. 2.5).

The Mining Charter and Codes of Good Conduct include scorecards to monitor and assess compliance levels. However, the government publishes little to no information about its mining contracts or its licensing practices, making the monitoring of the Code difficult.

The South African Minerals and Mining Policy

The South African Minerals and Mining Policy 1996, through mineral beneficiation, aims to help South Africa realise the full potential of its mineral wealth and to provide the maximum benefit of the entire population by promoting the establishment of secondary and tertiary mineral-based industries aimed at adding maximum value to raw materials. Under this policy, the government endeavours to provide opportunities through equity, ownership, and man-

agement to locals to participate in the mining industry. Steps such as policies linked to black economic empowerment as well as state intervention to finance investment in new and existing mining ventures in partnership with black companies are outlined in the policy. The policy promotes the establishment of secondary and tertiary mineral-based industries aimed at adding maximum value to raw materials.

The Precious Metals Act of 2005

The Precious Metals Act is another key piece of legislation, speaking directly about local content procurement in the mining, processing, refining and beneficiation of metals (The Precious Metals Act; 2005). In terms of local procurement, the Act gives preference to those applicants whose beneficiation processes will be at the last stage of the mineral beneficiation value chain or will have a positive impact on the beneficiation in the last stage of the mineral value chain.

In the issuance and renewal of precious metal beneficiation licenses, the Precious Metals Act requires that holders make up, change the form, or add value in any other manner to any unwrought or semi-fabricated precious metal in his or her lawful possession. This is to further contribute to the value addition of mineral commodities (Section 6 (1) of Precious Metals Act No.37 of 2005).

The Broad-Based Black Economic Empowerment Act

The Broad-Based Black Economic Empowerment Act, commonly known as the BBBEE Act, is another legislative tool introduced to promote the economic transformation and meaningful participation of black people (previously disadvantaged people) in the South African economy and is a key document to facilitate the participation of local people. The Act stipulates various objectives, such as the need for preferential procurement for enterprises owned or managed by black people, increasing the number of black people who own, manage or control enterprises and productive assets (Broad-Based Black Economic Empowerment Act No. 53 of 2003 (BBBEE Act)). In the mining sector, a firm's BBBEE status is a cardinal factor that can affect its ability to successfully obtain government and public entity tenders and licenses for their operations.

In considering an application for any license, permit or certificate the Regulator:
(a) must have regard to the promotion of

equitable access to and the orderly local beneficiation of precious metals.
(b) must have regard to the requirements.

Furthermore, many companies continue to view local content as a 'compliance' issue, and hence keep local content away from their core business functions by doing the minimum to comply with the rules.

Considering the above legislation and policies, mining companies have passed preferential procurement policies. For example, Harmony Gold's policy statement commits the company to support access of black businesses in the mainstream procurement opportunities throughout the value chain, as well as to promote entrepreneurship in black communities and development of future sources of supply through enterprise development (Steenkamp; n.d.). Companies with similar policies include AngloGold Ashanti, ArcelorMittal South Africa, and Anglo American.

The Petroleum Sector

According to the South African Petroleum Industry Association (SAPIA), the fuel sector contributes about 6 per cent to the country's gross domestic product (GDP) and produces about 31 billion litres of liquid fuels per year. The oil industry is divided into upstream and downstream activities. Upstream refers to the exploration and production of crude oil. Downstream refers to the refining, transportation, and marketing of end-user products. South Africa has no crude oil reserves of its own, and about 60 per cent of its crude oil requirements are met by imports from the Middle East and Africa (GCIS; 2012). The government tabled the Energy Policy White paper to transform the

energy sector. The Paper's overall objective is to achieve 25 per cent of sustainable presence ownership or control of all facets of the industry and of the various entities that hold the operating assets of the South African oil industry.

The 2005 Petroleum Products Amendment Act (Act No 58 of 2003) briefly states that licences shall be given in part to create opportunities for small businesses in the petroleum sector. The Charter for the South African Petroleum and Liquid Fuels Industry has more substantial requirements on local procurement. It states that the private petroleum sector must adopt procurement policies that encourage and show

preference to historically disadvantaged South African companies supplying goods and services. Although no specific efforts are stipulated, the charter does give an example of how this can be done – by developing criteria that favour local supplier bids, all else being equal. While there are no specific targets for petro-

leum companies to meet, they are subject to any BEE targets that apply more generally to all private sector companies in South Africa. This includes providing for the licensing of persons involved in the manufacture or sale of petroleum products and promoting the transformation of the South African liquid fuels industry.

The Liquid Fuels Charter (LFC)

The Liquid Fuels Charter, enacted in 2002 in line with the Petroleum Products Amendment Act, gives effect to the local content procurement and the transformation of the liquid fuels sector. The framework was enacted to progress HDSAs and sought to introduce local content procurement initiatives and measures, mindful of imperatives of redressing historical, social and economic inequalities as stated in the constitution.

The Liquid Fuels Charter sought to substantially expand opportunities for historically disadvantaged South Africans to enter the fuel industry (The Charter for the South African Petroleum and Liquid Fuels Industry 2000 (“LFC”). The Charter requires companies to subscribe to “South African subsidiaries of multinational companies and South African companies [that] focus their overseas placement and/or training programmes on historically disadvantaged South Africans”. This includes:

- identifying a talent pool and fast-tracking it;
- ensuring inclusiveness of gender
- implementing mentorship programmes; and
- setting and publishing “stretch” (i.e., demanding) targets and their achievement.

The Charter further requires that when procuring supplies, participants in the petroleum industry are required to give preference to companies owned or controlled by HDSA and adopt procurement policies that will contribute to and leverage the growth of such companies. To facilitate skills development the Liquid Fuels Charter states that: “In its bilateral relations with relevant countries, government endeavours to secure training, opportunities for HDSA companies”.

² Zambia Strategy paper on the promotion of local content.

Conclusion

It is evident that local content has become a salient feature of modern mineral policy and regulatory regimes and is also being incorporated into mineral development agreements to create opportunities for local entrepreneurs. However, the South African Minerals Council and others have expressed concerns that the local content procurement targets and requirements are too onerous, could decrease investment in the sector, and are at times in conflict with international trade agreements. Authors, Maponga and Musa are right that under certain conditions, local content can be an engine for facilitating diversification, market and product creation, and technological and managerial innovation, strategies and goals for each of which can be embodied within a broader institutional framework in South Africa (Maponga and Musa; 2020). The successful implementation of LCPs and LRP depends on intensive coordination across a range of government departments, the business community, and international partnerships

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SARW Objectives

Monitor corporate and state conduct in the extraction and beneficiation of natural resources in Southern Africa, and assess to what extent these activities uplift the economic conditions of the region's communities.

- Generate and consolidate research and advocacy on natural resource extraction in Southern Africa.
- Create informed awareness of the specific dynamics of natural resources in Southern Africa, building a distinctive understanding of the regional geo-political dynamics of resource economics.
- Provide a platform of action, coordination and organisation for communities, activists, researchers, policy-makers, corporations, regional and global governing bodies in the watching and strengthening of corporate and state accountability in extractive industries.
- Engage with and support government on building accountable and transparent management of extractive resources.
- Build capacity for communities, civil society, parliaments, and media to hold governments and corporations to account, and to participate in decisions about resource management.
- Advocate and promote human rights and environmental protection in resource extraction activities.
- Support efforts to legislate mandatory public disclosure of and access to financial, social, environmental and regulatory compliance information in the extractives industry.
- Promote extractive industries that create wealth for local communities.

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