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TRANSFORMATION OF THE MINING SECTOR OF SOUTH AFRICA: STRATEGIES BEYOND THE LIFE OF THE MINING CHARTER IN 2014

Nokuhle Vencentin Madolo

A thesis submitted to the Faculty of Engineering and Built Environment, University of Witwatersrand, Johannesburg, in fulfillment of the requirements for the degree of Doctor of Philosophy

Johannesburg, 2014

DECLARATION

I declare that this thesis is my own unaided work. This thesis is being submitted for the degree of Doctor of Philosophy at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other University.

_____

Nokuhle Vencentin Madolo

This _____day of _____ 2014

ABSTRACT

Transformation of the mining sector is imperative in South Africa as it is the backbone of the economy and informs all aspects of competitiveness in the global arena. In addition, it attracts foreign investment. The Mining Charter is an agent of transformation in the mining sector and its continuous updating must be the focus of all stakeholders given the lifespan of the Mining Charter. Thinking about tomorrow and planning ahead to a sustainable future is of importance to South Africa and is, therefore, vital for the implementation of strategies to take the sector forward. Such forward planning will ensure the efficient transformation and sustainable growth of the sector to address the inequalities in the distribution of income, property and opportunities as well as the very high levels of crime and violence that exists in the country. This disparity s is the result of the historically disadvantaged population groups of which the black South Africans comprise the majority. Continuous measures have to be taken to redress these disparities in order to achieve social and economic emancipation for all citizens.

The Mining Charter has a lifespan of 10 years, commencing in 2004 and ending in 2014. The research investigates the various elements of the Charter and whether the industry will have effectively been transformed at the end of its lifespan. The question that is raised is what should happen beyond 2014. Recommendations are made to promote practices in the mining industry that should lead to the desired results.

The research has included literature on transformation in South Africa, in particular the mining sector charter evaluation. The author's personal experience and involvement in the mining industry in implementing the Charter, drafting Social and Labour Plans, Employment Equity Plans and consultations with various stakeholders and the synthesis of various data has also been considered. A comparative analysis of countries that have undergone a transformation agenda has been made.

Even though progress has been made, the strategies beyond 2014 are a realization that in the transformation of the mining industry, there is still a need to re-visit the fundamentals in an attempt to achieve transformation in terms of substantive behaviors and practices. The research advocates strategies and implementation plans for the transformation of the Mining Sector of South Africa and recommends a proposed new charter in two parts: one for industry and the other for government.

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LIST OF ABBREVIATIONS

AA	Affirmative Action
ABET	Adult Basic Education and Training
AMV	Africa Mining Vision
ANC	African National Congress
ARMSCOR	Armaments Corporation
BEE	Black Economic Empowerment
BBBEE	Broad Based Black Economic Empowerment
BORA	New Zealand Bill of Rights Act 1990
CEE	Commission for Employment Equity
CEOs	Chief Executive Officers
CEDAW	Committee on the Elimination of Discrimination Against Women
COM	Chamber of Mines
COSATU	Congress of South African Trade Union
DMR	Department of Mineral Resources
EAP	Economically Active Population
EE	Employment Equity
EEOC	Equal Employment Opportunity Commission
ESOPs	Employee Share Ownership Plans
DMR Codes	Codes of Good Practice for the Mineral Industry
DTI Codes	Black Economic Empowerment Codes of Good Practice
HACAAP	Hazard Analysis Critical Control Points
ESKOM	Electricity Supply Commission
EXCO	Executive Committee
FET	Further Education and Training
FOSCOR	Phosphate Development Corporation

HDSAs	Historically Disadvantaged South Africans
HIV/ AIDS	Human Immunodeficiency Virus /Acquired Immunodeficiency Syndrome
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDC	Industrial Development Corporation
IDPs	Integrated Development Plans
ISCOR	South African Iron and Steel Corporation
LED	Local Economic Development
MIGDETT	Mining Industries Growth Development and Employment Task Team
MPRDA	Mineral and Petroleum Resources Development Act
MQA	Mining Qualification Authority
NEP	New Economic Policy
NIC	Newly-Industrialized Country
NP	National Party
NQF	National Qualifications Framework
PGM	Platinum Group Metals
PGDS	Provincial Growth and Development Strategy
SAA	South African Airways
SAMDA	South African Mining Development Association
SADC	Southern African Development Community
SASOL	International integrated chemical and Energy Company
SMME’s	Small Medium and Micro Enterprises
SLP	Social and Labour Plan

SWOT	Strengths, Weaknesses, Opportunities and Threats
UMNO	United Malays National Organisation
US	United States (United States of America)
VOC	Vereenigde Oost-Indische Compagnie

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CHAPTER ONE

STATEMENT OF THE ISSUE BEING INVESTIGATED AND THE OVERALL OBJECTIVE OF THE RESEARCH

1.1 Introduction

The aim of the research was to investigate the transformation of the mining sector in South Africa as envisaged by the Mining Charter[1] and other relevant South African legislation. The main question was whether the mining sector was effectively transforming and would have addressed past inequities (thus ensuring that the country's objectives on Black Economic Empowerment and transformation had been achieved). Several questions emerged regarding the implementation of Black Economic Empowerment (BEE). Among them were what the broad-based definition of BEE meant[2], how to balance its political and economic aims, whether the focus on big deals was helpful and whether BEE deals in the mining industry were truly transforming the large mining houses. The Charter attempted to solve both economic and political issues to encompass a broader beneficiary base. Political issues arose as the government tried to appease all its electorate, while pursuing a policy of BEE. However, the result was a concentration of wealth characteristic of the capitalist model. The economic question was about how cost effective the process of broad-based BEE could be achieved and whether it contributed to economic growth.

Implementation challenges emerged as BEE policy attempted to align itself with regulatory, legal, political and business environment. These challenges arose because BEE was an experiential process in South Africa. The research investigated whether the industry would have achieved the set target scores as stipulated in the Broad Based Socio-Economic Empowerment Charter 2004, whether they met the revised Charter of 2009 and whether the overall targets would be achieved by 2014. The research would recommend strategies beyond the life of the Mining Charter. The strategies would chart the course of the sector into the future in the most likely event that the set targets had not been met.

[1] Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry No. 26661 of 2004

[2] Broad based empowerment attempts to achieve a broad base of beneficiaries within a route that is broader than equity, which also encompasses employment, management control, procurement, skills development and social investment.

The history of mining has been that of the domination and exclusion of the majority of the people of South Africa and indifference to the plight of communities from which they drew their labour or those that hosted the mining industry[3]. The Charter was intended to be an agent for change and the question that was investigated was whether the industry would meet the predetermined targets and whether the Charter would set the course for transformation and would reach the objectives of BEE for the country.

In the South African context, there is no one definition of transformation, as it is a concept, not used specifically, but used of society as a whole. The Webster Dictionary defines transformation as an act, process, or instance of change in structure, appearance or character, conversion, revolution, makeover, alteration or renovation. BusinessDictionary.com defines it as process of radical and profound change that directs society in a new direction and brings it to an entirely different level of effectiveness. It is apparent from the definitions that transformation is about a change of consciousness, replacing what already exists with something completely new. The State must dismantle and emotionally let go of the old ways of operating while the new structure is being implemented. This transitional phase can be project-managed and effectively supported with traditional change management tools. Change management pundits have agreed in demanding that any change effort should have a well-defined future state, an assessment of the current state and a clear and precise strategy to move from the current state to the future and desired state. It is in implementing the strategy that problems present themselves when conducting a serious review, let alone when conducting a review of the transformation of a society such as South Africa.

That South Africa is undergoing a process of formidable and fundamental change is undeniable. The post-apartheid government introduced policies of affirmative action to address historical imbalances and bring about effective transformation, Effective transformation can better be defined as arriving at an acceptable position in society in redressing past injustices. This definition matches the ideals espoused in the Constitution, which acknowledges past differences and presently seeks to correct the inequalities of the past in society.

[3]Tereblanche, S, A History of Inequality in South Africa, (University of Natal and KMM Review Publishing Co (Pty) Limited, Durban, South Africa, 2002).

1.2 Current legal status

It was important to examine the current legislative frameworks of South Africa. Such a scrutiny would provide a broad picture of the legal basis that made it imperative to ensure that the Charter was an effective tool for transformation of the mining industry and the reasons why protection, affirmative action and non-discrimination were not debatable in South Africa. Legislation and regulations, as mechanisms for addressing discrimination and managing diversity, establish the process legitimacy and ensure its implementation is mandatory.

1.2.1 The Constitution

The legal basis of any legislation in a country is its Constitution. It is, therefore, imperative that in investigating the current legal status of South Africa, one had to first look at the Constitution. The Constitution of South Africa, Act No 108 of 1996 makes provision that transformation is a prerogative that cannot be denied. The Constitutional principle underpinning BEE is covered by Section 9(1), otherwise known as the equal protection clause and reads as follows:
Everyone is equal before the law and has the right to equal protection and benefit of the law.

Section 9(2), in most instances referred to as the affirmative action provision reads:

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Last, but not least, section 9(3), otherwise known as the anti-discrimination clause, reads:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The most important question in implementing any transformation strategy for BEE is how best to combine the three provisions into a constitutionally and socially meaningful whole. It is paramount that all three provisions be accorded their own importance. When it comes to

understanding the Constitution's attitude to affirmative action (or to its subset, BEE), the most relevant section is section 9. It is in the dialogue between the three provisions of section 9, that the Constitution presents a holistic view of equality in the context of South Africa. It is within these parameters and beyond the limitations of equality that redress and fairness is a requisite.

1.2.2 Broad Based Black Economic Empowerment Act No 53 of 2003 (The BEE Act)

This Act set the path of defining key elements of BEE compliance in respect of each and every sector of the South African economy. It removes the regulatory context of BEE away from disparate sectorial initiatives and places it firmly within a context of uniformity. This Act provides a framework for the BEE regulations known as the Codes of Good Practice. The BEE Act authorizes a regulation document, the Codes, to become the working mechanism for black economic empowerment.

Key important issues in the Act are Section 1, Section 2, Section 4 to 8, Section 9, Section 10 and Section 12.

Section 1: Definitions- The most important definition is that of Black people and Broad Based Black economic empowerment.

Black people are defined as *a generic term which means Africans, Coloureds and Indians.*

Broad based black economic empowerment means*: the economic empowerment of black people including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include, but are not restricted to-*

a) Increasing the number of black people that manage, own and control enterprises and productive assets;
b) Facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
c) Human resources and skills development;
d) Achieving equitable representation in all occupational categories and levels in the workforce;
e) Preferential procurement; and

f) Investment in enterprises that are owned or managed by black people.

Section 2: Objectives

The objectives are to *"promote economic transformations and provide meaningful participation of Black people in the economy"*. Section 2 makes mention of the desire to change the racial composition of ownership and management in the economy.

Section 4 to 8: BEE Advisory Council

This section establishes the Black Economic Empowerment Advisory Council. The council reports directly to the President, which emphasizes the priority given to the success of this policy. The BEE Advisory Council's main aim is that of continually determining and advising on the directions of BEE.

Section 9: Codes of Good Practice establishes and gives legitimacy to the regulation document known as the Codes of Good Practice. These codes outline and give effect to the practicalities of BEE. A regulation document shortens the lengthy and time-consuming parliamentary procedure required to implement any changes to an Act. The nature of BEE is dynamic and changes in market conditions necessitate quick response in BEE policy. Power is granted to the lower-level regulations documents to effect changes to the Codes without referring the matter to parliament.

The BEE Act authorizes and gives effect to the Codes of Good Practice to address the following issues:

- Interpretations and definitions of BEE and BEE entities;
- Qualifications requirements for preferential procurement;
- Measurement indicators and weighing compliance for broad-based BEE; and
- Guidelines for the various economic sectors to comply with requirements of the Act or the Codes of Good Practice.

The Act empowers the Codes to include any other matters necessary to achieve the objectives of the Act. The Codes also have the authority to specify the targets necessary to achieve BEE and to give the time period to achieve these targets.

BEE compliance in terms of the Codes of Good Practice is measured with reference to its overall score in respect of seven specific BEE elements. These are measured in accordance

with a BEE scorecard. Every company subject to BEE compliance is required to maintain a scorecard that should be prepared and verified by an accredited verification agency. The table below is an example of the generic BEE scorecard.

Table 1: Generic BEE Scorecard

Elements	Generic scorecard weighting
Ownership	20 points
Management Control	10 points
Employment equity	10 points
Skills development	20 points
Preferential procurement	20 points
Enterprise development	10 points
Residual	10 points

Source: Visions of Black Economic Empowerment (Mangcu, et al)

BEE compliance scoring matrix is the tool that is used to measure the overall BEE compliance level of entities.

Table 2: BEE compliance scoring matrix

BEE status	Qualification	Compliance Level
Level one contributor	≥100 points	135%
Level two contributor	≥85 but‹100 points	125%
Level three contributor	≥75 but‹85 points	110%
Level four contributor	≥65 but‹75 points	100%
Level five contributor	≥55 but‹ 65 points	80%
Level six contributor	≥45 but‹55 points	60%

Level seven contributor	≥40 but‹45 points	50%
Level eight contributor	≥30 but‹40 points	10%
Non-compliant contributor	‹ 30 points	0%

Source: Visions of Black Economic Empowerment (Mangcu, et al)

It should be noted that in terms of the regulatory regime under the Codes of Good Practice, any business of which more than 50% is owned by black people is automatically elevated to the compliance level.[4]

Section 9 also refers to the issue of amendments or replacement of provisions contained in the Codes. No amendments or replacements may be made without publishing the drafts in the Government Gazette. Provision is made for a minimum period of 60 days of public right to comment on the provisions proposed for changes.

Section 10 is worthy of note as it is crucial to BEE. It compels organs of state and public entities in assessing qualification criteria to investigate the following:

- The issuing of licenses, concessions and authorizations for any law;
- Preferential procurement policy;
- The sale of state-owned assets; and
- Entrance into partnerships with private sector entities.

It is crucial to note that Section 10 does not apply to the private sector as it makes no reference to the private sector. This lack of reference implies that there is no legal reason for the private sector to comply with BEE according to the Codes of Good Practice. It is only a business necessity propelled by preferential procurement that would compel compliance with the Codes by the private sector. Of importance is the realization of the absence of a legal necessity for compliance with the provisions of the BEE Act.

[4]Mangcu, X, Marcus, G, Shubane, K, Hadland A (ed) (2007) Visions of Black Economic Empowerment, Jacana Media (Pty) Ltd, Johannesburg, South Africa. In terms of the regulatory regime under the Codes, the only proof needed to be produced by a company is a verification certificate issued on an annual basis by an accredited verification agency that they have complied and the scoring matrix crucial as a basis for the implementation of section 10 of the BEE Act.

Section 12: Transformation charters

This section provides for the gazetting of industry transformation charters developed with the relevant industry stakeholders. These industry-specific charters advance the transformation objectives of the Act. The Codes of Good Practice rank supreme to the industry charters as the Act does not grant any power to transformation charter over the Codes of Good Practice.

1.2.3 The Minerals and Mining Policy of 1998

The Mineral and Mining Policy was enacted to prepare the industry for the challenges facing all South Africans as they approached the 21st century. This step was taken in realization that the South African mining industry had, since its inception, been a cornerstone of South Africa's economy. The Mining policy articulates the vision and the legislation undertakes action to realize the vision. The Minerals and Mining Policy of South Africa was adopted in 1998 to chart the course of the new political order of the country. It addressed the following key areas:

- Business Climate and Mineral Development, addressing continuation of policy conducive to investment;
- Participation in Ownership and Management addressing racial and other imbalances in the industry;
- People Issues; addressing health and safety, housing needs, migrant labour, industrial relations and downscaling;
- Environmental Management; Regional Co-operation; and Governance.

The main objective of the Mineral and Mining Policy was the change in ownership of mineral rights. The policy was the legal basis that ushered in a new era of mineral and mining law in South Africa. In the spirit of the policy, the Minerals and Petroleum Resources Development Act No. 28 of 2002 was enacted in 2004. The main element was the vesting of mineral rights to the state.

1.2.4 The Minerals and Petroleum Resources Development Act

The Minerals and Petroleum Resources Development Act (MPRDA) No 28 of 2002 came into force in 2004 and operationalised the vision of the state in mineral resources development. The MPRDA is the legislation that governs mining and minerals in South Africa. An important feature of the MPRDA is that it vested minerals in the custody of the

State in trust for the people of South Africa. This change was a departure from the common law right of owners of land to minerals, in that it vested minerals in the State. The common law foundation of South African mineral law premised that the land owner was also the owner of minerals embedded in and under the ground. Landowners could mine freely on land they owned or grant the right to mine to others.

The MPRDA's main aim was to streamline the exploitation of minerals in order to produce revenue for the State and, in turn, for the country's citizens. The MPRDA grants the State the sole authority and responsibility to manage the exploitation of the nation's mineral resources in an effort to ensure equitable distribution. This Act is the foundation of the Broad Based Socio-Economic Empowerment Charter for the mining industry. The central tenet, as already mentioned, is that ownership of mineral rights vests with the State rather than with the white-owned private sector as was the case prior to the enactment of this legislation. Mining companies had to apply to the state for conversion from old order mining rights to the new order mining right. This process was designed to assist government to identify opportunities for black empowerment as the "do not use it and lose it" principle would apply.
Section 100 of the MPRDA is the provision that is central to this research. This provision gives effect to the Charter. Section 100(2) (a) and reads as follows:

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 timetable 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.

(b) The Charter must set out amongst others how the objects referred to in section 2(c),(d),(e),(f) and (i) can be achieved.

Section 2 of the MPRDA is the provision that sets out the objectives referred to in Section 100(2)(b). To:

(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

(f) promote employment and advance the social and economic welfare of all South Africans;

(g) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

Section 23(1) of the MPRDA is the provision that outlines the requirements for applications for mining rights. The Minister is obliged as follows:

Subject to subsection (4), the Minister must grant a mining right if-

(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the Charter contemplated in section 100 and the prescribed social and labour plan.

In the BEE context in the mining industry, Section 23(1) (h) is most important. Section 23 read in conjunction with section 100 states that the Minister is legally obligated to apply the Mining Charter in her/ his determination in granting a mining right.

1.2.5 The Mining Charter

The Mining Charter was promulgated in 2002 and is aimed at improving equity, opportunities and benefits for historically disadvantaged South Africans. This document is government's attempt at driving transformation through its power to grant licenses. The Mining Charter is the most powerful leverage the government has at its disposal to force the private sector to comply.

The Mining Charter is important as a legal instrument because it stipulates targets that have to be achieved by the mining industry and the companying Scorecard sets out the timetable for transforming the South African mining industry. The objectives of the Mining Charter are to:

- Promote equitable access to the nation's mineral resources to all the people of South Africa;

- Expand opportunities in meaningful way for HDSAs including women to enter the mining and mineral industry and to benefit from the exploitation of the nation's mineral resources;
- Utilize the existing skill base for the empowerment of HDSAs;
- Expand the skills base of HDSAs in order to serve the community;
- Promote the employment and advance the social and economic welfare of mining communities and the major labour recruitment areas; and
- Promote the beneficiation of South's Africa mineral commodities.

In summary, the purpose of the Mining Charter is to address the imbalances of the past based on race, gender or disability of the HDSA. The Mining Charter, as an agent of transformation, has huge leverage in that it gave the power to the Department of Minerals Resources to grant mining rights in order to drive transformation within the private sector.

It is important to note that the Mineral and Petroleum Resources Development Act was promulgated on 1st May 2004 and the Mining Charter was gazetted in accordance with section 100 of the MPRDA on 13th August 2004. The BEE Act was promulgated on 21st April 2004 and the draft Codes were issued for comment by the public on the 8th December 2004. In determining the relationship between the Mining Charter and Codes of Good Practice, these dates are of major significance.

According to Section 23(1)(h) of the MPRDA, the Minister of Mineral Resources is obligated to require an enquiry as to whether the applicant complied with Mining Charter. In contrast to section 23(1) (h), section 10(a) of the BEE Act states:

Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of the Act in (a) determining qualification criteria for the issuing of licenses, concessions or other authorizations in terms of any law….

One can see that there is direct conflict between section 10 of the BEE Act and the provision of section 23 of the MPRDA in relation to the terms upon which the Minister of Mines may exercise her/his discretion in granting of minerals rights.

Section 13 of the Interpretation Act of 1957, states that where there is a conflict between two enactments, the later in time enactment takes precedence over the earlier one. Thus on the

basis of the *Lex posterior prior non derogat* rule, the Mining Charter must take precedence over the Codes of Good Practice with regard to the mining industry. This rule, therefore, means that the Mining Charter is not subject to the Codes of Good Practice.

1.2.6 The Scorecard

The scorecard is intended to measure BEE compliance by the mining sector. The idea was taken from a model developed by professors at Harvard to assist companies conduct internal assessments of their business processes and performance. This model was adapted by the Mining Charter with a tick-box approach, whereas the Empowerdex rating system adopted a numerical scorecard. The Department of Trade and Industry also adopted the numerical approach as more practical for measuring BEE contributions. A debate rages as to the best strategy to adopt, either numerical or the tick box to measure compliance. Critics of the tick-box approach claimed that it was largely a qualitative measurement and would result in interpretational challenges.[5] The scorecard's aim was meant to enable mining companies to track their progress and to provide a tool for reviewing the entity's empowerment objectives. The Scorecard is a "tick box" approach measuring tool to assess the mining company's compliance with the requirements of the Mining Charter. The scorecard allows BEE to become a dynamic process, thus fast tracking implementation as it operationalises BEE, even though Jack & Harris argued that the scorecards were meaningless scientifically. It only had a meaning given its comparative value as only the collective framework that gave meaning to the Scorecard.[6] The Charter and the Scorecard are annexure 1.

The Mining Charter, in terms of Section 100 (2) of the MPRDA, provided for the development of the Charter within five years of the Act coming into effect. The provision for its review is embedded in the Act. In addition, provision has been made to determine further actions, if need be, to achieve its objective. Such a review was conducted in October 2009. The relevant stakeholders met to assess the seven principles of the Charter and the progress made in achieving the objectives in these areas. The Mining Charter's review preceded the introduction of the Codes of Good Practice for the Mining Industry.

[5] Jack, V, and Harris, K, (2007) broad based BEE, THE COMPLETE GUIDE, Frontrunner Publishing (Pty) Ltd, pp. 76.

[6] It is through the comparative value of the scorecard that a measured entity progress is able to be tracked as the stipulated targets and defined measurements enable continual reassessment of the empowerment objectives of the measured entity.

1.2.7 The Codes of Good Practice for the South African Minerals Industry,

These Codes were developed by the Minister of Minerals and Energy in terms of section 100(1) (b) of the Mineral and Petroleum Development Act No 28 of 2002 which states:
The Minister must, within five years from the date on which the Act took effect-

(b) develop a code of good practice for the minerals industry in the Republic.

This document is a guideline document on how to complete empowerment in the mining industry. The purpose of the document as set out in the Codes introductory section stipulates:

The purpose of this document is to set out administrative principles in order to facilitate the effective implementation of the minerals and mining legislation and enhance the implementation of the Broad-Based Socio-Economic Charter applicable to the mining industry and to give effect to section 100(1) (b) of the Mineral and Petroleum Resources Development Act, 2002 by developing a Code of Good Practice for the minerals industry in the Republic.

The view of government was that these codes had been enacted to create an industry that would proudly reflect the promise of a non-racial, non-sexist and prosperous South Africa. The purpose of the Codes was not to replace laws relating to the minerals and the petroleum industry but were an endorsement of the laws already in place to effectively implement section 100(1) (b). The Codes introduced a standardized measurement tool for Broad-based BEE implementation which meant there was more focus on the measurement and reporting of BEE compliance, especially among private sector organizations, which entailed the monitoring of BEE compliance, the responsibility for which rested almost solely with the public sector before the enactment of the Codes. The inclusion of private sector companies had significant implications for corporate South Africa. The result was that the pace at which implementation was expected to be achieved would increase significantly. Second, the focus of BEE implementation and compliance would shift from ownership and management control to a broad-based balanced scorecard approach, taking into consideration all seven elements of the BEE scorecard. These actions were precisely what was required to achieve meaningful economic transformation.

The Codes of Good Practice have been viewed as a controversial document which critics claimed fundamentally and ruinously altered the way empowerment was implemented in

South Africa. Industry argued that the introduction of the Codes were government's attempt to amend the Charter through the back door. The most criticized aspect of the Codes was in relation to transfer of ownership. Industry was obligated to transfer a minimum of 40% of its assets in BEE deals. This transfer equates to a minimum of 10% debt-free black shareholding. The Codes stipulate that credits for empowerment when ownership was transferred could only be claimed two months after the BEE group was debt free. The industry argued that logically this was difficult to achieve because mining assets, by their nature, were expensive, capital intensive for growth by expansion, and required considerable working capital.

The good news for industry was that the Codes of Good Practice were not retrospective so mining companies that had completed empowerment, would not be subject to the new law. The Minister of Mines, Susan Shabangu was cited in the article "SA state mine firm to secure energy minerals" by Brendan Ryan (September 2009) published in Miningmx , as stating that there was nothing new in the Codes but that they were merely an elaboration on issues that had always been contained in the Mining Charter. The Codes discuss social plans, issues, such as provision of housing and infrastructure, skills development and sustainability of local communities. The Minister continued that *"stakeholders have to take responsibility for these issues at the right time which is from the beginning and not at the end*". Shabangu added, "*our observation in terms of transformation since the promulgation of the Minerals and Petroleum Development Act and the Charter is that there has been limited progress. The Mining Charter must be understood within the context of dynamic transformation and that this transformation does not have a shelf life ending in 2014-it is an not an event but rather a process."*

These legislative enactments provided the legal basis for transformation in South Africa and warranted being mentioned in the introduction. Other legislative measures promulgated prior to the Charter in an attempt to address transformation were touched on further in the research, for example, Employment Equity Act, 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 among others.

The risk was too big to undertake a research on transformation without learning from the transformation strategies and lessons from other countries. The issue of transformation affects the political, social and economy of a country. The reward is stability and security. It means stability for future generations. This research examined and drew on experiences and lessons from other countries that had similar approaches. For examples countries such as, Malaysia,

United States of America, Brazil and New Zealand had also experienced rectifying economic and social imbalances. The above-mentioned countries had to adopt Affirmation Action Policies to redress political, economic and social change to effect a redistribution of wealth, eradication of poverty and restructuring of society. These countries are similar to South Africa in that they are also home to ethnically diverse groups of people. In other words, they also have a plural society. The importance of a comparative analysis was to draw on and learn from the approach adopted by the other countries in implementing policies designed towards social and economic integration of different ethnic groups with the principal objectives of having indigenous people or previously disadvantaged groups of people participate in the mainstream of the economy.

In summary, the research explored the progress made and the problems encountered by the mining industry, government and all other stakeholders in implementing the Charter. In addition, the researcher gained insight into the approaches adopted by government, mining companies and other stakeholders to address issues of transformation. What worked? What failed? What lessons were learned? It has outlined the way forward for the mining industry with reference to the objectives of the Charter and targets for transformation, beyond 2014.

1.3 Overview

It was virtually impossible to engage in research relating to transformation without asking one of the most fundamental questions: "when did the social and economic disparities arise in South Africa?" The reason being that for effective transformation to be implemented, it was important to understand the basis of the unacceptable status that the country was transforming from to the acceptable position that was most desired.

South Africa's social and economic disparities could be traced to the colonization in 1652 by the Dutch East India Company as a supply base of the sea route between East and West. The beginning of the South African economy was when Jan Van Riebeeck landed at Table Bay on 6 April 1652. At that time, South Africa offered very little economically to Europeans when compared to North America, Canada, and other American countries except as a supply station on their way to the East. This situation was encapsulated in the words of Sir George Yonge, British Governor at the Cape in 1800, when he said *"I know very well this has been presented to us as a useless Colony and even a heavy burden and a place not worth retaining. The*

assertion is false and I assert that whoever has the Cape is Master of the Commerce of India."[7] The discovery of diamonds, however, took precedence and changed the entire scenario in which the monopoly of the Eastern sea route was breached.

The Bushmen and the Hottentots were the first people with whom the Dutch settlers came in contact. Their nomadic way of life did not suit the role the Dutch Settlers wanted them to play, that is, of servants. They were accused of incurable laziness and vagabondage.

The Bushman were viewed and treated as vermin as they had serious conflicts with the white settlers. The Bushman hunted and saw as easy game the cattle of farmers. They also regarded the white farmers as intruders in their ancestral hunting grounds. The extermination of the aboriginal inhabitants took a similar course as that in North America, Australia and New Zealand. The only differences were that, unlike their international counterparts, the South African whites failed to free themselves from dependence on the labour of the survivors of the original inhabitants of the new country. When they failed to convert them from their nomadic life to full-time farm labourers, they embarked on a policy of importing labour from other parts of the world. The result was that, in 1657, the first slaves arrived from Java and Madagascar.

In 1806, the Dutch occupation of the Cape came to an end with the arrival of the British. The British re-occupied the territory the Dutch had held between 1795 and 1803. The occupation of the Cape by the British was as a result of France declaring war on Britain and Holland. The British occupation of the Cape was in order for Britain to protect the spice route. The British returned the Cape in 1803 with the signing of the Treaty of Amiens with France and subsequently re-occupied it when the war with France resumed.

The English settlers arrived in the Eastern Cape in 1820, thus increasing English influence and authority at the Cape. The Dutch settlers did not get on well with the English settlers and in 1837 embarked on what is known as the "Great Trek." This mass exodus of the Dutch settlers inland was to escape the English influence. This Great Trek resulted in the founding of the Natal, Transvaal and Orange Free State Provinces.

[7] Andrew, HT AND Berril, FA et al (1962) South Africa in the Sixtees- A Socio-Economic Survey, South Africa Foundation, pp 104.

1.3.1 How the plural society came into being

A country's productive capacity depends both upon the resources it has available and upon the skills with which these resources are combined and applied. Three broad categories are generally recognized: the natural resources of the country, its human resources or labour potential and the capital equipment acquired as a result of past efforts. The existence of natural resources must be accompanied by the presence of sufficient numbers of people with drive, initiative and the desire for economic growth. The second resource is a socio-political climate in which these people can operate successfully. South Africa, in its quest for economic boom, relied on the importation of people from other parts of the world as they could not rely on the indigenous people who did not have the skills and preferred their nomadic lives.

The arrival of slaves from Java and Madagascar was truly the foundation of a plural society in South Africa and the main development of this society was the discovery of diamonds and gold in 1865. The importance of these discoveries was highlighted in the words of the Cape Colonial Secretary, Sir Richard Southey, in 1869, upon presenting the first diamond discovered in South Africa in the House of Assembly, *"Gentleman, this is the rock on which the future success of South Africa will be built."*[8] Economically and culturally, South Africa would not have been so successful and so diverse had it not been for the discovery of diamonds and gold and their magnetic attraction to men and money.

The discovery of diamonds in 1865 was followed in 1886 by the discovery of gold in the Witwatersrand. These discoveries attracted capital and men from within and abroad. The gold industry has, by far, been the major contributory factor to a multi-national society because of the size of the industry. There was a mass influx of men and capital into South Africa from all over the globe. These men were in search of fame and fortune and had the finance to invest in the mining industry. The migration policy had to be eased to allow for the growth of the industry. From 1887 to 1900, overseas capital amounting to millions of Rands was obtained for the development of the industry.[9] The economy of South Africa boomed to new

[8] Hobart, D, (1967), The South African Economy, Oxford University Press, London, New York.
[9] Lang, J, (1986) Bullion Johannesburg-Men, Mines and the challenges of Conflict, Johannesburg, Johannesburg Ball Publishers, pp 345.

levels. Within a few years, this boom resulted within in the construction of a railway infrastructure that traversed vast areas of land connecting the people with the Witwatersrand market for farm produce and with export markets.

The mining industry had a multi-faceted and multiplying effect on the economy of the country in that it became the biggest consumer of coal which resulted in the Highveld Coalfields being developed. As a consequence of this, electricity was generated in bulk for the industry and resulted in other manufacturing industries being developed as suppliers for the other needs of the mining industry. The Great Trek resulted in the establishment of Natal, Transvaal and the Orange Free State.

During the course of 19th Century, the demand for raw sugar increased dramatically in many countries throughout the world. The development of sugar industry in Natal emerged largely as a result of these demands. The sugar plantations of Natal necessitated the importation of another group of people into South Africa. Natal offered many economic opportunities to the European farmers, but they faced an acute shortage of labour since the Africans resisted working on the farms. There arose a need for indentured labourers from India. An indenture is a type of a labour contract. This type of contract arose where people without money or skills agreed to work for a master craftsman in return for being taught the trade. These apprentices could work for several years for an allowance or a small wage so that they could qualify as master craftsmen. The Natal Coolie Law 14 of 1859 was passed and the wheels of immigration were set in motion. The Indians began arriving in South Africa between 1860 and 1911 as indentured immigrants. By 1899, Indians were subjected to discrimination at the hands of the English settlers and the Boers. In the 1890s, the English settler legislature passed a spate of anti-Indian laws. In the Cape, there was a growing sentiment for exclusion. In 1893, Natal attained self-government and the government passed legislation to force Indians to re-indenture or return to India upon completing their indenture. These laws were passed to legally subordinate non-indentured Indians so that whites could feel secure against what they viewed as the Asiatic Menace. The attitude to Indians of the two Boer republics, that is Transvaal and the Orange Free States, was one of undisguised hostility.[10]

The Chinese were brought to South Africa under contract to work on the Witwatersrand gold mines during the period 1904 to 1910. The first official census of the Chinese in South Africa

[10] Lang, J, note 9 pp 346

was undertaken in 1865. There is no comprehensive documented history of the Chinese community in South Africa. The main reason was that they were always numerically insignificant. They were also the country's smallest minority. Their numbers were always considered to be too insignificant to warrant attention. These groups were categorized as "mixed" or "other", or together with the larger Indian population, as "Asian". Some historians have suggested that the Chinese were, in some instances, declared honorary whites in South Africa given the sparseness of their population. In the first decade of the twentieth century, anti-Chinese feeling was prevalent and had a negative impact on the free Chinese community. The introduction of legislation that referred to the native races of Asia or Asiatic inadvertently included the Chinese.

The enactment of the Asiatic Registration Act, otherwise known as the Black Act which stipulated the compulsory re-registration of all Asians with finger and thumb prints as a means of identity was the source of great humiliation. This humiliation was evident in the various petitions and representations made to the government by the Chinese. The result was a defiance campaign led by Mahatma Gandhi. The Chinese community was represented by Leung Quinn, acting chairperson of the local Cantonese Association. Throughout the passive resistance campaign, the steadfastness of Chinese community of South Africa in resisting this injustice was evident. During the apartheid era, the Chinese were caught up in a web of white and non-white delimitations. They had to come to terms with the complexities of ambiguous discriminatory laws: immigration was restricted, residence conditional, franchise denied, classification vague and social rights enigmatic. The history of the Chinese in South Africa is thus one of marginality.

Even though the roots of social inequality in South Africa could be traced to the Dutch landing in the Cape and their acrimonious relationship with the Bushmen and Hottentots, the mining sector was staunch supporter of the apartheid policy. Apartheid was based on the notion that blacks (the African, Coloured and Indian races) were inferior to the white race. This notion resulted in institutionalized racism, conditions on where blacks could live, what they could own, restrictions on the type of occupations in which they could participate and the standard of education they could receive.

The segregation included land distribution and subsequent sequestration of land. It included separate and unequal provision of housing, schooling and social amenities. In addition, there was economic and political oppression as well as exploitation of the majority of the African

people, that is black South Africans, who were excluded from the mainstream economic and political activities of the country. The black people of South Africa were also disenfranchised. [11]Apartheid excluded black people and constructed the material conditions for their exclusion in visibly demarcated areas. The most blatant and harshest example was the passing of the Group Areas Act. Even though blacks were excluded from the mainstream of the South African society, the establishment of white supremacy accompanied with all the associated privilege both economically and politically consistently necessitated the simultaneous construction of under-privileged black people. Inclusion and exclusion have been framed and experienced historically as inextricably inter-linked. Apartheid cannot be understood in isolation but has to be considered as interlocking with other forms of oppression and exploitation. It has to be noted that race remained the dominant articulating principle in apartheid formation.

1.3.2 The need to bring mechanism of transformation

In 1994, with the advent of democracy, a democratically-elected government came into power and inherited a contradictory legacy: the most developed economy in Africa but one with major socio-economic problems. The most serious of these problems were and are high rates of unemployment, abject poverty in the majority of population, sharp inequalities in the distribution of income, property and opportunities as well as very high levels of crime and violence. The population group on the receiving end of all these were mostly the black Africans.

The post-apartheid South African scenario was one that redefined the exclusionary construction of Apartheid and tried to redress past injustices by reconfiguring these in ways that were more inclusive of the people of South Africa. The Preamble of the Constitution of the Republic of South Africa, Act 108 of 1996, states the following:

'*We the people of South Africa, Recognise the injustices of our past; Honour those who suffered for injustice and freedom in our land; Respect those who have worked to build and develop our country; and believe that South Africa belongs to all that live in it, united in our diversity.*

[11] The term black and black people was taken from the magazine Education Southern Africa, Vol 1 no. 4, May 2007.

We therefore through our freely elected representatives, adopt this constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by the law; Improve the quality of life of all its citizens and free the potential of each person and build a democratic South Africa able to take its rightful place as a sovereign state in the family of nations.'

People had expectations for the past to be addressed. People of all races wanted to share in, participate in and own the mining sector and the economy at large. With the advent of democracy, the demand for delivery on the part of the government became an imperative. The Constitution stipulated that South Africa not only belonged to all those who lived in it, but it was also one based on the foundation of a democratic and inclusive society. The issues of social justice and fundamental human rights are imbedded in the Constitution. The comprehensive inclusion principle adopted in the Constitution is further reinforced substantially in the Equality Clause of the Constitution[12], which states:

a) *All the people of South Africa are equal before the law and have the right to equal protection and benefit of the law;*

b) *Equality includes the full and equal enjoyment of all rights and freedoms. To achieve equality, it states that legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken;*

c) *The state may not discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth;*

[12] Section 9 (1) and (2) of the Constitution of South Africa (1996) is referred to as the equality clause. Under the Constitution of South Africa, however, the right to equality is not an absolute right as it is capable of restriction under the limitation clause to be found in the same constitution. The role of the Constitutional Court becomes fundamental as it has jurisdiction to assess the facts of the case before it as to whether subsection 9(2) should be construed to mean that affirmative action is enforceable.

d) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination; and*

e) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.* Section (2) and (3) are most important because *they stipulate that the government enact such measures as it deems fit that would initiate, facilitate the passing of legislation to address past racial injustice.* In adoption of the Mining Policy, MPRDA, Mining Charter and Employment Equity Act of 1998 are examples of measures introduced to ensure racial equality and balances.

1.4 Reasons for the research and review of related studies influencing the research

Transformation is about change of consciousness, replacing what exists with something completely new. The State had to dismantle and emotionally let go of the old ways of operating while the new order was being implemented. This transitional phase could be project–managed and effectively supported with traditional change management tools. For any transformation action initiative to be successfully implemented to address historical imbalances, it is imperative and important to have a clear understanding of the following issues:

- historical background of the multi-racial society;
- the roots of economic inequality;
- political dynamics of an interracial society;
- the innovative political leadership pertaining to BEE and affirmative action;
- the ability to redress past historical imbalances and grievances. There was a need for a strong political will;
- national unity could never be achieved in the absence of equity and balance among the social and ethnic groups of the nation participating in the economic development of the country;
- effective economic participation of all indigenous ethnic groups of the country and in the sharing of the benefits; and
- a need to address and correct the past social and economic imbalances of the society.

It is without doubt essential to address past historical imbalances in a plural society for peace and unity to be enjoyed, as failure to do so would result in disenchantment of a section of the population that was disadvantaged. The result would be that peace and an economic boom would never be truly achieved. This addressing of imbalances was evidenced by South Africa emerging from its violent history. Further evidence of this addressing of imbalances would be considered in related studies of other countries that embarked on transformation. The researcher could not challenge the numerous ideologies that rendered unfair discrimination to be widely systemic and hegemonic without active and consistent advocacy and comparison.

The fundamental objectives of this research were as follows:

- To investigate whether the Mining Charter was accelerating economic transformation in the mining sector to enable economic participation of HDSAs and to ensure sustainable transformation of the mining industry of South Africa by 2014. The research would further recommend strategies for the transformation of the mining industry beyond 2014;
- To investigate the Mining Charter as an agent of transformation by investigating the gaps and challenges in its implementation;
- To make recommendations of how the intentions of the Charter should be achieved post 2014; and
- Dependent on the outcomes of the research, recommendations would be made to accelerate transformation of the mining sector beyond the life of the Mining Charter which is 2014 as the Charter has timeframe of ten (10) years

The scorecard[13] effect to the provisions is contained in the Broad Based Socio-Economic Empowerment Charter for the Mining and Mineral Industry. There are targets to be met since its promulgation to the end of the life of the Charter. The fundamental questions that were asked were as follows:

- Whether those targets were realistic;

[13] The scorecard is a tool that set targets to increase Historically Disadvantaged South African ownership of the South African industry assets to 26% in 10 years (from 1994 to 2014. This tool recognizes commitments by industry in a number of areas: management, employment equity, human resources development, procurement, beneficiation and level of ownership.

- Whether the landscape of the Mining Sector would significantly be changed from what it was pre-incorporation of the Charter to the end of the timeframe; and
- Whether the mining sector would have achieved the critical mass with regard to the transferring of 26% of the assets of the mining industry into the hands of Historically Disadvantaged South Africans at the end of the lifespan of the Mining Charter.

The year 2009 saw the half way mark of the implementation of the Charter and a review was done on how far the country had progressed in meeting the targets set out in the scorecard. This review gave a clear indication of the progress that needed to be achieved in the remaining years of the lifespan of the Charter.

To the author's knowledge, no concise analysis of the subject appeared to have been undertaken in an in-depth process. Therefore, the research would be useful in establishing how the problem of effective transformation would be tackled post-2014. This analysis could be done once it had been established that the targets as set out by the scorecards fell far below the intended targets. Affirmative Action and non-discrimination are vital in South Africa. It is not an option. It is pivotal necessity for the political and economic well-being of the country.

The targets set were as follows:

- To achieve 26% transfer of the assets of the mining industry into the hands of HDSA within a 10-year time frame (1994 to 2014);
- To ensure human resources development and employment equity in the workplace;
- To ensure non-discrimination of migrant labour;
- To formulate an integrated development plans,
- To ensure the provision of housing in the mining sector,
- To identify HDSA companies for the procurement of goods from,
- To achieve a baseline level of beneficiation.

The question that was investigated was whether the South African government played a significant interventionist role in ensuring that these targets were met. The 2009 Annual Report on Employment Equity stated that implementation of employment equity, which was one aspect of the Charter, looked bleak overall. This report indicated that there was a long

way to go in achieving the transformation agenda in South Africa and there was still considerable work ahead.

The various stakeholders that would benefit immensely in this research would be Industry, Unions, Government, Academia, and Civil Society.

Industry

Industry could use this research to evaluate whether it was effectively contributing to the transformation of the mining sector as a major role player. Industry should evaluate whether its proactive strategy of change introduced and encouraged Black Economic Empowerment and transformation at the level of ownership, management, skills development, employment equity, procurement and rural development.

Unions

This research would be useful to organized labour as a tool to measure whether transformation had been achieved in their area of concern, that is, skills development. career progression, mentorship, internship and bursary, and employment equity. The research would assist in assessing whether the situation of the employees of the mining sector employment and living conditions had improved over the past ten (10) years and what still needed to be done to achieve an equitable position.

Government

Minerals resources are vested in the State in trust for the people of South Africa. The principle of permanent sovereignty over natural resources applies in South Africa. It is government that determines how minerals are exploited and the rate of exploitation. It is in government's best interest to create an environment that fosters equitable access and sustainable development of the nation's mineral resources. Government could use the research to evaluate whether its main objective to achieve total transformation of the mining sector had been met and whether expanded opportunities for historically disadvantaged South Africans to participate meaningfully in mining, mineral industry and benefit economically, socially from the exploitation of the nation's mineral resources had been created.

Academia

Universities are concerned with capacity building of the relevant skills required by various levels of industry and are responsible for the drawing up of the curricula. In addition, the Academic Institutions form the core of research and development together with other relevant specialized institutions whose aim is to solve industry's problems.

Civil society

Civil society plays a major role in policing and assisting local communities to participate fully in mining and mineral development. The mining industry had to submit a social and labour plan with its application for mining rights. The plan's main objective was to alleviate the creation of Ghost Towns and, thus, create sustainable development.

1.5 Review of related studies influencing the research

The researcher examined other countries that had undergone social and economic engineering similar to South Africa. In this vein, the research focused mainly on four countries: Malaysia, United States of America, Brazil and New Zealand. There were lessons to be learnt from a review of the literature and empirical material on policy designed towards the social and economic integration of ethnic groups with the principal objectives to have equal participation of previously disadvantaged people participate in the mainstream economy.

Malaysia, United States of America, Brazil and New Zealand adopted comprehensive strategies of affirmative action designed to benefit a group of people who were previously disadvantaged by the enactment of legislative instruments to ensure they no longer remained subservient to an economically and, in most instances, politically dominant ethnic group in those countries. These affirmative action programs were necessitated by pressing problems of economic inequality among the ethnicities. A comparative analysis brought to the fore that national unity was unattainable without greater equity and balance among a country's social and ethnic groups in the participation of the country's development and in the sharing of the benefits derived from economic growth. It would be virtually impossible to achieve national unity if a vast section of the population and, in some instances, even a minority of the

population remained poor. In addition, if economic equality was not achieved, peaceful co-existence could never be achieved as chaos and riots would be the order of the day.

A literature review of these countries was discussed in detail later in the research. The lessons learnt from the review of related studies influencing the research would contribute immensely in making recommendations for the strategies to be adopted beyond 2014 in order to achieve success in the affirmative action program in the mining sector.

1.6 Methodology of the study

The research applied qualitative research methods with substantial use of personal experience and a literature review of social and economic integration of ethnic groups in four (4) countries. Affirmative action's policies and strategies had been implemented in Malaysia, United States of America, Brazil and New Zealand.

Consultations and discussions were held with relevant stakeholders, who included government, unions, industry, civil society and academia. Data was obtained from literature review, from the experience of the writer and from information collected from stakeholders through a process of interviews and written enquiries. Use of the Faculty of Law and Mining Engineering and DMR resources was an added advantage. A sample analysis of about ten listed mining companies annual reports, sustainable reports and transformation reports were consulted and critically reviewed. These documents were in the public domain, and thus there was no need to conduct personal interviews as to their Charter's compliance. These reviews also alleviated the critical problem of confidentiality and sensitivity associated with such information.

The author has industry experience having worked in the mining industry and has had personal experience of the Mining Charter from a HDSA/BEE perspective. The author had personally been involved in the drafting and implementing of the Social and Labour Plans and Employment Equity Plan and was well aware of the problems encountered with their implementation. Prior to joining industry, the author was involved in the process of development of the Mineral Policy for Namibia. The author has knowledge of resources policy and legislation, advocacy and training in the mining industry.

1.7 Research question

The question that this research answered and that was the foundation of the research was as follows: Was the Mining Charter as an agent of transformation effectively transforming the mining sector of South Africa? If not, then a strategy had to be formulated for adoption to ensure effective transformation. It was necessary to ensure effective transformation of the mining sector because what was ultimately at stake was not only social and political stability, but also the restoration of social justice after decades of systemic exploitation. The Charter has a lifespan of 10 years and 2009 was the halfway mark. An investigation into its achievement showed that it was nowhere near meeting its intended targets. A comparative analysis of other countries also revealed that 10 years were too short a time for effective transformation to take place to reverse years of socio-economic injustices. There was, therefore, a need to review the Charter and chart a strategy for the future. The strategy to be adopted would contribute immensely to the body of knowledge on this subject and would help all the relevant industry stakeholders in the transformation agenda of the mining sector. The strategy would implement a system that would attempt to address shortfalls and would need to be amended from time to time.

1.8 Limitations

Not many countries, if any, other than South Africa have a Broad Based Socio-Economic Empowerment Charter that is sector specific. South Africa is unique in having a Mining Charter to address issues of affirmative action and non-discrimination in the mining sector, which basically means the study has investigated fairly unchartered waters.

There is considerable sensitivity with regard to obtaining access to Mining Charter Compliance Reports as these documents are deemed to be very confidential. In turning to the DMR as the final recipient and custodian of these reports, the same argument of confidentiality was advanced. The only source of information was the public Sustainable Development Reports of the companies.

1. Structure of the thesis

The remainder of the thesis has been structured as follows:-

Chapter two: The political economy of South Africa

In order to establish why there was a need for the enactment of the Mining Charter in South Africa, it was imperative that we examine the history of South Africa to fully understand the origins of social and economic disparities in South Africa. Having fully understood how the social and economic disparities occurred in South Africa, it was then important to investigate the history of mining in South Africa and the origins of the repressive legislations that resulted in the Apartheid regime. This chapter established why there was a need for a mechanism of transformation.

Chapter three: Transformation of the mining sector

This chapter discussed the original Mining Charter and all its areas of compliance. The Mining Charter was an agent of transformation in the mining industry. Furthermore, this chapter examined the objectives of the Charter.

Chapter four: A critical analysis of the revised Mining Charter 2010

This chapter discussed the revised mining charter that was released by the Department of Mineral Resources on the realization that the original 2004 Mining Charter had failed to effectively transform, to the desired level, mostly in the areas of compliance.

Chapter Five: Investigation into compliance with the Charter.

This chapter examined the targets as set out by the Charter and assessed the current situation in South Africa. It examined gaps in achieving the targets as set out in the Charter. It also examined the scorecard which was the tool to measure and recognize commitment by industry in a number of areas. The areas were management, employment equity, human resources development, procurement, beneficiation and level of ownership.

Chapter Six: Transformation experience in selected countries

This Chapter examined and evaluated the lessons learned from other countries that had undergone social and economic transformation like South Africa. It drew conclusions based on these lessons learned internationally.

Chapter Seven: Comparative analysis of international proven practice and South Africa

Chapter seven presents results and their analyses of the international and local scans modelled in a matrix. The results informed the strategies to be adopted in the future with regard to the transformation of the mining industry.

Chapter Eight: Strategies

The Mining Charter is a document that created an insightful and useful basis to work on and would be a useful predecessor for other documents of transformation of the South African economy. This chapter discusses and recommended the strategies to be adopted post-2014. The strategies focused on each criterion of the Mining Charter.

Chapter Nine: Implementation of the strategies

This chapter questioned and defended the strategies through a SWOT analysis. It suggested ways of achieving compliance of the recommended strategies in order to chart the course of transformation into the future.

Chapter Ten: Conclusions and recommendations

This final chapter drew conclusions and made recommendations arising from the study.

1.9 Conclusion

This Chapter discussed the basis of the thesis and what the study aimed to achieve in examining the Charter as an agent for change and whether its objective would be achieved. It scrutinized the current legislative framework of South Africa to facilitate a broad view of what the legal basis was that gave authority to the Mining Charter. The next chapter would examine the political economy of Africa to establish why the government of South Africa felt there was need to bring about a mechanism of transformation.

CHAPTER TWO

THE POLITICAL ECONOMY OF SOUTH AFRICA

2.1 Introduction

It was important to delve into history to investigate the origin of the need for Black Economic Empowerment (BEE) in South Africa. . History provided a clear understanding as to where the roots of social inequality came into being. If justice were to be restored in South Africa, a thorough study of the past was essential. Stoop et al (2000) were of the view that history did not have to limit itself to dates and names, but should serve to inform us of who we are and where we are going. It was the most instructive subject in any political, economic and social discourse. For purposes of this thesis an overview was deemed to be sufficient.

Worden (2007) contended that history was important as a person could not understand any transformation agenda about one was going without knowing where one had come from as a people. This perception could be encompassed in the words of Lord Acton, when he said "*If the past has been an obstacle and a burden, knowledge of the Past is the safest emancipation.*"[14]The gross imbalance between socio-economic status of Black and White was as a result of government engineered laws, first through colonialism and then apartheid. Tereblanche (2002) was also of the view that history of South Africa during the periods of colonialism and white supremacy had been exceptionally violent. Violent methods were in the past used to dominate indigenous people politically, exploit them economically and oppress them socially.

The importance of a clear understanding of the past in order to draw the roadmap into a desired future state was further supported by these words of Colin Bundy, *"People make their own history (runs a celebrated phrase), but not in circumstances of their own choice; they act in an arena shaped by the past. Accordingly, to understand the present conjuncture*

[14]This quotation is taken from Tereblanche (2002) in Chapter 1, pp 3, where he quoted Lord Acton inaugural lecture given in Cambridge, June 1895). Lord Acton was one of the most important and celebrated British historians of the early 20TH Century. He was appointed Regius Professor of modern history at the University of Cambridge in 1895 and it was on this appointment that he delivered an inaugural lecture on "The Study of History" which impressed the University due to the wealth of learning and erudition it revealed.

in South Africa it is essential to have a sense of its history, to reflect on constraints and the possibility created by that history."[15](Tereblanche, 2002).

In a country that has been burdened with the legacies of discriminatory legislation and practices, history has shown that any radical transformation in a country would depend more on how the past was remembered to enable one to map out a desirable future. Social protection, which includes protection against discrimination, lack of skills, poverty, and lack of economic means need to be interpreted objectively rather than subjectively (Worden, 2007).

This chapter was determined to investigate the history of South Africa mainly from the view of unequal power relations and forced labour patterns. In most instances, what decided much of the social and economic history of the present day South Africa has been the history of forced labour that is mostly black labour. Historians have emphasized the importance of economics in the history of South Africa. The common political system that was the main theme in the history of this country was the growth of the single economy. Economic growth promoted integration and segregation masked repression (Lonsdale 1988).[16]

This section of the study was informed by recognizing that the history of labour in South Africa could not be viewed in isolation, but from a broader discussion of culture, ideology and politics (Cameron, et al 1991). While the emphasis of this chapter was on the history of forced labour, one should not forget that the history of power domination (political, economic and ideological) and deprivation of land form the cornerstone to understanding the evolution of forced black labour over the past 350 years. Stoop, et al opined that "*it is history that enlightens us as to who we are and why we are what we are. The ups and downs of societies, the development and continued existence or disappearance of groups within societies, the religious and other beliefs which emerge, the mode of production, the social structure, the power struggles within society and the legal system are all interrelated and part of history".*

[15] Colin Bundy (1993:49) taken from Chapter I, titled From systematic exploitation to systemic exclusion of the book by Tereblanche, S. (2002), pp. 3. Colin Bundy was a Professor of History and influential member of a generation of historians who contributed immensely to the understanding of South African history.

[16] The new school of liberal historians under the leadership of William Miller Macmillan asserts the importance of economics in the country's history. Macmillan was educated in Oxford and Germany and was Professor of History at the University of Witwatersrand. He was of the view that the incorporation of Africans into a common political system was to achieve the main objective in the country's history of the growth of a single economy. Most historians wrote exclusively on political-constitutional matters and did not take into consideration historical relationship between economic growth and development of the racial order. Economics and economic history were left in the hands of scholars of economics, many who had no historical training at all.

According to a number of historians, for example Tereblanche, Worden, Bundy, and others, the history of South Africa has as its main theme, a special relationship between power, land and labour. The law of economics stipulates that the scarcer a production factor is in relation to other factors, the more valuable it becomes.[17] Therefore at the outset, because labour was scarcer in colonial South Africa, it, therefore, became more valuable than land. This perception was evidenced by the continuing tendency to force the African people into slavery, serfdom and other forms of repressed labour. Repressive laws were enacted to enable the white landowning class to acquire forced labour by depriving indigenous people of their ancestral lands. The choice to use forced labour was not a single discrete decision but was systematic. Tereblanche, Worden, and Allen agree agreement that one of the best examples of the most repressive legislation that ensured the white land-owning class deprived indigenous people of their land was the Land Act of 1913. This legislative enactment was the central tool used to promote proletarian power and impoverishment of black people, thus ensuring the supply of forced labour. This law divided land between blacks and whites. The law stipulated that no whites could own land in African areas and that no African could own land in white areas, except in the Cape. Where Africans resided on white-owned land, this law stipulated that they had to work for the landowner. Alternatively, they had to live as farmers in the designated tribal land or reserves. [18]

According to Tereblanche and other historians, the results of this law were that only Africans who owned land could farm for themselves and such farms had to be in tribal land in the reserves. This farming resulted in overcrowding on the arable land. In addition, there was no room for more people. Further, white commercial farmers obtained more land and needed more labour. People who could not be utilized as workers had to vacate the land. This move resulted in many Africans migrating into towns in search of employment opportunities. The mines obtained more labour as a result of the Land Act. According to Dagut (1991) the tragedy of the Land Act could be expressed in a simple ratio of 87 to 13. This ratio meant that four and half million whites were allocated 87% of the land and twenty-two million Africans were assigned 13% of the land. The 13% of land allocated to Africans was clearly incapable of sustaining even subsistence farming and resulted in proletarisation of the Africans who

[17]Mohr. P, Fourie L., Economics for South African Student, Fourth Edition,(Van Schaik Publishers, Pretoria, South Africa, 2008) at p5

[18] The Land Act marked the end of the limited independence which African farmers had previously had on white-owned land. The position of the African farmers was further weakened by the government offering low interest to white farmers. These loans made it possible for white farmers to make improvements to their farms and purchase agricultural machinery.

migrated to towns in search of work. It pushed many former African farmers into becoming wage workers. The government also enacted laws on taxes through the Land Act, which further deprived the black farmers.

Tereblanche, Worden, Allen and other historians have argued that even though the history of social, economic and political inequality could be traced to the colonization of the Cape and their acrimonious relationship with the indigenous people, the San and the Khoisan and, subsequently, the Afrikaner which resulted in the Great Trek, the mining sector was the pillar of apartheid policy. According to the British Council of Churches (1979, p.2), apartheid was South Africa's sophisticated economic, political and social system based on race. It was protected by a complex legal structure, security system and theology that consolidated the country's wealth, power and privilege in the hands of a white minority. Apartheid's social impact made it the most pervasive and oppressive systems the world had ever known because it disfigured spiritually as well as physically both the oppressors and the oppressed. It was based on the philosophy of white supremacy and justified ideology through Afrikaner supremacy and racist scientific discourses. It was a defined system of institutionalized segregation of the South African nation along racial lines. [19]

For the purposes of this thesis, the history of mining in South Africa and its impact on the political economy was discussed separately in this chapter. This discussion clearly placed into context how this institutionalized racism, as described by various historians, stipulated where blacks should live, what they could own, imposed restrictions on the type of occupation they could participate in and the standard of education they could receive. Apartheid cannot be understood in isolation. The other forms of oppression and exploitation also need to be taken into consideration. In attempting to understand the political and economic impact of mining in South Africa, one had to first understand the history of South Africa in totality. Only then could one discuss the impact the discovery of gold and diamonds had in shaping the political economy of South Africa. According to Stoop, et al., (2000) history, did not only entail narrations of wars and other disasters, but also consisted of the daily life of the unmentioned millions and the changes or absence of changes in their lives.

[19] It is important to note that the foundation of apartheid could not only be found in the culture and religion of the Afrikaners, but also in the pragmatic acceptance by the English-speaking white population. In this theory, separation was viewed as normal in life as it allowed groups to develop in their own way, with their own customs and languages.

2.2 Historical Background

The South African history is characterized by the variety of ways in which whites used the political and economic power at their disposal to ensure that indigenous groups were deprived of reasonable opportunities for social, economic and entrepreneurial development. Whatever opportunities available to indigenous people were far fewer and usually far inferior to those available to white people. Most historians claimed that any attempt to explore the history of South Africa in this regard required a thorough exploration of how power and authority manifested themselves in successive systematic periods. Tereblanche (2002) found it necessary to categorize periods and to differentiate between the following six systematic periods in South African history:

1. Dutch colonialism of between 1652-1795 which saw the implementation of a mercantilist and feudal system institutionalized;[20]

2. The institutionalization by British Colonialism and British Imperialism of the systems of racial capitalism. This system destroyed the mercantilist, feudal and traditional patterns of the Dutch East India Company. The discovery of diamonds in 1867 and gold in 1886 saw the British colonialism transformed into an aggressive, repressive and comprehensive version of imperialism and racial capitalism. In order to successfully exploit South Africa's mineral resources, the British implemented a new political and economic system. To successfully institutionalize a system conducive to the profitable exploitation of gold, the British engaged in several wars which culminated in the Anglo-Boer War in 1899 to 1902. This period ushered in complete domination and institutionalization of political, economic and ideological power in the domain of the British;

3. The 19th Century saw the mass exodus of the Afrikaner from the Cape into the interior of the country. The "Great Trek" resulted in the Voortrekkers gaining independence from the British and establishing independent republics north of the Orange . They enacted labour laws and patterns regarded as illegal in the Cape;

[20] The South African equivalent of the Mayflower Pilgrims landing in Boston was the arrival of the Dutch East India Company in 1652in the Cape and the establishment of a resting station for ships enroute to The Far East from Europe. This station provided vegetables, grain and meat for the ships. Thus, the most efficient way to do this was to allow private farming not under the control of the company. These farmers in their quest for land began to grab land from indigenous people rapidly and violently.

4. The year 1948 saw the establishment of the Afrikaner-oriented National Party. When the Afrikaner won the elections in 1948, they used their political power to intensify forced labour patterns. The National Party used its political and ideological power to institutionalize repressive racial capitalism that did not differ much from the English version;

5. The period 1974-1994 saw the radical challenge of the legitimacy and sustainability of white political supremacy and the intense challenge of the profitability of racial capitalism. This realization led to the subsequent collapse of the Afrikaner political hegemony and the rise of the African political hegemony;

6. The year 1994 saw the transition from political-economic system of repressive white political domination and unsustainable racial capitalism to a new system of democratic capitalism. This period ushered in the *winds of change* to the new democratic order that institutionalized a democratic political system controlled by an African elite. This period of the new democratic order, most regrettably, did not automatically bring a parallel socio-economic transformation. The main reason for this lack was that the democratic part of the system was rather weak and underdeveloped when compared to the highly developed, deeply ingrained and powerful capitalist part of the overall equation. This period of transition could, however, be viewed as a major achievement toward the comprehensive liberation of the people of South Africa and a major milestone in the history of South Africa.

This new political system, ushered in by the mid-1990s was the one that introduced the transformation agenda, and brought understanding of the true meaning of both the democratic and capitalist components of the system and drew up the way forward on how they should interact in a country with serious socio-economic problems after almost 350 years of colonial domination. According to Dagut (ed), South Africa was involved in a program of major reform that is affecting the cultural, social, political and also economic structures of the country.

The notion of democracy is based on the equality of rights and privileges of the people maintained and supplied by the state power. The notion of capitalism, in contrast, is based on

the unequal distribution of property and assets. The double standard of democratic capitalism is described by Arthur Okun, in Tereblanche (2002), as follows:

> *A society that is both democratic and capitalistic has a split-level institutional structure, and both levels need to be surveyed. When only the capitalistic level is inspected, issues concerning the distribution of material welfare are out of focus… Democratic capitalism professes and pursues both an egalitarian political and social system and simultaneously generates disparities in economic well being. This mixture of equality and inequality sometimes smacks of inconsistency and even insincerity. To the extent that the system succeeds, it generates an efficient economy. But the pursuit of efficiency necessarily creates inequalities. And hence society faces a trade-off between equality and efficiency. This is our biggest socio-economic trade off, and it plagues us in dozens of dimensions of social policy.*[21]

This chapter attempted to illustrate that the socio-economic development that occurred in South Africa as outlined above during the first five systematic periods, from 1652 to 1994, was racist-oriented, extremely unequal, uneven and unjust. When one surveys the five periods together, one realizes that the political component of each period was not sensitive to notions of joint interests and shared justice. When one looks at the economic component of these periods, they can best be summarized as having thrived on unequal freedoms and unequal distribution of power, property and opportunities.

It is, therefore, understandable that there are many expectations on the part of the citizens of South Africa as a result of the changes taking place. The changes make considerable demands on democratic South Africa and contribute to the great economic challenge. Even though South Africa is richly endowed with mineral resources and has a first-world infrastructure that made the country the largest growing economy in Sub Saharan Africa, total resources are limited and human needs are insatiable. Social and economic growth needs time and effort on the part of all stakeholders and the country as a whole. The new Constitution of the Republic of South Africa, Act 108 of 1996, the lifting of sanctions against South Africa and the re-entrance of the country into the international community has had important consequences for South African society and its legal system (Stoop, et al 2000).

[21] Arthur Okun was an Economist known for his celebrated discovery of Okun's Law which describes the linear relation between percentage point changes in unemployment and percentage changes in gross national product. He believed that wealth transfer by taxation from the rich to the poor was an appropriate policy for governments.

2.2.1 First systemic period -The Dutch Colonialism (1652-1800)

The colonization of the Cape in 1652 as a supply base on the sea route between Europe and Asia was the start of the economic and social disparities in South Africa. This period marked the beginning of a colonial process of land deprivation that continued for more than two centuries and sparked many violent conflicts.[22] During the pre-colonization era, Africa was regarded as the Dark Continent. The perception that Africa was a dark continent was changed when Jan van Riebeeck established a Dutch Colony on behalf of the Dutch East India Company.

The colonization of the Cape was based on the notion that whenever the economic interest of different ethnic groups was opposed to each other, it was justifiable that the stronger group enforce its will on the weaker group. When the Cape was colonized, two indigenous groups inhabited it: these were the Khoikhoi, who kept cattle, and the San who were hunter-gatherers. The Khoisan had inhabited southern Africa for at least 8000 years prior to the arrival of the Dutch. The Dutch East India Company had a very amicable relationship with Khoisan and had ordered its first Commander Jan Van Riebeeck (1652-1662), to treat them with respect and not to interfere with their cultural integrity and socio-economic stability. This policy was strictly adhered to. However, it was ignored when some of the company's employees were released their contract and were set up as free burghers (or independent farmers) in 1657. The scramble for land then began which resulted in violent clashes with the Khoikhoi in 1659 (Cameron, T et al (ed) 1991).[23]The question raised by the Khoikhoi leaders was who had the legitimate right to the land: the true owner or the foreign intruder. The Dutch believed that they had won the country legitimately and intended to keep it.[24]

As more free burghers occupied land, the Khoikhoi were dispossessed of their land. The colony experienced an overproduction of food and a shortage of labour. The need for labour

[22] The dispossession of the indigenous people, the San and the Khoikhoi, and the simultaneous importation of slaves was significant in shaping the racial attitudes of the Europeans (new group of white Africans) who had come to consider this new country their home. For the majority of these people, not forgetting that there were always vocal liberal groups among them, measured a person's moral and social worth by the lightness of one's skin. The white people began to view themselves as exempt from any manual or otherwise unpleasant labour.

[23] The so-called Bushmen Wars were a manifestation of the continuing resistance by the San and the Khoikhoi to land dispossession.

[24] The increase of the free burghers was due to natural increase and the regular discharge of men from the Dutch East India Company. Other sources that contributed to the increase and thus the beginning for scramble for land was due to wives joining their menfolk; crew members of foreign ships seeking permanent residence; the return from the East of Company employees who wanted to settle in the Cape.

resulted in the illegal subjugation of the Khoikhoi and the first slaves imported from Angola. These first slaves imported into the Cape were to work on the farms. The period from 1652 until 1803 saw the importation of slaves from the Indonesian archipelago, the Indian subcontinent, Madagascar and Mozambique. Slave labour resulted in a society not only divided along racial lines, but also a socio-economic stratification (Cameron, T. et al (ed) 1991).[25]

2.2.2 The systemic period of British colonialism (1800-1890)

The colonization of the Cape by the Dutch ended in 1806 with the British re-occupying the Cape, a territory they had held between 1795 and 1803. Between 1795 and 1814, the Cape was subject to different colonial occupation three times. Between 1803 until 1806, the Dutch were in control and this period ended when the Dutch ceded the Cape to the British in 1814. This cession meant that Britain's direct colonial occupation of South Africa lasted from 1795 until 1910.

Britain colonized the Cape colony in 1795 to protect its lucrative spice trade with the East and to also prevent France from taking control of the Cape when the Netherland was occupied by the French during the Napoleonic wars. The new British colonial administration had more power and greater influence on South African history that was complex and contradictory.[26]

The British colonization led to long and bitter conflicts with the Dutch, as they promoted their own economic interest and redefined the three factors of production; labour, land and capital. The introduction of the new policy disrupted the economic, political and cultural interests of Afrikaners and those of the indigenous people (Dagut 1991).

The abolition of the slave trade was a major event that marked this era. The British parliament enacted the Emancipation Act of 1833. The abolition of slavery was a source of discontentment among the Afrikaners for decades. They lost their means of production, that is labour force and were never compensated by the British government for this loss.

[25] The general pattern was ready acceptance of a society based on forced labour of people believed to be ethnically quite different from their counterparts, the free burghers.

[26] The main theme of British policy in South Africa favoured the white farmers at a time Britain was also adopting a policy of disapproving of all forms of slavery and unfree labour. This attitude was evidenced by the freeing of the Cape's large slave population and in slow attempts to liberate from informal slavery and extreme degradation the descendants of the original inhabitants, the San and the Khoikhoi.

Immediately after the abolition of the slave trade, a racially-based repressive labour economy was introduced by the British. Between 1834 and 1840, the Dutch settlers (also known as the Boers) embarked on what was to be referred to as the Great Trek. The Dutch settlers moved inland to get away from British rule. This trek resulted in the establishment of the Boer republics: Natal, Transvaal and the Orange Free State (Tereblanche 2002).[27]

This period was also marked by the discovery of diamonds in 1867 and gold in 1886. The discovery of these resources had a huge impact on the political economy of South Africa as it led to the British colonialism being transformed into an aggressive, repressive and comprehensive version of imperialism and racial capitalism. The discovery of diamonds and gold changed the landscape of South Africa and Southern Africa significantly. For the most part of the 19th Century, almost all people in South Africa lived off the land. They were mostly subsistence farmers who produced all they needed. There was considerable trade between groups. They bought weapons, ploughs, guns, horses and some consumer goods, such as blankets, from Europeans. In exchange, they sold grain, cattle and hunting products such as ivory and skins (Leach 1989).

The diamond industry has not shared in the general expansion of economic activities as had the gold industry. According to the historians, the industry owed its existence to the energy and far sightedness of the late Sir Ernest Opperheimer.[28] He was the one man who gave the country a well-organized financially sound and stable diamond industry. The famous pipes, Du Toitspan, Bulfontein, the De Beers and Kimberly, Koffiefontein and Wesselton had all been discovered between 1870 and 1890. At the turn of the century, the Premier Mines near Pretoria were founded and a small group of small, but rich mines, in the Boshof district were proclaimed in 1906, 1910 and 1912 respectively. Along the Vaal River, small alluvial diggings were in existence. In 1870, the discoveries of more deposits on the slopes of Colesberg Kopje were made. The primary diamond rush in the area began during that period.

[27] The Great Trek was brought about mainly because the Boers wanted to escape the British administration and a difficult economic climate brought about from the perspective of the Trekkers of being forced to pay labourers a wage. One of the great myths, according to Dagut (ed), prevalent in South African history was the idea that the Boers trekked into an empty interior from the Cape which became theirs by default. This concept was far from the truth as the Boers did find people inhabiting the interior. However, these communities were weakened by war and famine and did not present an immediate military threat.

[28] De Gruch, J and Villa Vecencio, C (ed), Apartheid is a heresy (D Phillip publishers, Cape town, South Africa, 1983)

According to Tereblanche (2002), the town of Kimberly began as the New Rush. Men and capital came from all over the world in search of fame and fortune associated with the discovery of diamonds. The discovery of diamonds in South Africa brought unparalleled richness and changed the diamond from a rare gem to one available to anyone who could afford it. Kimberly became the largest city in the Northern Cape as a result of massive migration of miners from all corners of the globe. Because the British controlled much of South Africa, the area surrounding the diamond mine was annexed and Kimberly was besieged on October 14, 1899. Thus began the Second Boer War

Many scholars of South African history believe that the pass laws and the migrant labour of Apartheid South Africa had their origins in the policies designed to control the black workers in the diamond mines a century ago. Africans were treated as foreigners outside strictly defined areas of residence, the so-called homelands and their movement was controlled by the pass laws[29]. It is worthy to note that the system of migrant labour was not brought about solely by the discovery of gold and diamonds in South Africa. Agriculture used many migrant workers. In the summer, labourers used to leave their homes to work in white farms, to return when the farming season was over. In present day Kwa-Zulu Natal, many workers were imported from India to work in the sugar farms for five or ten years. Some were to later return to India while others stayed on.

Gold mining in the Transvaal gave impetus to the economy of South Africa by circulating millions of new money yearly; creating new towns; stimulating the founding of industry; providing an important and predictable market for the products not only of industry but of agriculture and commerce as well. In addition, it attracted much needed overseas capital and provided indispensable foreign exchange that gave stability to the national economy. These factors led to the rapid growth of the city of Johannesburg. Where once was windswept barren veld, now saw the emergence of a well-ordered town with beautiful parks and gardens, public buildings, business blocks, clubs, colleges and schools and comfortable houses in the suburbs. The discovery that had triggered this transformation was made in 1886 on a farm known as Langlaagte by an Australian prospector, George Harrison. The remains of these early outcrop workings adjoin one of Johannesburg busiest highways, the Main Reef Road

[29] The gold and diamond mines used migrant workers to provide cheap labour. Migrant workers were those who were forced for economic reasons to leave their homes in various parts of Southern Africa and travel long distances to the mines. They worked for certain periods before returning home again. This system of using migrant labourers on the mines (or a farm or a factory) is referred to as the migrant labour system.

and to the west, the modern city of Johannesburg. In 1910, at the dawn of the Union, great changes had been made in South Africa. According to a number of historians, the gold mining industry had come of age after 1910. It had progressed from the crude outcrop workings of the pioneers to deep level mining and improved hoisting machinery. Gold mines emerged all over the Reef. In 1907, four mines were in production on the Far East Rand. This development resulted in the growth of Benoni, Brakpan, Springs and Nigel. Accompanying the growth of these towns was their attendant industries, communication networks and populations. In the west, Randfontein and Krugersdorp were founded. The gold mining industry in South Africa, now over a century old, continues to expand its operations. For years, it has been the world's biggest producer and today it still produces more than half of the world's annual supply of new gold.

Tereblanche (2000) asserted that gold mining had provided the basis for South Africa's economic progress and development. It made large direct contributions to State revenue in the Union's formative years and progressively was the basis for the national economy. The industry played a dominant role in the economic development of South Africa in that it was the basis for secondary industry and agriculture and a diversified national economy. Today, these secondary industries operate in total independence from the mining industry as compared to the previous almost total dependence on the primary industry of mining. The gold mining industry, without a doubt, will continue to play an important role in South Africa's economy for many years to come.

In conjunction with economic development that gold mining played in the history of South Africa is the socio-political role that the industry played. The discovery of gold led to the demand for labour in the mines and for the resultant industry. Large numbers of Africans moved permanently into the cities. This exodus to the cities led to acute housing shortages, giving rise to informal settlements. The stronger position of black labour resulted in increasing expectation and demands from black workers which culminated in the 1946 Mine Workers' Strike. It was the breakdown of segregation laws, the growth of the squatter camps and the greater worker militancy that led to innovative solutions to resolve to these onslaughts. The National Party came up with the policy of Apartheid.

Dent, F (2009) claimed that the notion that the mine labour force held the key to the political and economic liberation of the black people of South Africa was a fallacy. He asserted that if the gold mine were to close, the economic disaster would be visible mostly on the poorer

section of society, the African blacks. The South African reforms had to be based on a stable and healthy economy.[30]

2.2.3 Period of the Great Trek and its effects

The mass exodus of the Afrikaner frontier farmers in a series of trek parties took place between 1834 and 1840. This exodus was an act of resistance against British rule in the Cape. The Afrikaners' main intention was to create in their new states the systems that they were accustomed to with regard to labour patterns, property relations and patriarchal feudal order before the arrival of the British. The result was the establishment of the Afrikaner republics of Natal, Transvaal and the Orange Free State. Natal was to be later taken away from them by the British.

The Great Trek has been cited by historians as a major landmark in the Afrikaner history. It was an important event in the rise of Afrikaner nationalism. The main reasons for the Great Trek were economic. The liberal reforms introduced in the Cape by the British deprived the Afrikaners of their easy labour and land. A question often asked among historians is whether the Voortrekkers (Afrikaners) subscribed to a particular racial ideology when they embarked on the Great Trek. Some historians have argued that because they went into an unknown interior and were prepared to make treaties with whomever they found they were not necessarily racist.

According to some historians, the racial attitude of the Afrikaner had not crystallized into a conscious racial ideology at that time. The socio-political, economic and legal framework in the Transvaal and the Orange Free State differed from that of the Cape. The Afrikaner recreated the feudal and patriarchal order they had enjoyed in the Cape. The political economy of the two Afrikaner republics, that is Transvaal and the Orange Free State, was characterized by a surplus of land, shortage of labour and scarcity of capital. These problems were the result of the relationship between the Boers and the Africans being varied and complex. The Afrikaners met with much resistance in turning the Africans they found in the areas they inhabited into farm labourers as the Africans were farmers in their own right. They were only able to proletarianise the Africans with the passing of the Land Act of 1913.

[30] Dent, F., The history of diamond mining in South Africa. http//www.helium.com/items/1374716-the-history-of-diamond –mining in south Africa which was viewed and accessed on the 9/28/2009

2.2.4 Period of the Rise of the Afrikaner-oriented National Party.

In spite of the success of the Land Act and the proletarianisation of the Africans to generate the cheap labour force required to work in the mines, the Afrikaners still felt marginalized with the coming of the mineral revolution. The Cape colonial administration had political control over the diamonds, while the goldfields fell under the political control of the Transvaal Boer Republic. O'Meara D (1983), in his compelling study of the rise of Afrikaner nationalism, Volks-Kapitalisme, highlighted how, by the end of the Great Depression of 1929-33, the development of the mining–based economy had transformed most white into poor whites, workers and small commercial farmers. The mineral revolution resulted with regard to economic empowerment, by-passed white Afrikaners except in the Cape where a minority of Afrikaner financiers had emerged in control of organizations such as Sanlam and Santam, which received their funds mainly from Afrikaner farmers. The major difference between black South Africans and the White Afrikaners was that the Afrikaners had political rights and the Black South African had been disenfranchised. The political power gave the Afrikaners leverage that they could use in their struggle to be free from under the weight of oligopolistic English economic and political domination.

O'Meara highlighted that in 1934 saw the economic empowerment of the white Afrikaner when the Afrikaner Broederbond launched a campaign aimed at securing the economic upliftment of the white Afrikaner. The strategy was all encompassing and designed to promote Afrikaner empowerment at all levels, including language, culture, ideology, economics and politics.

O'Meara further revealed that, between 1939 and 1948, the successes of the strategy for the economic upliftment of the Afrikaner were evident by the number of Afrikaner-controlled businesses. The successes of the *reddingsdaad* movement were not confined to the economic sphere. Politically, it was brought about by the mobilization of a broad spectrum of white Afrikaners under the banner of the *volk.* This strategy played a vital role in bringing the National Party in 1948 into power. O'Meara believed that Nationalist government ushered in the policy of apartheid. The Afrikaner had both the political and the economic power to rule South Africa. The state power that they had attained was used to subdue the mounting political black opposition and also to break the economic domination of the English oligopolies in mining, finance and industry as a whole.

Dagut (1991) claimed that South Africa was defined as a mixed economy in terms of ownership of the means of production. The degree of state ownership differed widely across industries. There was a monopoly of state ownership of the electricity industry (ESKOM), majority state ownership of the transportation e.g. railways- Spoornet and the airlines (SAA) and 15.5% of manufacturing (e.g. SASOL, the oil from Coal Company) and ARMSCOR, the armaments company. Mining has for decades remained a growing and fundamental sector of the economy given South Africa's wealth of global mineral reserves. South Africa ranks among the top in the world in terms of global reserves, e.g. gold. chrome, manganese, platinum, vanadium and alumina silicates. However, there has been a significant drop in gold production in the past years, with the grade of ore falling dramatically, paralleled with increases in mining at deeper and deeper levels. Coal output has significantly increased in the last few years with exports rising from nothing to almost one-third of the total output.

Tereblanche (2002) stated that after 1948, the formation of State corporations became an important tool of the new government's economic and racial policies. An example was the creation of ESKOM and ISCOR. These corporations succeeded in achieving a significant measure of control over both their labour market and labour costs. These corporations also partnered with the gold mining industry and the South African economy attained a unique character. The creation of these corporations and their emulation of the practices of the production means of the mining sector was a powerful tool in the hands of both the gold-mining industry and the state corporations to create upstream production conditions which required large numbers of unskilled African labour force that could be employed at low wages. [31]

The National Party introduced the policy of Apartheid when they realized that they were confronted with serious social, economic and racial problems. Apartheid was social and economic engineering. This policy sought to control economic change and to advance, as far as possible, the interest of the Afrikanerdom. To solve these problems they came up with a strategy to solve the most contentious issue of the growing urbanization of Africans.

[31] These state-owned firms did not provide for incentives to achieve what economists call both productive and allocative efficiency. Productive efficiency is the product of the operations of the capital markets that is the achievement of profits, while allocative efficiency is as a result of the productive market (the keeping of prices close to consumer product valuations). Managers of these state-owned companies were under their ministerial superiors and could be instructed to meet objectives other than customer satisfaction. In South Africa, these took the form, for example, to further the objectives of apartheid policies of the National Party, where non-whites were dismissed in the Post-Office service to provide jobs for whites. This action was in response to accommodate the needs of their constituencies and provided employment to alleviate the poverty of the whites, in particular the Afrikaner after the 2nd World War.

Apartheid has been defined by Tereblanche (2002) "*as the catch word for the multitude of racially-based control measures implemented and regularly amended by the National Party government to resolve the contradictions inherent in South Africa's modernization process and to perpetuate white political domination."* Allen V.L (1992) believed that this policy of discrimination was introduced to entrench racial discrimination in a far more comprehensive and systematic way contrary to the then western world ideology for the advancement of human rights and the elimination of racial discrimination.

Various legislations were enacted to advance white domination, for example, Prohibition of Mixed Marriage Act of 1949, Immorality Amendment Act of 1950. These pieces of legislation made it unlawful for marriages between black and white people. The Population Registration Act of 1950 was another piece of legislation that was passed mandating people to be classified along racial lines. History has shown that these legislations brought untold suffering to the non-white people of South Africa. The Group Areas Act reserved areas for the use of one particular racial group. The Black Education Act of 1953 laid the foundation for Bantu education, in that it prescribed the system of education to be received by Black people and careers they could follow. The Extension of University Education Act designated institutes of higher learning for specified African ethnic groups.[32] This legislation was an attempt by the state to counter the mission-based education which produced the black intelligentsia that was challenging the status quo. In creating several ethnic universities, history has revealed the state increased the number of black graduates and what the government failed to realize was it was creating an explosive situation by increasing the number of educated black graduates whose upward mobility was blocked by the policy of apartheid. This group of graduates formed the liberation movements, like the African National Congress, Black Conscious Movement, Pan African Congress and so forth that

[32] The government, through its series of reforms, opened occupational mobility and economic rights to a privileged section of the African people which reinforced the demographic and economic trends that are behind the creation of educated labour. These produced a restructuring of the racial divisions of labour in South Africa. The enlargement and growth of Black education resulted in the creation of occupational restructuring. This growth of the educated black elite contained a major contradiction in the government's attempt to win Black compliance and support. It was this class of the educated Black elite that was formed which led to Black protest when the State's intention was to fill the middle management, technical and professional positions to support the growing economy. Erik Olin Wright asserted that intellectuals have contributed immensely to revolutionary politics. Intellectuals have been defined as a category of people with a specific appreciation and commitment to ideas. Marxist and neo-Marxist theories have viewed intellectual participation in politics by defining them as workers, also viewed as organic to several classes and as part of the petite bourgeoisie. They exhibit ideological characteristics, that is, scientism, romanticism, revolutionism and populism.

would later lead South Africa to a democratic elected government in 1994.[33]Halisi (1999) concluded that, by the 1960s, black and white students alike became aware that "*what they want subjectively from life cannot be got without fundamental change in all society.*"[34]

2.2.5 Period between 1974-1994

The South Africa's politico-economic changes in the 1970s were focused on the many dramatic events in the political arena. Before the 1970s, the economic system of colonial and racial capitalism was based on the availability of docile and exploitable blacks, especially African labour. The economic system of South Africa thrived on the exploitation of natural resources, mainly mining and agriculture and of African labour. In the 1970s, black labour ceased to be docile, cheap and easily exploitable. Corporate South Africa lost one pillar of its colonial plundering.

The 1970s decade, as described by Worden (2007) and Tereblanche (2002), saw the occurrence of a cluster of events that precipitated the end of the colonial era and of white supremacy. These events were the unlawful strike by trade unions in 1973, the OPEC oil crisis of 1973, and the economic downturn from 1974 onwards. The year 1974 also saw to the coup d'état of General Spinola in Portugal and the Soweto uprising of June 1976 in South Africa.

The unlawful strike by trade unions in 1973 saw the South African industry shaken when a large number of African workers in Durban went on an industrial action in support of higher wages and the right to organize. This industrial action and its wide support demonstrated the strength of the power of the African labour in a way that surprised even Black South Africans. The coup in Lisbon, Portugal in 1974 led to the independence of Angola and Mozambique and exposed the countries to the north of South Africa to liberation. These

[33] Apartheid meant the complete separation of all races in South Africa under white domination. It introduced the total separation of black and white in all spheres of life: politically, economically, socially and culturally. It meant each race had its own distinct identity. To achieve its ideal, each race had to keep separate and pure and free from contact with other races which corrupt and destroy it. Supporters of apartheid maintained that the identity of each race would be destroyed in an integrated society. The ideology of apartheid was supported by the teachings of the Dutch Reformed Church which believed that the Afrikaner had a God-given right to preserve the purity of the white race. It was also influenced by the ideas of scientific racism

[34] The 1960s have been termed the decade of protest. This period witnessed students' revolt that affected the universities of most industrial nations. Civil action occurred in the USA universities, Beijing, Paris and Johannesburg. Students revolted to confront the social inequities in their respective societies. Mass actions in major universities were led by new left thinkers (students) to undermine the authority of the status quo. In South Africa, new left thinkers among students, both black and white, constructed a distinctive political discourse which made up for the lack of adult leadership.

actions led to the white minority regime being exposed to the rest of independent Africa and the spread of communism to the continent of Africa.

It is historically evident that the second half of the 1970 decade was marked with the critical attitude of President Jimmy Carter's administration in the United States of America. It also saw the increased hostility of the Organisation of African Unity. Furthermore, the Group of 77 succeeded in putting the immorality of the apartheid regime in the international limelight.

In June 1976, the Soweto uprising occurred. A number of historians, civil rights movements and politicians viewed this event as one of the decisive events in the South Africa's political and economic history in the 20th century.[35] This event was caused by the deteriorating economic circumstances in South Africa. It led to the awakening of a militarist culture of resistance in South Africa and to the worldwide condemnation by the frontline states in Southern Africa and the international community. The international call for sanctions against South Africa were implemented after the Soweto uprising. The dismantling of apartheid was clearly under way after this event.

At the end of the 1980s, the South African government was in a state of crisis. Internally, the government banned several organizations and restricted the labour organization COSATU as the cause of labour unrest. Internationally, the call for all manner of sanctions against South Africa resulted in the country being isolated. South Africa was forced out of almost all international political forums. An economic crisis occurred in the country because of all the political events occurring both internally and internationally.[36]

On the 2nd of February, 1990, the then president of the Republic of South Africa unbanned all liberation movements, freed all political prisoners, among them Nelson Mandela and thus began the process of entering into negotiations with all political parties to achieve a peaceful transition to a democratic political system.

[35] The 1976 Soweto Uprising stressed the uniqueness of the black struggle and related African liberation, civil rights, black power and Third World politics within the framework of New Left discourse. This uprising led to the United Nation labeling Apartheid as a crime against humanity.

[36] The 1980's history of South Africa had been a period of recession for the country, partly due to the imposition of external sanctions and partly due to the traditional contra-cyclical behavior of the South African economy in comparison to the rest of the world. It is, however, worthy to note that within these factors affecting South Africa during this period, considerable variation existed. Staple industries such as food, beverages and tobacco grew due partly because of the rise in population.

2.2.6 Period from 1994 to present day South Africa

According to historians, the democratically elected government that came into power in 1994 inherited a contradictory legacy. On the one hand, they inherited the most developed economy in Africa and, on the other, major socio-economic problems. The socio-economic problems mostly affected blacks. Africans, in particular, suffered a high rate of unemployment, abject poverty, social and economic inequalities in the distribution of income and opportunities as well as high level of violence and crime. None of these socio-economic issues was temporary or incidental in nature. They were all interlinked and had its root cause in South Africa's colonial history. The transition from apartheid to an inclusive democracy has been hailed internationally as a political miracle. Credit must be given to former President Nelson Mandela's leadership and reconciliatory attitude for the peaceful transition towards a non-racial dispensation in which the humanity and dignity of all South Africans are protected in a constitutional democracy.

The 1990s ushered in political emancipation for the black Africans. It has been argued that the political initiatives that were introduced by the then government during this period[37] were the direct response to the economic crisis that had occurred in the 1980s in South Africa. The economy had deteriorated to such an extent that the government had no option but to yield to both local and international pressure. This economic transformation revealed the complexity of implementing programs that would also serve to address the problems of inequity and poverty in the South African society as well as ensuring a pattern of self-sustaining growth to the benefit of all. The journey towards socio-economic transformation has just been undertaken and was the subject of this research. Mangcu et al (2007) explained that the socio-economic inequalities in the past had a distinctly racial character. However, the post-democratic dispensation was the greatest inequality experienced within the African population group.[38]

The political transition of 1994 was largely legalistic freedom. It had given black people the right to vote and, in theory, equality before the law, freedom of movement and restored

[37] Worden, N, The making of modern South Africa, Conquest, Apartheid, Democracy, 4th edition (Blackwell Publishing Ltd, Johannesburg, South Africa, 2007), pp 154.

[38] The historical pattern of growth entrenched in South Africa has been so biased as a result of Apartheid, in the view of some economists, that the future economic growth of the country lay in limiting State intervention, thus leaving the economy to the markets dictates would alleviate and solve fundamental imbalances is incorrect. The state would have to play a major role in the reorganization of the South African economy.

human dignity. However, such freedom was not enough. This freedom can better be summarized in the words of Pallo Jordan when he said; "*the legal emancipation of an oppressed people is not enough; improvements in the ability to profit from opportunities are also necessary"* (Tereblanche 2002).

President Lyndon Johnson of the United States of America was in agreement on the topic that freedom was not enough. *"You do not take a person who for years, has been hobbled by chains and liberate him, bring him up to the starting line of the race and then say, you are free to compete with all the others, and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through the gates…. We seek not just freedom but opportunity- not just legal equality but human ability- not just equality as a right and a theory but equality as a fact and as a result."*[39]

The French philosopher, Jean Jacques Rousseau (1712-1778*) believed that "inequality among mankind is as a result of science, art and social institutions.*[40] *Government involvement is therefore needed in any economic agenda. It is through monetary, fiscal, exchange rate and industrial policies that effective private sector participation is provided. The state has directly been involved in social; infrastructure and poverty-alleviating investment in order attain substantial returns over a long term period. One has to realize that such investment will not come lightly without huge monetary intervention on the part of the state, it would also be non-profit earning and has to be made accessible to all members of society, especially the previously economically and politically marginalized".*[41]

Tereblanche, S (2002) argued that eight years after the political transition changes in the socio-economic benefits had only accrued to ±10 million blacks in the bourgeois classes and had no impact at all on the 22,5 million blacks in the middle lower and lower classes. Only 7.5 million in the upper class might have benefited marginally. The poorest of the poor were relatively uneducated, unskilled, unemployed and deprived of information about their rights

[39] According to Tereblanche, S, A History of Inequality in South Africa 1652-2002, pp 35. President B. Johnson served as the 36th President of the United States from 1963-1969. As President, he was responsible for designing the "Great Society" legislation that included laws that upheld Civil Rights

[40] This is highlighted in his main work, The Social Contract (1762), which champions civil liberty. Rousseau's influence on the French revolutionaries and codifiers resulted in the transformation of the natural rights to the civil rights and the political rights of positive law.

[41] Merriman, C, Biography of Jean Jacques Rousseau (1712-1778) (JalicInc, London UK, 2005)

and opportunities. There can be no talk about effective transformation without meeting the economic needs of the poor.

The government of South Africa has introduced legislation aimed at laying the foundation for a non-racial society. This legislation was based on the realization that it was impossible to create a non-racial South Africa as long there was an economic gap between blacks and whites. The introduction of various legislations by the government to alleviate the socio-economic inequality was an important step. The government had further acknowledged, in an international forum, the need for socio-economic upliftment. In a communiqué to the Southern African Development Community (SADC) summit of 2001, the government of South Africa declared as follows:

Since racial inequality in South Africa is not a set of aberrations that can be corrected by the equal application of the law, or the re-education of pathological individuals, it is not sufficient to simply tamper with or reform the system. It requires instead the complete and progressive transformation of society' (Department of Foreign Affairs 2001)

The guiding legislation that served as the foundation of creating a non-racial society was the Constitution of the Republic of South Africa, Act No 108 of 1996. It represented a milestone in the human rights and a non-racial society in the country. The preamble states that the reason for the adoption of the Constitution is to:

Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations (Constitution of the Republic of South Africa, No 108 of 1996).

As mentioned earlier, the social and economic history of present day South Africa had its foundation in the history of unfree black labour and unequal power relations. On the issue of economic and social rights, the Constitution states: *Labour rights; the right to an environment that is not harmful to health or well-being; and to have the environment protected through reasonable legislative and other measures that secure sustainable development; equitable access to land; security of land tenure; and restitution of property or*

equitable redress for property that was dispossessed after 1913 as a result of past racially discriminatory laws or practices; the right of access to adequate housing and a prohibition on the arbitrary eviction of people from their homes; the right of access to health care services (including reproductive health care), sufficient food and water, and social security; the right against the refusal of emergency medical treatment; the right of children to basic nutrition, shelter, basic health care services and social services; educational rights; adequate accommodation, nutrition, reading material and medical treatment at state expense for persons deprived of their liberty.

The government had also enacted wide-ranging legislative programs aimed at addressing the legacy of apartheid through affirmative action and special protection for the HDSA. An example of these legislations is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, which compels every minister and every level of government to implement measures aimed at achieving equality. Practices, law or policy that perpetuates inequality had to be repealed or removed. In addition, a plan for the eradication of poverty had to be drawn up by the Minister. Another Act was the Employment Equity Act, No 55 of 1998. This legislation aimed to address the legacy of apartheid racial discrimination, which excluded black people from jobs above a basic level. It had to be noted that these laws had gone a long way in addressing the legacy of apartheid, but the true beneficiary was the aspirant African petit bourgeois, who were in formal employment and are members of trade unions. According to Mangcu et al (2007) the downside of this legislation to the economy was that they had increased the cost of doing business and thus affected the growth potential of the economy.

2.3 Conclusion

The chapter provided an overview of the political economy of South Africa. It investigated the origins of inequality and disenfranchisement based on race. It scrutinized the socio-economic development that occurred in South Africa during five systematic periods from 1652 to 1994. These periods were marked with socio-economic developments that were racist-oriented, extremely unequal, uneven and unjust. The conclusion of all the five periods was that the political components of each period were not sensitive to notions of joint interests and shared justice. The economic component of these periods thrived on unequal freedoms and unequal distribution of power, property and opportunities. These actions were

deemed unacceptable in modern South Africa. For the country to move from an unacceptable past position that had been a burden to a future that would be acceptable, knowledge of the history that brought the unacceptable position was important. Investigating the past empowers people with the knowledge of what interventions would be needed for the future to enable a just and equitable society.

The chapter set the scene that the oppression of a section of the people had dire consequence for the economic development of the country. True economic prosperity of a country could never be achieved if a portion of the citizens were not able to participate in the economy. Continuation of inequalities was detrimental to the achievement of a developed South Africa.

The next chapter focused on the transformation initiatives in the mineral sector.

CHAPTER THREE

TRANSFORMATION OF THE MINING SECTOR

3.1 Introduction

Chapter two examined the political economy of South Africa. The overview provided a historical perspective of the political and economic status of South Africa and why there was a need to embark on a transformation agenda aimed at addressing past inequities by giving Historically Disadvantaged South Africans (HDSAs) access to the mineral resources, the backbone of the economy of the country, which they had been denied in the past. This Chapter investigated the legal foundation for transformation of the Mining sector and, in so doing, scrutinized the Mining Charter and all its areas of compliance. The Mining Charter was the agent of transformation in the mining sector and was government's attempt to transform the country from an unacceptable position to a morally and just acceptable position.

3.2 The Legal framework of transformation of the mining sector

The transformation of the mining industry has come a long way since the adoption of the Freedom Charter in 1955 by the ANC and its allies: the South African Indian Congress and the Coloured People's Congress, where specific reference was made to the mining industry. The document was important because of its demand for and commitment to a non-racial South Africa. The legal framework was one of the effective tools to transform society.[42]The Mining Charter's legal foundation was the MPRDA and it was the tool that was used to set the transformation agenda of the mining sector.

The transformation of the mining industry was the aim of the Mining Charter in order to bring equality to the society of South Africa. The Mining Charter was the ideological and legal basis for equality to access to mineral resources and overall transformation of the mining sector. It would be useful at this point to examine briefly the legislation which enforced discrimination in the sector in the past. As already mentioned in the previous

[42] The history of black empowerment in Africa from the earliest times has been the history of human empowerment. The Neolithic revolution was when man gained control over the forces of nature. The discovery of minerals in South Africa brought to the fore to all ethnic groups their entitlement to the control of these. .

chapter, "*it is history that enlightens us as to who we are*" (Stoop et al, 2000). South Africa is a society with diverse ethnic groups of people, in which Africans, Asians and Europeans co-exist. The country has a history of prolonged contact between the different ethnic groups of people. The result of this prolonged contact is filled with conflict over land and cattle in the beginning, followed by conflict over industrial opportunities when towns grew and minerals were discovered. In 1893, Native Locations, article 1322, 6/09/1893, expounded a decision was made by the Volksraad to instruct Government not to grant any location on ground that was rich in minerals. Further to that, a restriction was made on issuing prospecting to Coloureds, natural or juristic persons in which they held controlling interest (section 7(3)(b) Mining Rights Act of 1967). Section 7(3) (d) of the same Act also legislated a restriction on issuing prospecting permits to blacks, natural or juristic persons or their nominees.

Apartheid had a severe impact on the people of South Africa and this impact can best be described in the words of the Judge in Brink v Kitshoff NO 1996 (CC), when he said:

> "*Apartheid systemically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property….; senior jobs and access to established schools were denied to them. The deep scars of this appalling program are still visible in our society"*

3.2.1 The Constitution

The Constitution of South Africa, in its preamble, outlines the vision of the Republic of South Africa: The preamble states:

> *"We the people of South Africa, Recognise the injustices of the past, Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights…Improve the quality of life of all citizens and free the potential of each person… God bless South Africa"*

The State has a legal obligation to address the injustices of the past and the legal foundation for this claim is the Constitution. Section 9 of the Constitution which states "*The Republic of South Africa is one democratic state founded on the following values:*

(a) Human dignity, the achievement of equality and the advancement of human rights; and
(b) Non-racism and non-sexism."

Section 2 of the Constitution states "*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled."*

Section 7 states that "*The State must respect, protect, promote and fulfil the rights in the Bill of Rights*." Section 237 states "*All constitutional obligations must be performed diligently and without delay".*

The Constitutional foundation of the Equality clause is section 9, which states "…*To promote the achievement of equality, legislative and other measures designated to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken"* According to the Constitution with regard to formal equality the statement is that "*the law must treat individuals in like circumstances alike."* In addition, with regard to substantive equality "*requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal"*

The courts have made informed pronouncements on the issue of equality, unfair discrimination and transformation of society and the State. In the constitutional case of Minister of Finance v Van Heerden 2004 (CC) it was held that the "*The Constitution informs a conception of equality that goes beyond mere formal equality and mere non-discrimination which requires identical treatment, whatever the starting point or impact."*

In dealing with the equality clause, the Constitutional Court held in President of the Republic of South Africa v Hugo 1997 (CC) that "*although a society which affords each human equal treatment on that basis of equal worth and freedom is our goal, we cannot achieve the goal by insisting upon identical treatment in all circumstances before that goal is achieved".*

The courts have made further pronouncements on the issue of transformation and held in the case of Bato Star Fishing v Minister of Environmental Affairs and Tourism 2004 (CC) that

"*…transformation is a process. There are profound difficulties that will be confronted in giving effect to the Constitutional commitment to achieving equality. We must not underestimate them. The measure that bring about transformation will inevitably affect some members of society adversely, particularly those coming from the previously advantaged communities…What is required though is that the process of transformation must be carried out in accordance with the Constitution."*

3.2.2 The Employment Equity and Skills Development Act

The legislative foundation for transformation is found in the enactment of a number of legislations, for example, The Employment Equity Act, 1998 (10/08/1999). Section 5 states; "*Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice".* Section 13 states that *"Every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act."* Section 15(1) states that "*Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and equitably represented in all occupational categories and levels in the workforce of the designated employer."*

Another Act to be noted is the Skills Development Act, 1999 (10/09/1999), section 2(1)(e) that states that "*The purposes of this Act is to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantaged through training and education."*

3.2.3 The Mining Policy and MPRDA

The most relevant legislative foundation that directly impacts on the mining sector is A Minerals and Mining Policy of 1998 and Minerals and Petroleum Resources Development Act (2002).

The Minerals and Mining Policy was developed to take into account the new political dispensation of the country and addresses eight key areas:

- Business Climate;

- Mineral Development. These two sections deal with the continuation of a policy conducive to investment;
- Participation in ownership;
- Management are two sections that encompass racial and other economic and social imbalances in the industry;
- People issues, dealing with health and safety, housing needs, migrant labour, industrial relations and downscaling;
- Environmental Management;
- Regional Co-operation and
- Governance.

In 2002, the Minerals and Petroleum Resources Development Act was enacted consistent with the policy. The main element was that mineral rights were now vested in the state in custody for all South Africans. Section 2(1) (c) explains that its aim is to "*Promote equitable access to the nation's minerals and petroleum resources to all the people of South Africa."* Section 2(1) (d) pronounces it intends to *"substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit…*" Section 2(1) (f) states it aims to "*promote employment and advance the socio economic welfare of all South Africans."*

Section 100(1) of the MPRDA provides the Mining Charter its legal foundation. Section 100 of the MPRDA is the provision that is central to this research. It is the provision that gives effect to the Charter. The section states that the "*The Minister must within 5 years;*

Section 100 (1)

- (a) *Develop a housing and living conditions standard for the mineral industry;*
- *(b) Develop a code of good practice for the mineral industry; and*

Section 100(2)

- (a) *Develop a broad-based socio –economic empowerment Charter…framework, targets and timetable for effecting entry of HDSA into the mining industry"*
- *(b) the Charter must, amongst others, set out how the objects in;*
- *(c) equitable access;*
- *(d) substantial and meaningful;*
- *(e) economic growth;*

- *(f) employment and economic welfare;*
- *(i) holders' obligations.*

3.2.4 The Broad Based Socio-Economic Empowerment Charter for the Mining Industry

The Mining Charter (original Mining Charter) was promulgated in 2002 and was aimed at improving equity, opportunities and benefits for HDSA. In terms of the mining legislation of South Africa, The Minerals and Petroleum Resources Development Act and the Broad Based Socio-Economic Charter for the Mining Industry were developed in consultation with the mining industry and government. The goal of the Charter was to create a mining industry that would proudly reflect the promise of a non-racial South Africa.

The Mining Charter recognized that the history of South Africa resulted in blacks, mining communities and women largely being excluded from participating in the mainstream of the economy. It was the formal mining industry's stated intention to adopt a proactive strategy of change to foster and encourage black economic empowerment (BEE) and to transform the tiers of ownership, management, skills development, employment equity, procurement and rural development.

The Mining Charter's goals and objectives were the government's attempt at driving transformation through its power to grant licenses. The granting of licences was the most powerful leverage that the Charter had to force the private sector to comply. The Mining Charter was important as a legal instrument because it stipulated targets that had to be achieved by the mining industry. It's companying Scorecard set out the timetable for transforming the South African mining industry. The main objective of the Mining Charter was to address the imbalances of the past based on race, gender or disability of the HDSA. The objectives of the Mining Charter are as follows:

- Promote equitable access to the nation's mineral resources to all the people of South Africa;
- Expand opportunities in a meaningful way for HDSAs including women to enter the mining and mineral industry and to benefit from the exploitation of the nation's mineral resources;

- Utilize the existing skill base for the empowerment of HDSAs;
- Expand the skills base of HDSAs in order to serve the community;
- Promote the employment and advance the social and economic welfare of mining communities and the major labour sending areas; and
- Promote the beneficiation of South Africa's mineral commodities.

Section 100(2) (a) reads as follows:

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 timetable 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.

(c) The Charter must set out amongst others how the objects referred to in section 2(c),(d),(e),(f) and (i) can be achieved.

Section 2 of the MPRDA is the provision that sets out the objectives referred to in Section 100(2)(b). These are as follows:

(c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

(e) promote economic growth and mineral and petroleum resources development in the Republic;

(f) promote employment and advance the social and economic welfare of all South Africans;

(i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

Section 23(1) of the MPRDA is the provision that outlines the requirements for applications for mining rights. The Minister is obliged as follows:

Subject to subsection (4), the Minister must grant a mining right if-

(h) the granting of such right will further the objects referred to in section 2(d) and (f) and in accordance with the Charter contemplated in section 100 and the prescribed social and labour plan.

In the BEE context in the mining industry, Section 23(1) (h) is of paramount importance. Section 23 read in conjunction with section 100, the minister is legally obligated to apply the Mining Charter in his/her determination in granting a mining right.

Section 23(1)(h) of the MPRDA obligates the Minister of Mines to investigate as to whether the applicant complies with the Mining Charter. In contrast to section 23(1)(h) , section 10(a) of the BEE Act states:

Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of the Act in (a) determining qualification criteria for the issuing of licenses, concessions or other authorizations in terms of any law.

3.3 Objectives of the Mining Charter

The areas of compliance are discussed in detail below: The first part to Section 4.1 of the Charter states that:
The South African labour market does not produce enough of the skills required by the mining industry. Stakeholders shall work together in addressing this skills gap in the following:

3.3.1 Human Resource Development

The primary objective of the human resource development program is to ensure the availability of mining and production operation-specific skills and competencies of the work force and the skilling of employees for portable skills utilizable by the employees outside the life of mine. To access the effective compliance of the Human Resource Development program of the Mining Charter, five plans and supporting forms have to be submitted to the Department of Mineral Resources; skills development plan; career progression plan, mentorship plan; internship and bursary plan and employment equity plan.

3.3.2 Skills Development Plan

Under the skills development plan, all stakeholders acknowledged that the core skills required in the mineral sector were mining engineering, geology, survey, engineering and mineral processing. The sector used support skills in other areas such as equipment maintenance, electrical, ventilation, health and safety, among others. The main goals for the skills development plan were the following:

- to ensure that the mine had a pool of necessary skills and competencies that would enable the mine to meet current and future production and operational needs;
- to ensure that, over a period of time, employment and skills levels within the mine broadly reflected the demographics of the country; and
- to offer employees opportunities for training and development as well as for portable skills.

A socio-demographic profile had to be done of the mining entity's labour force to determine the education level of the labour force and the percentage of the workforce that would need different categories of training, that is ABET (Adult Basic Education Training), from level I to level 4, certificates, diplomas, and degrees. The Charter's main objective was for all workers in the mining industry to be functionally literate and numerate as soon as possible (within five years of granting a mining license). Completion of ABET Level 3 is generally accepted by industry to comply with the requirement of all employees being functionally literate and numerate.

The mining industry and mining entity were required to participate with processes of skills development legislation, including and submitting the workplace skills and annual training report, paying and claiming of levy and grants from the SETA. The mine had to submit the supporting form, Education level of workforce-Form Q. The form required information on the educational level of employees in a mine. It required information on how many had a general education, further education and higher education. It categorized the workers into male and female and African, Coloured, Indian and White. The information derived from this form would indicate how many had or needed to be trained in ABET I to 4, NI to N3, diplomas, certificates, first degrees, higher diplomas, honours, Masters degrees and Doctorates.

3.3.3 Career Progression Plan

A career path ideally requires relevant education and development of technical, administrative and managerial skills at the work place. In this way, an individual in the mining industry would develop a career path through employment and practical life skills. To develop a career progression plan one requires technical knowledge or skill that is academically achieved through education and practical knowledge obtained from the work environment through onsite training. This training can be complemented by formal training courses. The mining company had to create a process of generic paths for every discipline at its operation in agreement with employee representatives. Individual development charters (IDC) were to be created for management employees. This process was imperative in order to develop a career path.

The objective of a career progression plan was not to promote people into positions for which they were not qualified. The career progression of an individual was to be made on sound economic principles, taking into consideration that Black Economic Empowerment was a process rather than an event. Companies needed to prepare, educate and promote people into the correct positions over time. The challenge was to identify potential employees, then develop them by means of career paths. However, it should be acknowledged that this did not always extend to every individual employee in very large companies.

The MQA is also mentioned in the Charter. It is important to note that employers see the role of the MQA as facilitative rather than as a policing role, which role properly belongs to the government.

3.3.4 Mentorship Plan

A mentorship program should be accessible to all employees who wished to take advantage of this facility had to be set up by the mining company. HDSA employees had to be identified and fast tracked from a talent pool. The main features of this program were as follows:

- the planned involvement, agreement and buy in of suitable managers; the design of necessary training materials, mentoring agreements and working documents;
- the training and accreditation of line management responsible for mentoring; the matching of mentors to protégés;
- regular audits and necessary corrective action.

The intention of the Mentorship plan was for mining companies to recognize talented black people and to groom them actively for senior management positions. Companies needed to fast-track staff members within their ranks in the company. This fast tracking would assist integration of people from different ethnic backgrounds within the corporate environment instead of ignoring them or suppressing them as in the past.

3.3.5 Internship and Bursary Plan

This program was designed to attract, educate and develop high calibre young professionals to meet the mine's needs as well as support the mine's Employment Equity requirements. The primary objective of this program was to feed the professional levels of the mine with well-educated and competent people to meet the industry skills needs.

The plan was to encourage companies to take on board young professionals who were studying for various disciplines in the mining industry at university level, to give them bursaries to assist in their studies and, during vacation times, to take them on as interns. This internship and bursary plan would ensure that HDSA candidates had the financial assistance and technical experience in their chosen field while pursuing their education.

3.3.6 Employment Equity Strategic Plan

Section 4.2 of The Charter deals with Employment Equity and how it was to be achieved by the industry. The plan was to prevent racial, gender and age discrimination and to promote equal opportunities. The plan would scrutinize recruitment procedures, how positions were advertised; selection and appointment criteria. This scrutiny was to ensure that all future recruitment, especially in management, focused more on affirmative action candidates to ensure that HDSA participation was speeded up. The aim was to achieve the required 40% of HDSA with 10% being women in the top and middle management levels within five years.

Senior top management was categorized as, without limitations, the chief executive officer, the chief financial officer and the chief operations officer. These categories of positions would hold the highest decision-making power after the board of directors. Middle management would largely consist of professionally qualified and experienced specialists. Middle management positions were to be held by persons who had experience in the company by way of technical expertise, but did not necessarily have to be in possession of

academic qualifications. Middle management lacked control of the company as they had more interpretive decision-making power and had to implement top management decisions.

The targets for HDSA's management participation were high as they had to reflect the demography of the country. Mining companies claimed that there was a scarcity of black executives. The 40% target for HDSAs in management had to be met within a ten-year period. The question of how these targets were to be achieved, when there was an alleged scarcity of black candidates, became a matter of looking within and developing a means to fast-track promising individuals in the company. The advancement could be done in line with concept that BEE was a process rather than an event. This fast tracking would encourage the introduction of fresh blood and innovative new ideas as well as broaden opportunities for blacks to occupy managerial positions.

With regard to employment equity, the Charter was silent on mineworkers that came from neighbouring countries as to whether they should be regarded as HDSAs, particularly if they had long service in the mining industry. Another issue was the prevention of token appointment.

The target set out in the Charter was that in five years, meaning by 2009, women should at least make up 10% of employees in the formal mining industry. As to whether the mining industry had met the targets would be discussed in Chapter 5. The investigation and analysis that was undertaken would be explained in that chapter to determine where the country was in terms of meeting the targets as set by the Charter.

According to report, there had been a substantial increase in the number of females in training, from blasting certificates, to engineering apprentices, to university and technikon bursars. The School of Mining and Engineering of the Witwatersrand was, for example, the leader among the English-speaking universities of South Africa in attracting women in mining-related studies. This fact provided hope for the future increase in the number of qualified women professionals in mining.

3.4 Migrant labour

The Charter in Section 4.3 stated that government and the industry would undertake to:

- change the migrant labour system in a way that protected the interests of migrant mine workers;
- review the system of compulsory deferred pay;
- ensure that foreign mine workers were afforded human treatment in terms of their immigration status as any other potential immigrant or temporary resident;
- ensure that the social plan was in place before mining commenced so as to avoid unsustainable settlements and
- lastly, develop integrated rural development plans for labour sending areas.

Reforms of the foreign labour system in the industry still had room for improvement. Before the promulgation of the Charter, there had been attempts to reform the problem of foreign labour. The Presidential National Labour Market Commission of 1996 proposed a series of reforms which were never implemented. The Green Paper on International Migration 1997 proposed similar reforms which were dropped in the White Paper on International Migration 1999 and the Immigration Act of 2002. Section 4.3 simply reads: *Stakeholders undertake to ensure non-discrimination against foreign labour*. This vague and ambiguous statement would leave the *status quo* as is. The prospect of a fundamental revisiting of the migrant labour system had once again been ignored, presumably at the insistence of the mining companies.

The main ethos of the Charter with regard to migrant labour was one of non-discrimination. The 2003 wage agreement concluded between the Chamber of Mines (COM) and National Union Mines (NUM) was aligned with the Charter and provided that "*employees from SADC will not be treated differently in respect of family accommodation".* However, the Charter in section 4.2: Employment Equity referred to 40% HDSA in management within 5 years. At the same time, the Immigration Act allowed only migrant labour with necessary skills to work in the country. The question then arose as to whether employees from SADC countries with lower skills would be prevented from working in the country even though they had been working there for decades. Did this action not entail discrimination against migrant labour? There was also the issue of the 2% levy on migrant workers. This levy seemed to be a tax on the utilization of migrant labour which amounts to discrimination.

3.5 Mine Community and Rural Development

Section 4.4 of the Charter reads: *Stakeholders, in partnership with all spheres of government, undertake to:*

- *Co-operate in the formulation of integrated development plans for communities where mining takes place and for major labour-sending areas, with special emphasis on development of infrastructure.*

The mining companies were mandated to implement local development sustainable projects to ensure poverty eradication and community upliftment in the areas from which the majority of the workforce was sourced and the areas where mining activities would take place. These projects had to be implemented in consultation with the local municipalities to ensure that there was interaction and cooperation with the Integrated Development Plans (IDPs) and had to be funded by the company. These projects had to be sustainable projects with a future to ensure economic livelihood of the community well past mining stage and thus avoid the creation of Ghost Towns. In order to determine what sort of projects to implement in the area, the company had to conduct a socio-economic baseline assessment of the area and align its local development programs with the integrated development plans of the area. The baseline study would take into account the population of the area, educational level of the population, employment rate, occupational categories and income. This assessment should involve the communities with those decisions that affected them and should assist with integration of their development plans with those managed by local municipalities.

A key characteristic of the labour-sending areas was that they had a relatively small economy which meant that any mining development would have massive impacts on the economy. The social and economic upliftment of these communities was made an imperative under the new political dispensation in South Africa. The mining industry had to contribute towards skills development, developing physical infrastructure, provision of social services and business opportunities. Social plans had to integrate the development of mine communities to readdress historical displacement of rural communities where land deprivation happened forcefully. Compensation issues and restitution of land rights to HDSA was essential because of the loss of land and livelihood resulting from these mining activities.

3.6 Housing and Living Conditions

Section 4.5 reads: *Stakeholders, in consultation with the Mine Health and Safety Council, the Department of Housing and organized labour, undertake to:*

- *Establish measures for improving the standard of housing, including the upgrading of hostels, conversion of hostels to family units and the promotion of home ownership options for mine employees; and*
- *Establish measures for improving of nutrition of mine employees.*

The system of housing mine employees in hostels was a legacy of the past. It certainly had to be addressed by setting targets in this regard. The Gold and Coal Wage Agreement of 2003 concluded between Chamber of Mines and the National Union of Mineworkers was a benchmark for the mining industry and the broader society. The agreement proposed phasing in freedom of choice of accommodation options for employees, so that their families could be accommodated. This agreement was the start of a process of moving towards normalized housing.

Mining companies had to be inventive with strategies to alleviate the housing and living conditions as the past accommodation in hostels had been most inhumane. It had resulted in a negative impact because it included the disruption of the social fabric of rural communities.

Statistics reveal that 59.3% South Africa's population in and around mining communities live in abject poverty in settlements characterized by overcrowding, inadequate resources, social exclusion and limited access to basic infrastructure, services or economic opportunities.[43] Human settlements were a significant factor in addressing the issues of sustainable social and economic development in a globalizing world. The quality of work of mine employees could greatly be improved through attention being paid to housing and accommodation, infrastructure and basic services, social issues such as repatriation and migration and addressing health matters such a removals and potable water.

The past was marked by labour migration from the rural to the urban areas to work in the mines. This migration resulted in the extended absence of workers from their homes. Homes

[43] This figure comes from the an analysis of data of two surveys conducted by Statistics South Africa South Africa-the Income and Expenditure Survey of Households (IES) 2005/06 and The General Household Survey 2006. The analysis indicated that Kwa Zulu Natal, the Eastern Cape and Limpopo were the three provinces in South Africa that were most populous and it was not surprising that 60.1% of poor individuals came from these three provinces. The incidence of poverty is much higher in the rural areas where most of mining activities take place despite the fact that the rural areas housed well below one-half of the South African population.

for the future for mining employees should be family-oriented which would reduce other social negative aspects, for example HIV/AIDS. All stakeholders should work together to ensure that employees would be able to appreciate the importance of housing as an important asset, which could be utilized for other wealth-building activities. Employees should be educated into understanding that the utilization of housing loans and that living-out allowances for housing purposes would be in their own interest.

The mining industry should assist and facilitate the provision of basic infrastructure to ensure that housing and living conditions were as follows:

- Fully integrated with the broader Integrated Development Plan;
- Delivered through proper consultation with the relevant authorities and community structures;
- Designed to address the high rate of urbanization in a holistic manner;
- Structured to consider other social amenities required in accommodation issues; and
- Able to provide pathways to self-sufficiency for economically vulnerable persons and families.

3.7 Measures to address nutrition

The Charter required the mining industry to address and implement measures for improving nutrition of mine employees. Section 4.5 states in bulletin number two that employers had to:

- *Establish measures for improving nutrition of mine employees.*

Mining is very labour intensive and, therefore, good nutrition is important for the well-being of the mine employees. In compliance with international standards and dietary norms, the industry had to ensure that employees had a well-balanced diet. Food safety aspects were important and all feeding programs had to adhere to the minimum HACCP (Hazard Analysis Critical Control Points) principles.

3.8 Procurement Plan

Section 4.6 stipulated that the mining industry had to eradicate resource enclaves of giving out contracts for the supply of goods. Procurement had been divided into three levels: capital

goods; services; and consumables. Mining companies were now compelled to give HDSA a preferred supplier status at all levels of procurement. Companies had to procure cost-effective and reliable goods and services from companies owned and controlled by Historically Disadvantaged South Africans (HDSAs) and preferably from communities of the affected areas in which they operated. All suppliers were to be sourced, evaluated and selected accordingly. The plan had to comply with other related transformation enablers: Broad Based Socio-Economic Charter for the South African Mining Industry; Preferential Procurement Framework Act, No 5 of 2000; Provincial Growth and Development Strategy (PGDS); Local Government Local Economic Development (LED) and Integrated Development Plan (IDP) support programs; Employment Equity Act No 55 of 1998; The Competition Act No 89 of 1998; The Mineral and Petroleum Resources Development Act, No 23922 of 2002; and The Skills Development Act No. 97 of 1998.

The industry was now required to show significant progress towards planned preferential procurement targets and goals. This progress would, as a result, facilitate equitable meaningful access and participation by HDSA Small, Medium and Micro Enterprises (SMMEs) into mainstream procurement activity. Such actions would redress past imbalances based on race, gender and disability of HDSA. It would also preserve principles of good corporate governance. The plan had to ensure a fair, transparent and compliant environment at all levels of procurement and should enhance BEE awareness among all procurement officials at operational level.

3.9 Ownership and Joint Ventures

Section 4.7 states: *Government and industry recognize that one of the means of effecting the entry of HDSA's into the mining industry and of allowing HDSA's to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSA's. Ownership and participation can be divided into active or passive involvement as follows:*

One of the main objectives of The Charter was to ensure the transference of 26% of the mining industry's assets into the hands of black ownership in ten years. Such a transfer would be achieved through the formation of joint ventures and outright sale of assets to a BEE company in order to increase the number of HDSA who owned, controlled and managed the economic resources of the country. The rationale was that once ownership had been

transferred into the control of HDSA, then empowerment would be driven from within the organization by the new owners. Without ownership, there would be no mechanism capable of setting the other broad-based elements in motion. BEE meant ensuring that HDSAs were integrated into the mainstream economy through owning productive assets. Such integration would also result in the transfer of skills and wealth creation.

Adherence to sound economic principles in the transfer of mining assets was critical to ensure market stability, which in turn was vital to the success of BEE. Sustainable development of HDSA would be enhanced if the measured entity adhered to sound economic principles. Jack, et al. (2007) argued that even though sound economic principles had to be adhered to when considering the transfer of assets to a BEE, it could remain purely market-based. The ideal scenario would be a hybrid that favoured market principles with a donation (discount) element. Free market principle detected selling of an asset when the market was highest and buying when it was at its lowest. HDSAs who tried to buy in might have to buy when the value of the mining assets were high and when the market dropped they would be left with negative net equity, where the value of liabilities exceeded the value of the assets. This negative equity would result in the BEE company being forced to sell its shareholding at a discounted rate to cover its debt. They would then be back to square one, because the original owner would be happy to buy back the asset. If no facilitated entry was done to assist HDSA, the targeted 26% by 2014 would remain a dream for the next thirty years.

The target set by the Charter with regard to ownership was set at 15% HDSA ownership within five years (April 2004 to April 2009). This target would be increased gradually to a minimum of 26% in the five (5) years leading to 2014. The target was, however, subject to one exception, with regard to conversion of rights for State owned, unused mineral rights. The Department of Mineral Resources required an immediate 51% HDSA ownership.[44] This requirement would meet the definition of a BEE company of 50% BEE shareholding plus one vote for a company, which would include management control and 25% BEE shareholding plus one vote for a joint-venture, which would include a Management Agreement that provided for joint management and control. It would also provide for dispute resolution. Even though government had done much to accelerate transfer of ownership into the hands of HDSA, finance was still a barrier to entry for BEE entrepreneurs, because most South African finance institutions were risk averse, especially for new entrants into the mining

[44] This requirement was Government's strategy to accelerate BEE ownership of mining assets to meet the targets as set by the Charter.

industry who did not have collateral and a track record to meet the high barrier to entry.[45] In an attempt to achieve broad-based empowerment and to bring ownership within the reach of mine workers, companies commenced to offer equity through dedicated unit trust schemes and ESOPs. This strategy allowed mining companies to grant shares to employees, to provide for profit-sharing incentives to employees and to allocate shares for mine workers credited trusts.

3.10 Beneficiation

Section 4.8 states: *This Charter will apply to mining companies in respect of their involvement in beneficiation activities, specifically activities beyond mining and processing. These include production of final consumer products.*
Mining companies will be able to offset the value of the level of beneficiation achieved by the company against its HDSA ownership commitments.

Mining companies agreed to:

- *Identify their current levels of beneficiation.*
- *Indicate to what extent they can grow the baseline level of beneficiation.*

In South Africa, there is a need to grow the beneficiating industry as there is added value in the selling of a mineral commodity in its finished product. Mining companies had traditionally exported raw products and had to consider local value-addition first because it made economic sense for the development of the country. Minerals are wasting assets and thus it was necessary to compensate for the loss of mining's contribution to the economy by growing the manufacturing industry. In South Africa, statistics show that such compensation did occur. Government's intervention was needed to bring beneficiation from its infancy to maturity in South Africa. This action was government's attempt to boost the manufacturing industry's contribution to the economy and to encourage the use of incentives for mining companies to invest in downstream activities in South Africa.

There were advantages in promoting a beneficiating industry in the country as it would greatly promote the manufacturing industry. A good example of this is the manufacturing of aluminium at Richards Bay and in Mozambique.

[45]Cawood, F; Social Change through Mineral Law in South Africa, paper presented at the Annual Mining Seminar organized by the Centre for Energy Petroleum and Mineral Law and Policy, University of Dundee and held at the Natural History Museum, London, 21st June 2005

3.11 Exploration and Prospecting

Section 4.9 states: *Government will support HDSA companies in exploration and prospecting endeavours by, inter alia, providing institutional support.*

The DMR had a unit to assist small-scale miners with technical advice with regard to prospecting and mining.[46]

3.12 State Assets

Section 4.10 states*: Government will ensure compliance with the provisions of this Charter and be exemplary in the way in which it deals with state assets.*

In converting the old order right into new order rights the Government had ensured compliance with provisions of the Charter, by requiring an immediate 51 percent HDSA ownership for State-owned unused mineral rights. This provision was made possible by combining the state's common law right with the vesting of mineral rights to the state in trust for the people of South Africa.

3.13 Licensing

Section 4.11 states*: To facilitate the processing of license conversions there will be a scorecard approach to the different facets of promoting broad based socio-economic empowerment in the mining industry.*

This scorecard approach would recognize commitments of the stakeholders at the level of ownership, management, employment equity, human development, procurement and beneficiation. These commitments have been spelt out in section 4.1 to 4.9 above.

The HDSA participation required to achieve conversion within the five-year period on a company specific basis will be specified in the scorecard, hereto attached as Annexure A.

Under the MPRDA, mineral resources were vested in the State in trust for the people of South Africa. This vestment meant the private sector had to apply to the state for

[46] Section 16(4) of the MPRDA states that the Minister must grant a prospecting right if the Minister having "*regard to the type of mineral and the extent of the proposed prospecting project, requests the applicant to give effect to the object referred to in section 2(d)"*

authorization to prospect and mine. The Mining Charter's goals and objectives were the government's attempt at driving transformation through its power to grant licenses. The power to grant licences was the most powerful leverage that the Charter had to force the private sector to comply.

In the matter of arbitration under the Additional Facility Rules of the International Centre or Settlement of Investment Disputes, the issue of transformation, was brought into the international arena and the issue of black economic empowerment was challenged. The Foresti case, named after one of the investors, contended that the MPRDA, in effect, terminated its rights and was equivalent to expropriation of its investment. It was such a pity that Foresti abandoned the claim as the merits of the dispute were never adjudicated. It would have been interesting to see the competing pressures being brought to the fore: the bilateral investment treaties between South Africa on one hand and Italy and Belgo-Luxembourg on the other and the MPRDA which required mining companies to commit to specific transformative programs to retain their rights. The treaties provided reciprocal protection in each country for investments from the other. The treaty stipulated that where there had been expropriation or actions tantamount to expropriation that affected the value of an investment, the injured party was entitled to prompt, effective and adequate compensation from the host country.[47]

3.14 Financing Mechanism

Section 4.12 states*: The industry agrees to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5 years, Participants agree that beyond the R100 billion industry commitment and in pursuance of the 26 percent target, on a willing seller-willing buyer basis, at fair market value, where the mining companies are not at risk, HDSA participation will be increased.*

Even though the Charter had stipulated this financing mechanism, BEE entrepreneurs still faced major finance problems. The initial equity ownership deals concluded with BEE enterprises in the mining sector occurred at holding company level, where the BEE enterprise

[47]PieroForesti, Ida Laure De Carli, Dora Foresti, Maria Teresa Suardo, Paola Suardo, Antonio Foresti, Luigi Foresti, Massimiliano Foresti, Franca Conti, Daniela Conti, Finstones.a.r.l and The Republic of South Africa, Case No ARB (AF)/07/1

acquired 26% of the shares of the listed enterprise at zero equity finance by the BEE enterprise. The empowerment interest was usually contracted to be exchangeable into the vendor enterprise ordinary shares after the expiry of a five-year lock value.[48] Such vendor finance to a BEE enterprise was not without its challenges, especially where the BEE Company did not achieve its stated cash flows. The vendor then had to repurchase its share back at a significant premium to market price. Another form of vendor finance that was common was in the form of a soft loan or subordinated debt.

Later, most BEE companies had to resort to facilitating cash upfront from financial institutions at market-related prices to develop properties acquired. This action was because South African finance institutions were risk averse, especially as most BEE entrepreneurs did not have the collateral and track record to meet the high barrier to entry.

3.15 Regulatory Framework and Industry Agreement

Section 4.13 states*: Government's regulatory framework and industry agreements shall facilitate the objectives of this Charter.*

The 2003 Gold and Coal Wage Agreement concluded between the Chamber of Mines and the NUM should be regarded as a benchmark for the industry. Various issues were highlighted as requiring attention to make the mining industry a favourable sector. Among these issues was the employment of women in mining. It was acknowledged in this agreement that employment of women represented special challenges such as the lack of facilities needed for child-care and ablution facilities. This agreement also made provision for both paid maternity and family responsibility leave. The issue of sexual harassment was also addressed and viewed as a concern by many women. Commitment was made by all stakeholders to eliminate direct and indirect sexual harassment.

[48] The Goldfields-Mvelaphanda transaction is an example of this type of transaction in which the BEE enterprise, Mvelaphanda acquired 26% of the shares of the Vendor, Goldfields. Mvelaphanda's empowerment interest was contracted to be exchangeable into Goldfields ordinary shares after the expiry of a five-year lock-in period.

3.16 Consultation, Monitoring, Evaluation and Reporting

Section 4.14 states: *It is recognized that the achievement of the objectives set out herein entails an ongoing process. Companies undertake to report on an annual basis their progress towards achieving their commitments, with these annual reports verified by their external auditors. A review mechanism will be established which again provides flexibility to the company commitments.*

- *Parties hereto agree to participate in annual forums for the following purposes:*
- *Monitoring progress in the implementation of plans;*
- *Developing new strategies as needs are identified;*
- *Ongoing government/industry interaction in respect of these objectives;*
- *Developing strategies for intervention where hurdles are encountered;*
- *Exchanging experiences, problems and creative solutions;*
- *Arriving at joint decisions;*
- *Reviewing this Charter if required.*

Industry had undertaken to report annually on its progress in achieving its commitments with regard to the Charter. These reports enabled the government to evaluate whether any significant progress had been made with regard to the transformation of the mining sector.

In evaluating the progress made by the industry, government had enacted the Codes of Good Practice for the Mining Industry, which were an elaboration of issues contained in the Mining Charter. The codes emphasized that the social plans and issues, such as provision of housing and infrastructure, skills development and sustainability of local communities, had to be taken care of at the beginning of mining activities and not at the end.

The introduction and scope section of the Codes of Good Practice for the Mining Industry states that:

"*the development of the Codes of Good Practice (the code) for the minerals industry is a requirement provided for in section 100 (1) (b) of the Minerals and Petroleum Resources Development Act, 2002. The code does not replace the key legislation and laws relating to the minerals and the petroleum industry but serves as a statement of present policy providing an overview and confirmation of the existing mineral and mining policy that is in place. The applicability and the enforcement of these Codes cannot be divorced from the Mining*

Charter and the key legislation in relation to the measurement of the socio-economic transformation in the mining industry."

The enactment of the Codes was government's strategy to accelerate transformation. The key advantage of the Codes was that unlike the Charter, Mining legislation and Mining Policy, they could be amended by the Minister of Mines without having to go through the procedure that governed amendments of legislations and policy.

Section 100 (1) (b) of the MPRDA states that:

The Minister must, within five years from the date on which this Act took effect-

(b) develop a code of good practice for the minerals industry in the Republic.

The enactment of the Code, even though provision was made for in the MPRDA, has been criticized by industry as government's attempt to amend the Charter through the back door.

3.17 The Scorecard

The purpose of the scorecard was to measure compliance with the Mining Charter. The scorecard's objective was to calculate a weighted average to enable mining companies to track their progress and also to provide a tool for reviewing the entity's empowerment compliance. The scorecard would report on progress made in cases where targets were not yet met. The Scorecard was a tick-box approach measuring tool to assess the mining company's compliance with the requirements of the Mining Charter. Holders of mineral development rights would be, in the final analysis, classified as being satisfactory or as a good contributor towards social change in South Africa.

The scorecard had three core elements:

- direct empowerment through ownership and control of enterprise and assets;
- human resource development and employment equity;
- and indirect empowerment through preferential procurement and enterprise development.

In terms of the Charter and with the scorecard as a measurement for compliance, it was not clear how credits for beneficiation would be used to offset future shortfalls in the expected

social impacts made by the industry. This aspect was an obvious weakness of the Charter in that credits for beneficiation were vague and open to misuse. Also the scorecard, as a tool to measure progress, did not take into account nor credit initiatives before the introduction of the MPRDA. There was also no mechanism to detect fronting.

3.18 The Social and Labour Plan

The purpose of the plan was to assist in the implementation of the Charter. The DMR developed guidelines for such a plan, which was a requirement for mining and production rights. The plan addressed the implementation agenda by mining companies in terms of Human Resources Development Programs, which included Employment Equity Plans, Career Progression Plan, Mentorship Plan, Measures to address nutrition, Local Economic Development programs and processes to save jobs and manage downscaling or closure. All these plans and programs had been addressed in detail under the objectives of the Charter above.

3.19 Conclusion

This Chapter gave insight into the objectives of the Charter by scrutinizing its components and what the government aimed to achieve with regard to the transformation of the mining industry. One apparent result of this chapter was that the Charter, as an agent of transformation of the mining sector, was a process and not an event. The Mining Charter' main intent was the dynamic transformation of the mining sector.

The transformation of the mining sector was paramount in South Africa as it was the bedrock of the apartheid system of government. The Mining Charter was one of the policy initiatives, in accordance with the objectives of the MPRDA that had been introduced by stakeholders of the mining sector to ensure a meaningful inclusion of the HDSAs in the economy. It was important to note that the country should never lose sight of the fact that the Mining Charter was not only about ownership, but had other elements that were equally important. These elements were the procurement, human resources development, beneficiation enterprise and skills development, housing and living conditions, migrant labour mine community and development.

The Mining Charter consists of eight elements which can be summarized into three themes. The three themes are as follows:

The Individual

1. Human Resources Development
2. Employment Equity
3. Migrant labour

The Community

4. Mine Community and Rural Development
5. Housing and Living Conditions

Business and Enterprise

6. Ownership and Joint Ventures
7. Beneficiation
8. Procurement

The Charter required, among other thing, to achieve transformation, that mining companies:

- Offer very employee the opportunity to be functionally literate and numerate by the year 2005;
- Prepare detailed plans for achieving 40% HDSA management and 10% participation by women in the mining industry, within five years in each case and
- Give HDSAs preferred supplier status and show a commitment to the progression of the procurement from HDSAs of capital goods, services and consumables over a three to five-year period.

As to the 15% (within 5 years) and 25% (within 10 years) ownership targets, active involvement could comprise:

- HDSAs' companies (where HDSAs were in possession of and owned 50 % share of the company in conjunction with management control);
- Strategic joint ventures or partnership (where HDSAs owned at least 25%, plus one vote and have joint management and control);
- Collective investment vehicles (the majority ownership of which is HDSA based) or

- Passive involvement (particularly through broad-based vehicles, such as employee stock option plans, where ownership occurred at any level, but with no involvement in management.

The Charter aimed at measuring progress against the HDSA ownership targets, including by:

- Taking into account, for instance, attributable units of production controlled by HDSAs and
- Allowing flexibility, for example, by offsetting HDSA participation, where it exceeded any targets in one operation to another operation where there was a shortfall. The Minister of Mines could use his or her discretion and be flexible in this regard, depending on the company's compliance with broader objectives of the Scorecard of the Mining Charter.

Transformation of the mining sector was imperative in South Africa as the risk was too big both politically and economically for it not to happen. The Charter should not have a shelf life ending in 2014 as it is a process rather than an event. In terms of section 4.14 of the Charter provision was made for its review if required. The original Mining Charte,r which was revised in 2009 to ensure compliance with regulations when government, as a stakeholder, claimed that the transformation targets by 2009 had been missed and its shortcomings had to be addressed.

The next chapter examines the revised mining charter.

CHAPTER 4

A CRITICAL ANALYSIS OF THE REVISED MINING CHARTER 2010

4.1 Introduction

Chapter three examined the original Mining Charter of 2002 with regard to the transformation agenda of the mineral sector and investigated the original charter's objectives. This chapter discusses the revised mining charter that was released by the department of Mineral Resources in 2010 on the realization that the targets of the original 2002 Mining Charter had not been met. This chapter will make a comparative analysis of the 2002 Mining Charter. The original Mining Charter of 2002 had committed government, labour and business to first-phase targets over a five-year period that ended in October 2010.

The year 2009 was the halfway mark in the timeframe for the transformation agenda of the mining sector. A review was done to assess the first half of transformation. The review raised questions about the mining sector's commitment to effectively transforming and transferring 15% of the industry's wealth to HDSAs. The review was sanctioned by the Department of Mineral Resources to gauge the transformation level of the sector in a document titled "The Mining Charter Impact Assessment Report of October 2009" which revealed that there was little progress of the advancement of HDSA in the industry after five years on the transformation agenda.[49] The report found that the mining industry had not met the targets as set out in almost all the key indicators of transformation as outlined in the Mining Charter. The report further revealed that the mining industry was below the targets as agreed with reference to skills development, employment equity, preferential procurement, mining community upliftment, housing and living conditions, mining beneficiation and the transfer of ownership and joint venture in the hands of HDSA.

The transfer of ownership was perhaps the most controversial aspect of the Charter in that it stipulated compulsory transformation of ownership of mines which, in all likelihood, would not lead to broad-based empowerment of HDSA. This aspect had led to accusations in the

[49]The contents of this report had been leaked to the media before it was officially released by government in October 2009 and it caused an uproar, with mining industry disagreeing with the findings but it served as catalyst to get the mining industry to engage in discussions to chart the way forward and address the challenges of transformation in South Africa. This reaction was a positive as it addressed the contesting relationship between the Stakeholders, which were the State and the Mining Industry. It also served to outline the Mining Charter's grey area or limitations that had often been subject to different interpretations.

media, both locally and internationally that empowerment was the reserve of a few politically connected individuals. The report reflected that 9% of the industry was in HDSA possession in 2009 as compared to the 15% target set by the original Mining Charter, which would then increase to 26% following the years leading to 2014, the end of its lifespan. There was, however, one exception that had to be taken into consideration. For the allocation of new rights and for conversion purposes, government required an immediate 51% HDSA ownership for State-owned, unused mineral rights. This requirement was as a result of combining the state's common law ownership of the vesting of minerals in the custody of the state as stipulated by the MPRDA.

In summary of the report, the review found that:

- 26% of mining firms had achieved the target of having 40% HDSA representation at management level;
- A number of mining companies had a 33% HDSA representation in their upper management level. The review revealed that a large number of HDSA managers were in middle management and only very few in key decision-making positions;
- On the issue of 10% women in mining, 26% of mining companies had complied with the 10% women (inclusive of white women) participation in mining and of these very few were in core management positions;
- There was lack of investment in developing skills among HDSA; and
- There was lack of significant improvement on the issue of upliftment of mining communities.[50]

Whether the authenticity of the review done by DMR could be substantiated or not, most industry stakeholders agreed that it was a good starting point to get the mining industry, government and labour to review the charter's industry compliance level and amend the original Charter.[51] Industry, labour and government met in April 2009 after the report had

[50] In some instances, the low targets were a reflection of the onerous compliance requirements of the Charter. Companies were required to prove their efforts in improving a mining community, instead of companies being encouraged to pool their resources and addressing a wider variety of the need of communities where mining operation were adjacent to each other.

[51] Zola Diliza, CEO of the Chamber of Mines, when asked about the Draft five-year review of transformation in the mining industry document, according to miningmx.com of the 11 April 2010, pleaded ignorance about the draft report and said "I have not seen the draft report and I don't even know which facts have been substantiated or verified." Industry players were wary of commenting on record about the contents of the report owing to its sensitivity.

been leaked to the media to discuss the report and committed themselves to reaching a common understanding about the contents of the report by June 2010.

The leaders of government, business and labour signed a declaration to show their support for the strategy to chart their way forward in the transformation agenda of the mining sector. A review of the charter was prompted by the Charter itself in that 2009 was the halfway mark of its lifespan. Furthermore, there were concerns that the target to transfer 26% of ownership in the industry to HDSA by 2014 might not be met. The main intention of the revised charter was to provide more specific targets and to clarify ambiguities and uncertainties that existed under the 2002 Mining Charter since the 2002 Mining Charter, as an agent of transformation document, was found to be more policy-oriented.

4.2 The Stakeholders' Declaration Strategy

A stakeholders' Declaration on Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry (The Stakeholder's Declaration) was signed on 30 June 2010 by the Department of Mineral Resources, National Union of Mine Workers, Solidarity, UASA-The Union, the South African Mineral Development Association and the Chamber of Mines of South Africa. The Stakeholders' Declaration was an acknowledgement that transformation could not be achieved without a competitive and sustainable mining industry in South Africa.[52]

This document was the culmination of the March 2010 Mining Summit, where it was agreed that the Mining Industries Growth Development and Employment Task Team ("MIGDETT") [53]would review the 2002 Mining Charter. The review was on the basis of competiveness, infrastructure, sustainable development, beneficiation and transformation. This review was because South Africa's reputation, as an investment destination with a sound mineral policy and regulatory framework, had suffered a major setback. This setback resulted in investment capital diminishing and investors seeking alternative investment destinations with regard to

[52] It was agreed during the March 2010, Mining Summit that the Mining Industries Growth, Development and Employment Task Team ("MGDETT") would review the current Mining Charter with regard to the issues of competitiveness, infrastructure, sustainable development, beneficiation and transformation. The main reason for this review was the deterioration of South Africa's reputation as an investment destination with a sound mineral policy and regulatory frameworks.

[53] The Mining Industry Growth Development and Employment Task Team(MIGDETT) was established in December 2008 with industry stakeholders committing to help the industry manage the negative effects of the global economic crisis, to save jobs and to position the industry in the medium to long-term.

mining projects. Other parts of Africa and the world were more preferred investment alternatives than South Africa.[54]

The Stakeholders' Declaration formed the framework against which the Mining Charter was reviewed and amended. As the Declaration had the approval of all the relevant stakeholders in the mining sector, it also served to quell investment fears raised by the maligned Codes of Good Practice. The objective of the Declaration was to promote investment, enhance competitiveness, drive transformation, remove barriers to sustainable growth and transformation and commit to effective implementation. It also touched on issues such as infrastructure; innovation, beneficiation, regulatory framework, human resources development, employment equity, mine development, housing and living conditions, procurement, ownership and funding and monitoring and evaluation. This document elaborated on issues that had not been dealt with adequately in the original Charter and Codes of Good Practice to push the transformation agenda forward.

4.2.1 Mining Industries Growth Development and Employment Task Team

The Mining Industries Growth Development and Employment Task Team (MIGDETT) was established in December 2008 with a two-pronged mandate. One was to find a mechanism to mitigate the effects of the global financial and economic crisis and to propose interventions that would position the South African mining industry on a growth path when the global economic growth revived. It was a multi-stakeholder task team chaired by the Department of Mineral Resources (DMR) and other government representations including the Presidency, National Treasury, Trade and Industry and Public Enterprise; included were the Chamber of Mines, the South African Development Association (SAMDA) and organized labour. MIGDETT identified two major attributes that would place the South African mining industry on a sustainable growth path and that would effect transformation and competitiveness. MIGDETT emphasized the symbiotic relationship nature of transformation and competitiveness. After much deliberation and agreement between the stakeholders of MIGDETT, the result was the signing of the Stakeholders Declaration on Strategy for Sustainable Growth and Meaningful Transformation of the South African Industry, hereafter referred to as the Stakeholders Declaration.

[54] The Fraser Institute 2009/10 survey of mining companies states that South Africa, during the past decade, had steadily fallen in the policy potential index, ranking to a position of 27 out of 47.
This ranking was exemplified by the fact that the DMR's processing of mining and prospecting applications took longer than most of the country's competitors. It had been noted that 90% of mining rights applications took more than a year to process and, in some instances, up to five years.

The Stakeholders Declaration was an acknowledgement that transformation was not possible without a competitive and sustainable mining industry in South Africa. This view was in accordance with the provision that was embedded in the Mining Charter of 2002, to review the progress and decide on the way forward, if any, that needed to be made to achieve its objectives. The objectives of the Stakeholders' Declaration were "*to promote investment, enhance competiveness, drive transformation, remove barriers to sustainable growth and transformation and commit to effective implementation.*"

The Stakeholders Declaration found that growth in the mining industry had not reached the desired results and that transformation within the sector had been not achieved the desired targets in terms of the Mining Charter. This lack of outcomes resulted in what the Minister, Susan Shabangu called a "major overhaul" of the law, which would clarify how much change major multinational operations in the country had to make to be within the framework of the law and stay in business in South Africa.

4.2.2 Codes of Good Practice for the Mineral Industry

As part of the major overhaul of the law, in April 2009, the Department of Minerals Resources published the Codes of Good Practice for the Mineral Industry (The DMR Codes) which were based on the DTI Codes. The aim of the DMR Codes was an attempt to address some of the weaknesses in the 2002 Charter. The legal justification for the development of the Codes of Good Practice (The DMR Codes) for the minerals industry was a requirement provided for in section 100(1) (b) of the Minerals and Petroleum Resources Development Act, 2002. The aim of the Codes, as stated by government, was to serve as a statement of policy providing an overview and confirmation of the existing mineral and mining policy and was never intended to replace the main legislation and laws relating to the minerals and petroleum industry. The main intent of the Codes with regard to applicability and enforcement was that it had to be read in conjunction with the Mining Charter and the Mining Act (MPRDA) in relation to the measurement of the socio-economic transformation in the mining industry. The Codes' amendment was at the discretion of the Minister of Mineral Resources when there was a change in mining policy and legislation. It was the intention of government that the DMR Codes be used by labour organizations, non-governmental

organizations, financiers, government departments, individuals, communities, beneficiation industry, minerals and mining industry as it set out administrative principles.[55]

4.3 The revised Mining Charter of 2010

The result of all these documents by industry was the review of the Broad Based Socio-Economic Empowerment for the South African Mining and Minerals Industry (Revised Charter). The Amendment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry, that is, the Revised Charter was released by the Minister on 13 September 2010. The intention behind the Revised Charter was to clarify certain ambiguities and uncertainties which had been identified in the original 2002 Mining Charter. Its main aim was to provide more specific targets than the 2002 Charter which was a more policy-oriented document. The Revised Charter had, in some cases, resulted in more questions than answers. For example, one of the issues in question was the relationship between the Original Charter and the Revised Charter. The question that arose was whether the Revised Charter repealed the Original Charter or did the Revised Charter have to be read in conjunction with Original 2002 Charter?

The title of the Revised Charter specifically read that it was an "Amendment of the original (2002 Charter)"as opposed to an Amended Charter. This view was confirmed in the Preamble to the Revised Charter which records that "*amendments are made to the Mining Charter of 2002 in order to streamline and expedite attainment of its objectives*." This statement indicated that it would be necessary to read and consider the Original 2002 Charter and the Revised Charter simultaneously in order to ascertain industry's obligations. However a comparative review of the Revised Charter and the Original Charter left little doubt that the aim of government in enacting the Revised Charter was, in fact, intended to replace the 2002 Charter and not merely amend it.

[55] The main intent of the DMR Codes was to facilitate the effective implementation of the minerals and mining legislation and the Mining Charter. The biggest challenge of the Codes was their rejection by the other stakeholders in the mining industry because of lack of consultation by government in their drafting. As a measurement system, these Codes were deeply flawed and needed to be redrafted and aligned with the BEE Codes. The targets in the DMR Codes, for example for management control and employment equity, were too low. The targets in the BEE Codes were set after careful benchmarking and in-depth consultation over four years. The mining sector, in the view of the stakeholders, could not provide a compelling reason for having lower targets than the rest of the economy.

The second primary issue was as follows: when reading the Revised Charter, to what extent was it a product of the consensual agreements recorded in the Stakeholders' Declaration on Strategy for Sustainable Growth and Meaningful Transformation of South Africa's mining industry? In answer to this inquiry, a comparative analysis of a summary of the most pertinent aspects of the Declaration would be done. The aim of the comparison would be to show that while government, through the DMR, sought the cooperation of stakeholders; it was not averse to adopting a coercive stance when it came to ensuring empowerment within the mining industry.

What was most apparent was that one of the biggest surprises was that the Revised Charter, despite the consensual nature of the Declaration, seemed to provide that non-compliance with provisions of the Revised Charter would amount to a breach of the MPRDA. A consequence of that would be the possible suspension or cancellation of a holder's prospecting or mining rights under section 47. In addition, the Minister would have the power to amend the 2002 Charter without consultation and would, therefore, have the discretion to impose onerous obligations on the industry going forward to the future. This perpetuated regulatory uncertainty in the South African mining industry further rendering it likely that the Revised Charter, as a delegated legislation, was subject to being challenged as being unconstitutional. It was, however, worthy to note that the wording of the Revised Charter stipulated that "*Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA…"* The inference to be drawn here was that the holder had to be in breach of both the Revised Charter and the MPRDA before the right can be taken away. If this is the case, the provision would be more acceptable.

The departure from the 2002 Charter was that the Minister was now entitled to amend the Mining Charter unilaterally. This authority perpetuated the problem of an overly broad administrative discretion. What the revised Mining Charter did not change was the 26% historically disadvantaged South African (HDSA) ownership requirement. The revised charter, on a positive note, had gone further than the 2002 Charter and defined the term "beneficiation" For the first time, it was spelt out that mining companies were allowed to offset up to 11% of their HDSA ownership requirements against the value of their beneficiation activities.

4.3.1 The objectives of the revised Mining Charter

The objectives were dealt with in Item 1 and sought to:

(a) Promote equitable access to mineral resources;

(b) Substantially and meaningfully expand opportunities for HDSA to enter and benefit from the mining and minerals industry;

(c) Utilize and expand the existing skills base for the empowerment of HDSA and to serve the community;

(d) Promote employment and advance the social and economic welfare of mine communities and major labour sending areas;

(e) Promote beneficiation; and

(f) Promote sustainable development and growth of the mining industry

The objectives were dealt with in Item 3 of the 2002 Charter and included empowerment, transformation and the promotion of beneficiation. No reference was made to competiveness and sustainability.

Table 3: A comparative analyses of the 2002 Charter and the Revised Charter of 2010

The 2002 Charter	**The Revised Charter 2010**	**Charter Differences**
Item 1- Scope of application	Item. 1 Objectives	Item 1 in the 2002 Charter is Scope of applications and Item 1 of the 2010 Charter objectives. The Objectives are dealt with in Item 3 of the 2002 Charter.
Item 2-Interpretation	Item.2-Elements of the Charter	Item 2 of the 2002 Charter is Interpretation and Item 2 of the 2010 Charter deals with the Elements of the Charter.

	2.1- **Ownership** -Effective Ownership is defined as the meaningful participation of HDSAs in the ownership, voting rights, economic interest and management control of mining companies.	Ownership is dealt with in Item 2.1 of the 2010 Charter, while ownership was dealt with under Item 4.7 of the 2002 Charter -2010 Charter defines what is Effective Ownership -Under the 2002 Charter provision is made for two ownership targets of 15% and 26% within 10 years of May 2004.
	2.2- **Procurement and Enterprise Development** - defines what a BEE entity is- entity with 25%+ 1 vote of share capital owned by HDSA under flow-through principle. -Procure a minimum of 40% of capital goods from BEE entities by March 2015. -Procure 70% of services from BEE entities by March 2015. -Procure 50% of consumer goods from BEE entities by March 2015	Dealt with in Item 4.6 of the 2002 Charter and makes provision for companies undertaking to five HDSAs preferred supplies status; commit to a progression of procurement over 3-5 year time-frame- no specific targets set.

	2.3-. **Beneficiation** -Beneficiation is defined. -Mining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11%, -Compliance target is any additional production volume of local value addition over and above the base-line.	Dealt with in Item 4.8 of the 2002 Charter through general statements, -No targets set in the 2002 Charter. -Allows for beneficiation off-sets against HDSA ownership commitments without details as to how this is to be achieved,
	2.4**- Employment Equity** -must achieve 40% HDSA demographic representation at each of executive management (board) level and senior management -existing talent pools mining companies must be identified and fast-tracking to ensure high level operational exposure in terms of career path programs.	The 2002 Charter has no measurement of management control. -The 2002 Charter identifies the advancements of women in the identification of talent pool and fast tracking initiatives.
	2.5-**Human Resources Development** -Invest a percentage of annual payroll. -weighting very high at 25%.	
	2.6-**Mine Community Development**	This Item is not dealt with in the 2002 Charter.
	2.7-**Housing and Living Conditions**	

	2.8 **Sustainable Development and Growth of the Mining Industry**	This item was not dealt with in the 2002 Charter. Dealt with in item 2.8 of the 2010 Charter.
	2.9-**Reporting Monitoring and Evaluation)**	Revised scorecard is applicable. -must report levels of compliance with the 2010 Charter annually as provided for by Section 28(2)(c) of the MPRDA in accordance with Reporting Template. The DMR according to the Revised Mining Charter shall monitor and evaluate taking into account the impact.
Item 3- Objectives	Item 3- Non Compliance	Item 3 of the 2002 Charter deals with objectives and Item 3 of the 2010 Charter deals with non-compliance. Objectives of the Charters are dealt with in Item 1 of the 2010 Charter and in Item 3 of the 2002 Charter.
Item 4-Undertaking 4.1- Human Resources Dev 4.1- Employment Equity 4.3- Migrant Labour 4.4- Mine Community and Rural Dev 4.5-Housing and Living Conditions	Item 4 Amendments	Undertakings as in regard to the 2002 Charter is dealt as Scope of the Charter under the 2010 Charter. Under the 2002 Charter, amendments are not dealt with.

4.6-Procurement 4.7- Ownership and Joint Ventures 4.8- Beneficiation 4,9- Exploration and Prospecting 4.10-State Assets 4.11- Licensing 4.12- Financial Mechanism 4.13-Regulatory Framework and Industry Agreement 4.14-Consultation, Monitoring, Evaluation & Reporting		

Source: Information taken from the 2002 Mining Charter and The Revised Charter of 2010

4.4 Ownership

Ownership was dealt with in Item 2.1 of the Revised Charter. What was apparent was that the HDSA ownership of 26% remained unchanged and was required to be achieved by March 2015. The revised Charter introduced a new definition of HDSA, which included the phrase "*…which should be representative of the demographics of the country."* Precisely what was meant by this phrase was not clear. The question that arose was whether this representation entailed that a holder's HDSA participation should include all demographically represented groups or for example, that South African Chinese persons, who were classified as HDSA, could not exceed 2 or 3% of a holder's HDSA grouping.[56] Is this a devise intended to limit the number of white women which were included in the definition of HDSA? The intention in this regard was rather vague.

"Effective ownership" is defined as the meaningful participation of HDSA in the ownership, voting rights, economic interests and management control of mining companies." The Revised Charter contained a limited degree of flexibility with regard to ownership in that it

[56] Mid-year population estimates of 2011 from Statistics South Africa estimated that the Indian/Asian population at 1.3 million (2.5%).

stated that ownership should vest within the agreed time-frame "taking into account market conditions". It was, however, important to note that the March 2015 date for achievement of 26% of HDSA ownership was set in stone. There was no applicable consideration to this criterion on the scorecard. The interpretation was that the holder would either have met the target or would have failed to do so.

With regard to ownership, there was a recognition of the value of beneficiation as provided for by Section 26 of the MPRDA and "elaborated in the mineral beneficiation framework" which could be offset to a maximum of 11% of ownership target. Further continuing consequences of all previous deals concluded prior to 1 May 2004 could be included in calculating such credits/offsets in terms of market share as measured by attributable units of production.

Under the 2002 Charter, this ownership was dealt with in Item 4.7 and provided for two ownership targets of 15% within 5 years and 26% within 10 years of May 2004.

Summary of significance changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The revised Charter introduced a new definition of HDSA;
- The revised Charter contained a limited degree of flexibility with regard to ownership; and
- The revised Charter recognized the value of beneficiation and that it could be offset to a maximum of 11% of ownership targets.

4.5 Procurement and Enterprise Development

Procurement and enterprise development was dealt with in Item 2.2 of this Charter. The target was that the mining industry had to procure from BEE entities a minimum of 40% of capital goods by 2014. This target excluded non-discretionary procurement spending, that is, expenditure that could not be influenced by a mining a company, such as procurement from the government and public enterprises. Exactly how such procurement was to be measured was unclear. There was, for example, no inclusion of the measurement provisions of the Code 500 which allowed procurement from certain BEE entities to be measured at 120% of procurement spent.

"Procure 70% of services and 50% of consumer goods from BEE entities by 2014." There was a positive aspect of this increment, but what was of concern was the ability of BEE entities to supply requisite goods and services of quality at competitive prices in accordance with demand. These requirements were questionable in light of the specialized nature of mining. Further of concern was that these requirements were not in alignment with the provision of the Scorecard. The Scorecard required, in light of the 70%, that procurement of services should be 10% by March 2011, 15% by March 2012, 25% by March 2013, 40% by March 2014 and 50% by March 2015. With regard to the 50% of consumer goods from BEE entities by March 2015, the Scorecard required 30% by March 2011, 40% by March 2012, 50% by March 2013, 60% by March 2014 and 70% by March 2015.

Further, this Charter provides that the *"Multinational suppliers"* had to contribute 0.5% of procurement spending by South African mining companies to a *"social development fund"*. The Charter did not clarify precisely what this fund was, who were to benefit from it and who would administer this fund. The question that arose was how mining companies would meet its obligations and what the position would be where no procurement was made from multinational suppliers. This provision posed the risk that the mining companies would be forced to lose the 3% from the scorecard as the weighting of this item was 3% on the scorecard. However, it was the supplier who had to make this contribution, not the mining company.

Procurement was dealt with in Item 4.6 of the 2002 Charter and stated that companies had to undertake to give HDSAs preferred supplier status; commit progression of procurement over 3-5 year time-frame and no specific targets were set.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The 2002 Charter only made mention of procurement opposed to the revised charter that had procurement and enterprise development; and
- The revised charter provided that multinational suppliers had to contribute to 0.5% of procurement spending to a social development fund; and
- The revised Charter set a minimum percentage progression level of capital goods, services and consumer foods from BEE entities, over a period of time.

4.6 Beneficiation

This aspect was dealt with in Item 2.3 of the amended Charter which stated that "*Mining companies may offset the value of the level of beneficiation achieved by the company against a portion of its HDSA ownership requirements not exceeding 11 percent".* This aspect was a change from the 2002 Charter and while it could be welcomed by the mining companies, the entire issue of beneficiation generally remained clouded. The Charter referred to a *"mineral beneficiation strategy".* The strategy framework enacted in 2011 referred to as "*A Beneficiation Strategy for the Minerals Industry of South Africa"* was vital for South Africa as government recognized that the country's mineral endowment on it its own was not sufficient. What was apparent was that the country's mineral endowment only provided a comparative advantage against other countries. The strategy, therefore, served to translate that comparative advantage into a competitive advantage against other countries. It identified critical interventions needed to be implemented by the country. The strategy served as an intervention that contributed to the developmental agenda of the country. It had as its foundation, the Minerals and Mining Policy for South Africa (1998) and also served to advance the objectives of a range of other policies and legislations, that is, The Mineral and Petroleum Resources Development Act (MPRDA), the Mining Charter, the Precious Metals Act, the Diamonds Amendment Act etc.

Beneficiation was dealt with in Item 4.8 of the 2002 Charter through general statements and no targets were set. The 2002 Charter allowed for beneficiation off-sets against HDSA ownership commitments without stipulating the details as to how these were to be achieved. What remained was the definition of the beneficiation levels for various commodities to qualify for the 11%.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The revised Charter allowed for the offset in value of the level of beneficiation by a company against a portion of its HDSA ownership requirements not exceeding 11 percent, as compared to the original Charter which allowed for offset without detailing as to how it should be achieved; and

- The term “Beneficiation” was defined by the revised charter.

4.7 Employment Equity

The Employment Equity element was dealt with in Item 2.4 of this 2010 Charter. Every mining company had to achieve a minimum of 40% HDSA demographic representation by March 2015 at each of executive management (board) levels and senior management (EXCO) levels. The Scorecard required both levels at 20% by March 2011, 25% by March 2012, 30% by March 2013, 35% by March 2014 and 40% by March 2015. At middle management level, the Scorecard required 30% by March 2011, 35% by March 2012 and 40% by March 2013.
Each level, as outlined, had its own weighing. Many companies, particularly junior companies and prospecting companies who were part of the mining industry, only had two levels and in some regard, the distinction between the levels was blurred. The question that arose was how the scorecard would affect such companies. There was also no indication whatsoever as to what was meant by *“core and critical skills*” or whether “*demographic representation*” had also to be applied within each level. These aspects needed clarification.

The Employment Equity element was dealt with in Item 4.2 of the 2002 Charter. It set out that companies had to aspire to 40% HDSA participation in management within 5 years. It also stipulated that companies had to focus overseas placement and /or training programs on HDSAs, to identify a talent pool and fast track the talent, to ensure inclusiveness and the advancement of woman. Under this Charter, there was no measurement of management control.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The revised Charter stipulated a minimum of 40% HDSA demographic representation at each of executive management (board) and senior management (EXCO) levels and set measurement of management control in percentages to be achieved within different time periods.

4.8 Human Resources Development

This topic was dealt with in Item 2.5 of the Charter. The mining companies were mandated to invest a percentage of its annual payroll (Scorecard required 3% by March 2011, 3,5% by March 2012, 4% by March 2013 and 5% by March 2015) in essential skills development activities reflective of the demographics, but excluding the mandatory skills levy and including 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.

The Human Resources element was dealt with in Item 4.1 of the 2002 Charter. Under this Charter, provision had to be made for education, training and scholarships to up-skill HDSA employees and to provide HDSA employees with skills required by the mining industry.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The revised Charter stipulated that a company should invest a percentage of its annual payroll within different time periods in essential skills development activities reflective of the demographics. The money should also be used to support South African-based research and development initiatives intended to find solutions in exploration, mining, processing, technology, beneficiation, environmental conservation and rehabilitation; and
- The revised Charter stipulated a compliance level weighing of this element at 25%.

4.9 Mine community development

Item 2.6 dealt with Mine Community Development. The mining industry was required to invest in ethnographic community consultative and collaborative processes consistent with international best practices in terms of the rules of engagement and guidelines prior to the implementation/ development of mining projects. In addition, the mining industry had to conduct an assessment to determine the developmental needs in collaboration with mining community development according to the Integrated Development Plans (IDP), the cost of which should be proportionate to the size of the investment. The Mining Charter stated that community development projects should be fully detailed in the mine's Social and Labour

Plan (SLP), following consultation, assessment and implementation. Scorecard compliance equal up-to-date project implementation scored heavily at 15%.

The Mine Community Development element was dealt with in Item 4.4 of the 2002 Charter and stated that stakeholders were to cooperate in the formulation of integrated development plans for communities where mining took place and for major labour sending areas. Special emphasis was laid on development of infrastructure.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The revised Charter stipulated that a company had to invest in ethnographic community consultative and collaborative processes according to international best practices in terms of rules of engagement and guidelines prior to the development of mining projects;
- The company had to conduct an assessment to find out the developmental needs in collaboration with mining community development. Such an assessment of development needs was to comply with the Integrated Development Plans; and
- Projects to be implemented by the company, following the consultation, assessment, and implementation should be fully detailed in mine's social and labour plan; and
- Scorecard compliance of up-to-date project implementation scored at 15%.

4.10 Housing and living conditions

This aspect was dealt with in Item 2.7 of the revised Charter. The mining industry was required to convert or upgrade all hostels into family units by March 2015 and attain the occupancy rate of one person per room. Both these measures required compliance from base line at March 2011 of 25% by March 2012, 50% by March 2013, 75% by March 2014 and 100% by March 2015. The facilitation measure of home ownership options for all mine employees in consultation with organized labour by 2014 was not in the scorecard.

Item 2.7, in comparison, was dealt with in Item 4.5 of the 2002 Charter. The 2002 Charter merely established measures for improving housing, including upgrade of hostels, conversion

of hostels to family units and promotion of home ownership options. It also established measures for improving nutrition of mine employees.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The revised Charter set a time frame of March 2015 to convert or upgrade all hostels into family units;
- The revised Charter stipulated that companies attain the occupancy rate of one person per room by March 2015;
- The revised Charter set compliance in percentages, from baseline at March 2011 of 25% by March 2012, 50% by March 2013, 75% by March 2014 and 100% by March 2015; and
- The revised Charter stipulated that companies, in consultation with organized labour, had to facilitate home ownership for all mine employees by 2014.

4.11 Sustainable development and growth of the mining industry

This topic was dealt with in Item 2.8 of the revised Charter. It is notable that this aspect was not dealt with in the 2002 Charter. The revised Charter recognized that mineral resources were a non-renewable resource so their exploitation should be conducted in a sustainable way. The concept of sustainable development had been defined as the integration of social, economic and environmental factors into planning, implementation and decision–making to ensure that the mineral resources development served present and future generations. To ensure sustainable development and growth of the mining industry, the mining company had to implement elements of sustainable development commitments included in the "Stakeholders' Declaration of Strategy for Sustainable growth and meaningful transformation of the South Africa's Mining Industry of 30 June 2010 and in compliance with all relevant legislation" and read as follows:

- *Implementing environmental management systems that focus on continuous improvement to review, prevent, mitigate adverse environmental impact;*
- *Undertake continuous rehabilitation on land disturbed or occupied by mining operations in accordance with appropriate regulatory commitments;*
- *Provide for the safe storage and disposal or residual waste and process residues;*

- *Design and plan all operations so that adequate resources are available to meet the closure requirements of all operations.*[57]

Improvement of the industry's health and safety performance by:

- *Implementing a management system focused on continuous improvement of all aspects of operations that have a significant impact on the health and safety of employees, contractors and communities where mining takes place;*
- *Providing all employees with health and safety training and require employees of contractors to have undergone such training;*
- *Implement regular health surveillance and risk-based monitoring of employees*[58]

Stakeholders undertake to enhance the capacity and skills in relevant South African research and development facilities in order to ensure quality, quick turnaround, cost effectiveness and integrity of such facilities for the analysis of samples across the mining value chain.[59]

Sustainable Development and Growth of the Mining Industry element was not dealt with in the 2002 Charter. It was important to note that the revised Charter had gone a step further by the addition of this Item.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- Sustainable development and growth of the mining industry was not dealt with in the 2002 Charter;
- The concept of sustainable development was defined;
- Implementation of element of sustainable development commitments had to comply with the Declaration Strategy and also with all relevant legislations; and
- Implementation of elements of sustainable development was to be scored by progress and given a weighting in percentages over a time period baseline established at March 2011.

[57] This being scored by progress achieved against EMPs weighting 12%
[58] This being scored by the progress achieved against commitments "in the tripartite action plan on health and safety." (weighting 12%).
[59]The above being scored by "percentage of samples in SA facilities". Base-line established at March 2011. Thereafter 25% by March 2012, 50% by March 2013, 75% by March 2014 and 100% by March 2015

4.12 Reporting (Monitoring and Evaluation)

This aspect was dealt with in Item 2.9 of the Charter. In terms of reporting every mining company had to report its compliance level annually, as provided for by Section 28(2) (c) of the MPRDA. Furthermore, the revised Score-card was applicable.

DMR, in terms of monitoring and evaluation of meeting the set targets, had to take into consideration the impact of material constraints which could result in not achieving them.

This topic was dealt with in Item 4.14 of the 2002 Charter. The 2002 Charter stipulated that companies had to undertake to report annually. Stakeholders, under this Charter, agreed to participate in annual forums for monitoring implementation and developing new strategies. They further agreed to government/industry interaction; developing strategies for intervention; exchanging experiences, problems and solutions. They also agreed to arrive at joint decisions and subsequent reviewing of this Charter.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- Companies had to report compliance with Revised Charter annually, as provided for by Section 28(2) (c) of the MPRDA in accordance with Reporting Template;
- The Revised Charter stipulated that DMR should monitor and evaluate, taking into account the impact of material constraints which could result in not achieving set targets; and
- The company should comply with revised score card.

4.13 Non-compliance

This topic was dealt with in Item 3 of this Charter which stated that:
Non-compliance with the provisions of the Charter and the MPRDA shall render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with Section 98 and 99 of the Act.[60]

[60] Section 47 entitled the Minister to suspend or cancel rights, permits or permissions.
Section 98 dealt with Offences and 98 dealt with Penalties.

This provision was one of the most contentious provisions of the revised Charter as it could open legal challenges as being unconstitutional. It also flaunted the consensual nature of the Declaration as stakeholders agreed that to achieve a competitive and sustainable mining industry, there should be continuous dialogue to discuss and iron out issues where conflict could arise. The 2002 Charter that was dealt with under Item 4.13 stated that the regulatory framework and industry agreements had to strive to facilitate the objects of the 2002 Charter.

Summary of the significant changes between the original Charter (2002) and Revised Charter (2010) in this item:

- The Revised Charter stipulated that non-compliance with the provisions of the Charter and the MPRDA would render the mining company in breach of the MPRDA and subject to the provisions of Section 47 read in conjunction with Section 98 and 99 of the Act.

4.14 Observations

When analysing the declaration, various aspects were incorporated in the Revised Mining Charter and in this regard the Stakeholders' Declaration reflected that meaningful transformation in South Africa could only be achieved within a mining industry that was sustainable and competitive.

The revised Charter had not dealt with innovation and infrastructure. Innovation was an obvious oversight as stakeholders agreed at the mining summit that resulted in the stakeholders' Declaration on Strategy for the Sustainable Growth and Meaningful Transformation of South Africa's Mining Industry. They agreed to assess current research and development, resuscitate research development culture in the mining industry and strengthen partnerships with research institutions. With regard to infrastructure, the Declaration provided for the identification, evaluation and engagement with national stakeholders regarding critical infrastructure, such as rail, ports, electricity and water supply.

The reason for the Revised Charter was to address the deficiency of the original Charter based on the assessment done by the stakeholders. It was found that the mining industry had not met the targets as set out in almost all the key indicators of transformation outlined in the original Mining Charter. The question arose as to whether the revised Charter would ensure

that the targets would be met. The prediction was that it would most unlikely not be able to meet the targets. One of the reasons for this assumption was that at the heart of the economic and social crisis affecting the mining industry was the migrant labour system which had remained unchanged post-apartheid. The mining industry's reliance on migrant labour and the housing conditions of migrants had resulted in a double economic burden[61] that affected issues of human resources management, the collective bargaining processes, employment equity and so forth.

Unfortunately, the issue of migrant labour has been a global phenomenon because resource extraction was founded on geography and geology. This reason made it imperative that upon the discovery of mineral deposits, usually in remote parts of the world, compelled a degree of migration to effect the economic exploitation of the resource. In the colonial history of South Africa, this migration phenomenon associated with minerals had the added burden of the apartheid system. A recent example of this burden in South Africa was the Marikana tragedy as well as the related strikes at other mines and the added impact and effect on other areas of the economy. The unrest in the mining industry, either wholly or in part, was identified as the cause for the country's credit ratings downgrade and slow economic growth rate when compared to other developing countries. This downgrade did not have a positive effect on the country as a favourable investment destination.

There was lack of uncertainty between the original Mining Charter and the revised Mining Charter with regard to what would meet the targets that needed to be complied with. The DMR and the mining industry, represented by the Chamber of Mines, had thus far been unable to agree on what met the requirements of attaining the targets as stipulated. This disagreement was evidenced by the disparity in figures presented. However, this uncertainty still exists in the revised Charter and any future reporting would be no different, as the disparity between the figures presented between the two stakeholders would likely remain the same. There was an urgent need to reach consensus on attainment of targets going forward.

The solutions required intervention and a radical rethink of the future of migrant labour, employee and company leadership in human resources and management, collective bargaining to ensure a vibrant mining industry that was effectively transforming to achieve

[61]Double economic burden in this regard meant the longer-term effects on current challenges for the future growth of the industry and subsequently the economy of South Africa.

productivity, job creation, and further ensure that the country was an investment attraction destination into the future.

4.15 Conclusion

The main aim of the revised Mining Charter could not be better expressed than in the words of South Africa's Chamber of Mines president, Sipho Nkosi, when the revised Mining Charter was launched, when he said that the "*incremental progress that government, labour and business were making did not mean that we have reached finality or reached perfection.*[62] *It's a process and the process continues"* He went further to say "*At the end of the day, it's all about ensuring that this industry remains vibrant and viable. We hope that, as we move forward, we'll hold hands and continue making sure that we panel-beat this thing, so that it makes sense for the South African mining industry"*. These words proved that the Mining Charter was an important legal instrument in the mining transformation agenda of the mining sector of South Africa, because it stipulated targets and its Scorecard gave a timetable for transformation.

The next chapter examines the compliance level of the original Mining Charter by the mining industry.

[62] This was reported by the Mining Weekly of the 14 September 2010. Sipho Nkosi made this comment at the announcement of the revised Mining Charter by the Minister of the DMR, Susan Shabangu to various stakeholders of the mining sector.

CHAPTER FIVE

COMPLIANCE LEVEL OF THE MINING INDUSTRY

5.1 Introduction

Chapter four examined the Revised Mining Charter and all its areas of compliance thus setting the scene for what the mining industry was further obligated to do after the Mining Charter expires in 2014. This chapter examines the compliance level of the mining industry and the stakeholders' reaction in the first five years of the original Mining Charter. The chapter scrutinizes the targets set out by the Mining Charter and where South Africa is with regard to achieving the goals. It would place into perspective how far the country has succeeded achieving the targets set out in the Charter. The chapter will also examine whether the Revised Charter would address the issues which were a stumbling block to effective transformation of the mining sector. It would further evaluate the scorecard which is the tool to measure and recognize commitment by industry in all of the Charter's areas of compliance. The question that this chapter will attempt to answer is as follows: As regard the transformation agenda, what progress has been made by the mining industry towards the attainment of the objectives of the original Mining Charter of 2002? The researcher would analyse the result of compliance of the mining industry in the first five years, that is from 2004 to 2009 and assess whether the Revised Charter of 2010 had addressed the gaps as identified.

In examining industry compliance with the Mining Charter, an analysis of the documents that had been compiled by the Department of Mineral Resources, the Chamber of Mines and the author's own independent analysis of a sample of ten (listed) companies to gauge the progress achieved in terms of transformation was undertaken. The study would have benefited from having access to the companies' raw data that they eventually submitted to the DMR as required by legislation in order to report on the Mining Charter compliance. Attempts to obtain such data from the Mining Companies failed since the companies cited the confidentiality of such documents as a reason. This refusal was despite assurance that the information derived was for research purposes and would be treated with the utmost confidentiality and that the identity of the companies would not be disclosed. When approaching the DMR as the end recipient of such reports, the author was made to apply for

Request for Access to Records, in terms of section 18 (1) of the Promotion of Access to Information Act, 2000 (Act No, 2 of 2000) (Regulation 6). Access to the records proved futile. The author then relied on annual company reports in the public domain to make the analysis.

For the purposes of this Chapter, it is important to note that the study done by KIO Advisory Services on behalf of The South African Mining Development Association (SAMDA) had not been consulted as it had not been officially released since the DMR had expressed concern about some of their findings. Attempts to access this document for comparative purposes proved unsuccessful. Therefore, the author relied on newspaper releases on the findings of this study.[63]

These organizations engaged into a consultative process with all mining stakeholders in order to appreciate in totality of where the industry was with regard to compliance with the targets of the original Charter and the challenges encountered. The DMR released the Mining Charter Impact Assessment Report in October 2009 and the Chamber of Mines published the Report for the Chamber of Mines Broad-based Black Economic Empowerment Transformation Project which was compiled by EMPOWERLOGIC in March 2010.[64] These two documents investigated the compliance level of the Charter by industry and, in doing so analysed the actual responses from industry and measured the achievement of industry so far. The findings of the reports determined the extent to which the objectives of the Mining Charter had been achieved with regard to the transformation of the sector. Each element of the Charter would be examined to analyse progress in achieving the targets as set out. Reliance to measure compliance would be placed on the company reports in order to establish what progress had been achieved so far in regard to transformation.

[63] On the 14 October 2010, the South African Mining Development Association (SAMDA) issued a press statement that announced it had had a meeting with the Minister of Minerals Resources on the 11 October to clarify its position with regard to the reports in the press concerning the study issued by KIO Advisory Services, the consultants appointed by SAMDA to undertake research on transformation in the mining industry for the period ending December 2009. SAMDA stated that it intended to use the report to enable it to form an independent position; however, the agreement entered between SAMDA and KIO Advisory Services allowed KIO to express its "own view on the research undertaken." Mr. Aubrey Lekwane, CEO of SAMDA made it known that, at the appropriate time and forum, SAMDA expected to make its position clear on these and related matters.

[64] It was important to note that no verification was done by EMPOWERLOGIC and the information provided by the mining groups was accepted as valid information. The methodology and consolidation followed was that the assessments were done at mine level which were then consolidated at mining group level and the mining groups' scores were then consolidated to get an overview of the mining sector's BBBEE status on the Mining Charter.

5.2 Investigation of measurement of compliance of the Charter.

The Mining Charter was a vehicle to redress the socio-economic imbalances of the past. This investigation was conducted against the acknowledgement that the Mining Charter was a significant achievement in the economic transformation process of the democratic order. The analysis of the mining industry compliance was informed by the DMR's internal inspection process and findings made from an independent assessment conducted by a consultancy group that the Department appointed. A comparative analysis was made using the study from the Chamber of Mines. Reference was made to company reports reporting on the compliance to the Charter. Newspaper releases that made reference to the report done by KIO Advisory Services on behalf of SAMDA were also consulted.

Nine elements of the Charter were investigated to measure the compliance of stakeholders to create to achieve effective transformation of the mining industry. The nine elements were as follows:

- Human Resources Development (Skills Development Act of 1998);
- Employment Equity (Employment Equity Act 55 of 1998);
- Migrant labour (Immigration Act 13 of 2002);
- Mining community;
- Housing and living conditions;
- Procurement (Preferential Procurement Policy Framework Act of 2000);
- Ownership and joint ventures (Competition Act 89 of 1998);
- Beneficiation; and
- Reporting.

All nine pillars were addressed to measure the mining industry compliance with the original Mining Charter of 2004.

Table 4- Mining Charter Impact Assessment

Elements	Compliance Targets %	Actual % DMR	Actual % COM
Human Resources Development • Functional literacy • Career pathing • Mentoring-empowerment groups	100 100 100	17 17 11	72.73
Employment Equity • HDSA's participation in management • Women's participation in mining	40 10	33 6	72.73
Mine Community Development • Companies participated in IDP • Approved labour plans expenditure	100 100	49 37	66.67
Procurement • Procurement from HDSA companies	40	37	57.58
Ownership and Joint Ventures • HDSA ownership • BEE ownership	26 in 10 years and 15 in 5 years	5	77.27

Housing and Living Conditions			97.73
Migrant Labour			100
Consultation, Monitoring, Evaluation and Reporting • Companies that have audited reports • Annual progress report to the DMR	100 100	37 11	

Source: Mining Charter Review-Growth or Transformation (2011) and Draft Report for the Chamber of Mines Broad Based Black Economic Empowerment Transformation Project Mining Charter Review-Growth or Transformation (2010).

The above table illustrated the assessment of the original Charter done by the DMR and the COM. In terms of the DMR's assessment, the above figures demonstrated that the targets fell significantly below the expectations required by the Charter. To this extent, the original Charter had shown inherent shortcomings in its current form. The level of non-compliance, as shown by the table, afforded the industry with an opportunity to review the weaknesses in order to address the transformation agenda of the mining sector in the future. Given the figures, it was clear that, according to the DMR, compliance with the Charter had failed and there was, therefore, a need for new innovative ways to correct these inequalities.

The COM figures demonstrated that the mining industry complied with all the elements of the Charter and that significant progress had been made in the first five years. Housing and living conditions and migrant labour elements achieved the highest score and had no compliance targets set in the Charter. The report by the Chamber revealed that the overall consolidated score was 97.3% compliance with the Mining Charter as most mining companies answered yes to all questions. It was clear, according to the assessment as done by the COM, that compliance with the Charter had been achieved.

To have a balanced view, the author undertook an independent process of evaluating the Mining Charter compliance by consulting mainly annual Sustainable Development Reports for financial years 2012 and, where available, 2013 as published by the companies. Where sustainable development reports were not available, annual reports and transformation reports were reviewed. It is important to mention that the author consulted and had talks with various

employees of various mining companies and also with the DMR, who gave their views on the questions posed on condition of anonymity because of the sensitivity of the subject matter. Such discussions went a long way to demystify various issues and to provide a better outlook. The author's findings were based on the sustainable development reports of mining companies listed on the Johannesburg Stock Exchange.

Below is a list of the companies whose annual sustainable development report was investigated when conducting the independent sample study.

Table 5: List of Mining Companies whose annual reports were consulted

Company	**Type of Mineral Resource**	**Headquarters**
Anglo American	Gold	United Kingdom
De Beers	Diamonds	Luxembourg
Kumba Resource	Iron Ore	South Africa
Lonmin	Platinum	United Kingdom
Xstrata	Coal	Switzerland
Harmony	Gold	South Africa
Gold Fields	Gold	South Africa
Samancor	Chrome/ Manganese	South Africa
BHP Billiton	Coal	Australia
Sasol Mining	Coal	South Africa
Exxaro	Coal and Heavy minerals	South Africa
Aquarius Platinum Limited	Platinum	Bermuda
Northam	Platinum	South Africa

To put the mining industry into perspective, the following figures were important. The South African population was 51 770.560 million in 2011 according to Census 2011 conducted by Statistics South Africa. Of the total population figure, the demographical representation with regard to the different ethnic races is shown in Table 6.

Table 6: Mid-Year Population Estimates 2011

Population Group	% of total
Africans	79.2%
White	9.0%
Coloured	9.0%
Indian/Asian	2.5%
TOTAL	100%

Source: Statistics South Africa

Economically active persons between 15-64 years of age in the months between April to June 2011 equalled 32 335 - 42% female and 51% male.[65] Total number of people employed directly by the mineral mining sector was approximately 518, 000 in 2011. Male workers constituted 92.7%, whereas females were 7.3% which was still below the target set by the Mining Charter of 10% for women in mining. Only 4.0% represented female managers.[66]

In 2008, it was reported that the mining sector was the 5th largest contributor to formal employment with one million people directly or indirectly employed by the sector. The mining sector directly contributed to 8% to GDP which increased to 18% through various multipliers and was a significant tax contributor, with 20% of total tax revenue in 2008.[67]

As a result, the figures represented in table 4 showed a discrepancy, which culminated in the stakeholders agreeing that the discrepancies in the figures was a result of different interpretations given to issues of compliance. They recommended the subsequent review of the original Charter. The DMR, as regulator, undertook a Mining Charter Impact Assessment Report in 2009 to determine the extent of compliance by industry of the Charter and reported the progress made with each element of the Charter was contrary to the Report for the Chamber of Mines Black Economic Empowerment Transformation Project. Contrary to the good progress as reported by the Chamber, the study showed a different picture. Below is the

[65] This report presented the key findings of the Quarterly Labour Force Survey, Quarter 2, 2011.
[66] Turning our resources into sustainable wealth-Towards a shared, long –term vision for the South African Mining Sector. Chamber of Mines of South Africa, November 2009
[67] Ibid.

analysis made of the study conducted by the DMR in comparison with the study by the Chamber.

5.2.1 Human Resources Development

The mining industry is highly technical and, therefore, relies on knowledge skills resulting in a greater emphasis on skills development. The main basis for the requirement to address human resources issues was that the Charter recognized that the South African labour market did not produce enough requisite skills required by the mining industry. It was as a result of the shortage of skills identified that the stakeholders agreed to work together to adopt measures to effect skills development which would be measured in answer to the following:

(1) Has the company offered every employee the opportunity to be functionally literate and numerate by the year 2005 and are the employees being trained?
(2) Has the company implemented career paths for HDSA employees including skills development plans?
(3) Has the company developed systems through which empowerment groups can be mentored?

The DMR assessment report in respect of the above-listed measures yielded the following results as shown in Table 4*:*

Functional literacy: An average of 17.1 percent was achieved.

Career pathing: An average of 17.1 percent was achieved.

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

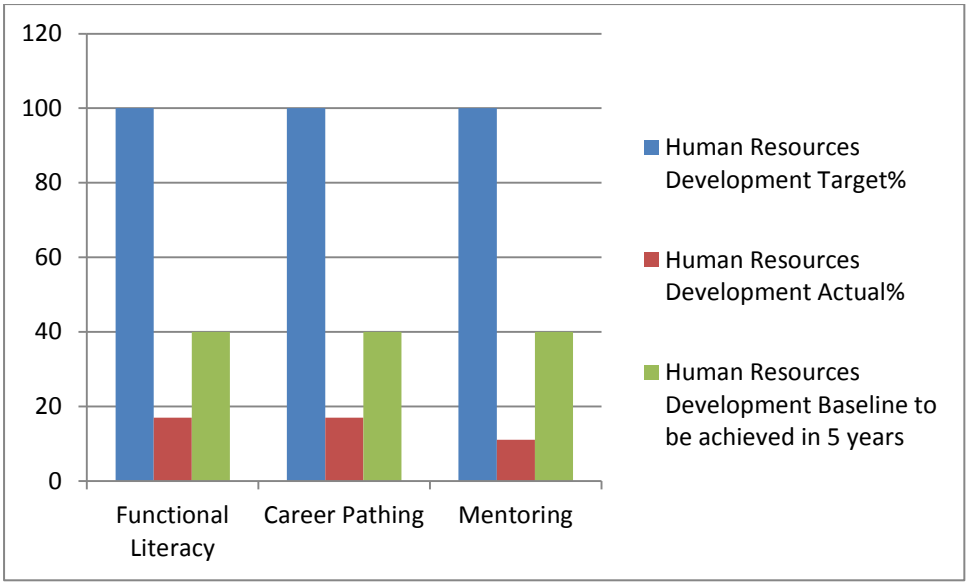


Figure 1: Performance of Human Resources Development Indicator

The assessment conducted by the DMR on human resources development found inadequate progress on skills development. It further found a lack of management support for staff participating in Adult Basic Education and Training (ABET). This lack of support was shown by recalling of staff from classes to accelerate production, loss of bonuses for employees attending ABET and classes arranged after working hours far away from the places of residence for the employees. This assessment revealed that the prevailing conditions were less attractive for employees to enrol on the programs of skills development. The study also found that the majority of those employees attending ABET training and those who had benefited from ABET were mostly non-South Africans.

The research also found that the results of investigations into the career pathing and mentoring statistics did not coincide with the plans submitted to the DMR and the actual implementation. The study reported that the majority of those interviewed who were mentors and protégés were not aware of the plans and, as a result, their participation was limited. On the issue of career plans, research revealed that the focus was on the development of senior managers to the exclusion of lower level employees. The findings of the assessment were that only the companies that provided sufficient resources and incentives for training had succeeded in the implementation of agreed measures of the Human Resources Development plan.

The original intent of the Charter was the utilization and expansion of the existing skills base to contribute to the sustainable development of the mining industry. The study revealed that

implementation of the Human Resources Development Plan had focused mainly on basic skills development at the expense of developing the required skills to effect meaningful transformation of the mining industry. This unbalanced approach was evident in the continuing paucity of skills in the industry. Simultaneously, the longest commodity boom bore testimony to the lack of investment in critical skills development. This lack of skills had resulted in the South African mining industry not benefiting as it should have from the commodity boom due to poor investment in the development of core skills, despite the fact that government had implemented measures by the creation of the Mining Qualification Authority (MQA) to drive skills development in the mining sector, in terms of the Skills Development Act No. 97 of 1998.

Table 7: Scarce skills according to occupational group, June 2010

Occupational group	Vacancies	Percentage(%) of total vacancies	Percentage(%) of total occupational category
Directors and Corporate Managers	119	9.1	1.1
Professionals	188	14.5	0.9
Technical and Trade Workers	607	46.7	0.8
Community and Personal Service Workers	1	0.1	0.0
Clerical and Administrative Workers	4	0.3	0.2
Sales Workers	0	0.0	0.0
Machine Operators and Drivers	376	28.9	0.2
Elementary Workers	6	0.5	0.0
Total	1301	100.0	0.2

Source: MQA Annual Report 2010/2011

Table 7 shows the results of the MQA skills development research function, whereby information about scarce skills was analysed. The MQA, on an annual basis, collected data from employers on occupations that were dependent on scarce skills. The table shows a total

number 1301 people were reported in occupations in which the existence of skills shortages was present. This shortage translated into 0.2 percent of total employment in the sector. The highest percentage of skills shortage in the table was in the technical and trade workers. The largest number in the professional category was for mining engineers, followed by mechanical engineers, surveyors, geologists, metallurgists and occupational health and safety advisors.

The report of the Chamber of Mines Broad Black Economic Empowerment Transformation Project stated with regard to skills development that the statistics on the expenditure and, more importantly, how much money had been spent on educating black women, were not available. The study found that during the follow-up meetings and discussions, it was clear that some information was either not available about most aspects of the Human Resources Development Plan or the mining companies simply did not have the information available at the time of the project.

An independent review of mining company reports of listed mining companies revealed that they had, by far, exceeded the targets as set out by the Mining Charter in almost all areas of compliance.[68] Those companies that fell short in meeting the targets of Human Resources Development reported that it was as a result of constant job hopping by HDSAs in search for more lucrative salary packages both in South Africa and internationally.

Findings

- Despite claims by industry, it seemed that more effort was needed to address Human Resources in the sector;
- Conditions for ABET training by employers had to be addressed;
- Action was needed for HDSA to set ABET targets for South African as more non South Africans had benefited;
- Increased allocation and monitoring for Human Resources Development by companies;
- Career pathing and retention incentives/measuring needed attention; and
- Common understanding of the need for HDSA's representation at the management and professionally qualified level.

[68] According to the Companies' Annual Reports reviewed in light of their reported status about compliance with the Mining Charter, Anglo, American, Anglo Platinum, De Beers, Royal Bafokeng Platinum and Kumba Resources all reported to have complied and, in some cases, exceeded the targets as stipulated by the Charter.

5.2.2 Employment Equity

As revealed in Chapter 2, the mining industry contributed to apartheid's discriminatory employment practices. The mining industry needed cheap labour and the apartheid policies enabled a solution to the problem in different ways.[69] As a result, the stakeholders saw it fit that Employment Equity had to be included as an element of the Charter and adopted by addressing the following questions:

(1) Has the company published its employment equity plan and reported on its annual progress in meeting that plan?
(2) Has the company established a plan to achieve a target for HDSA participation in management of 40% within five years and is implementing the plan?
(3) Has the company identified a talent pool and is fast tracking it?
(4) Has the company established a plan to achieve the target for women participation in mining of 10% within five years and is implementing the plan?

Employment Equity plan and reports

The DMR assessment study showed that only 37% of mining companies had developed Employment Equity Plans and that only a few companies had published these plans. It further showed that there was no evidence of EE reports (either audited or unaudited) had been submitted to the Department of Mineral Resources. This finding revealed the lack of commitment by the industry to transform.

[69]The detrimental consequences of the Apartheid policies on the mining industry and workers are a historical fact. The laws to control labour for the mines and racial segregation became tougher and stricter with the introduction of Apartheid in 1948.

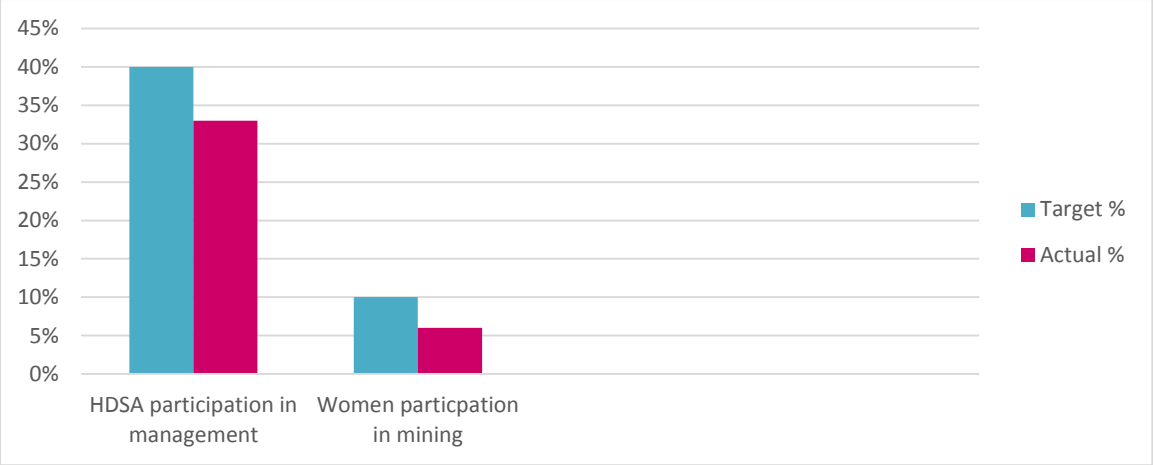


Figure 2: Employment Equity impact assessment

Findings

- The DMR needed to follow-up on individual companies in terms of equity plans, in particular development and publication, that is, they had to allocate resources (people and time) to ensure compliance;
- There was a need to revise the 40% target and to set new targets for black people, black women and black disabled employees. These targets should be set to be in line with EAP (Economically Active Population) targets, to avoid over representation;
- Employment equity policy had to be based on the demographics of South Africa;
- Positions occupied in Mining Companies had to demonstrate related quality of relevance and not become window dressing; and
- Occupied positions had to demonstrate ongoing development of candidates as managers and as executives.

HDSA participation in management

The DMR study showed that an average of 26% of mining companies had achieved a threshold of 40% of HDSA participation at management level. Thirty-three percent was the average achievement for the overall industry as explained in Table 4 above. Research further revealed that a large number of HDSA occupied middle management positions and only an insignificant number of HDSAs occupied key decision-making positions.

The Business Times of 8 October 2006 reported that white executives had scored significantly from empowerment deals and collectively held a R1-billion stake in some of the country's black-owned giants. They secured top jobs that landed them shares of up R250 million from the deals because of their skills. Mvelaphanda's, HOSKEN Consolidated Investments, Safika Holdings Chief Executive Officers (CEOs) had all made it to the Sunday Times Rich List through deals with black partners. Analysts claimed these men, like most white executives, were invaluable in empowerment transactions as they come with vast experience. A study commissioned by the Black Executive Circle reported that there were only about 90 black executive directors, that is 4.3%, in the top 200 JSE-listed companies.[70] These figures indicated that in the overall economic sphere of South Africa the pace of skills development was unacceptably slow.

The Mining Weekly online of the 17th September 2010 reported that the study by KIO Advisory Services, commissioned on behalf of the South African Mining Development Association, showed that the JSE's top 25 mining companies were lagging far behind the legislated targets as outlined in the black economic empowerment (BEE) Codes of Good Practice. The report revealed that the sector had huge shortfalls in the representation of black people in management. The figure reported by the KIO Advisory Services was 63% compliance in middle management, with almost 27% of black people being in middle management. The study further revealed that junior management scored 68% compliance, with 32% being represented by black people.

Measured against the DTI Codes: "*The percentage of HDSA's (black) in top management was 17.3% compared with a compliance target of 40%; The percentage of black people on senior management was 15.5% compared with a compliance target of 43%; The percentage of black people in middle management was 26.9% compared with a compliance target of 63%; The percentage of black people in junior management was 32.9% compared with a compliance target of 68%.*"

Lack of HDSA participation in management limited their decision making and left them at the mercy of empowering companies. The result was that HDSAs had no say whatsoever in the charting of the economic agenda, let alone transformation agenda of the country as they

[70] The Progress of Broad-Based Black Economic Empowerment in South Africa-Executive Report, Baseline Study 2007 prepared for The Presidency, the Department of Trade and Industry and Presidential Black Business Working Group. This study was conducted by Cosulta Research, Affiliate Company of Business Enterprises, University of Pretoria.

were not involved in key policies to determine the future direction of a company and were excluded from major decisions relating to investments.

Findings:

- Indubitably, HDSA participation in management had not progressed satisfactorily, particularly at senior levels. Skills development together with mentorship needed greater attention.

Women participation in mining

The result of the DMR study revealed that only 26% of mining companies had met the target of 10% women (inclusive of white women) participating in mining. It further revealed that, on average, the rate of women participation was 6%. The majority occupied support positions in the companies with less than 1% represented in core management positions. Of the 1% in core management positions, the majority were white women.

The KIO Advisory study, according to the Mining Weekly online of the 24th June 2010, claimed "*there was an alarming shortfall of black women in management. Black women had a representation of: 4.1% in senior management compared with a compliance target of 21.5%; 8.5% in middle management compared with a compliance target of 31.5%; 7.9% in junior management compared with a compliance target of 34%."*

The above figures, as reported by the DMR, showed over-representation of white women in management in the mining sector. Overall statistics revealed that black women represented 40.3% of the country's economically active population (EAP). This percentage meant that there were eight times more black women than white women. This figure was well above the EAP target of 5.3%. Despite this stark contrast, the report showed that there were more white women than black women in management in the mining sector. The Commission for Employment Equity (CEE) report of 2011 pointed out that 6.5% white women were in top management when compared to 3% black, coloured and Indian women.

The Chamber of Mines report recommended that targets had to be set for black women participation in mining companies to enable companies to implement plans and strategies to do so. The companies would then know how far they were from achieving the set targets. This recommendation was contrary to the 2002 Charter question about whether there was participation and whether companies were responding negatively or positively.

It is worthy to note that women constituted less than 5% of the formal mining sector's workforce and most of them were clustered in administrative or clerical positions. The analysis pointed out that women were under-represented in the industry. Explorative studies suggested that women were also involved in artisanal and small-scale mining, an activity largely associated with poverty and driven by the need to survive.[71] Women's participation in the formal mining sector was fairly unchartered waters. The harsh reality of transformation of the sector in all dimensions, that is, social, economic, cultural, political and physical brought as a result of mining activity, was felt most agonizingly by women which had an impact on development from a gender perspective.

The BEE Institute believed that concerning the South Africa's mining industry women still needed to benefit significantly from black economic empowerment (BEE).[72] The Institute further believed that there had been little progress in black women taking up management positions in mining companies and that they were under-represented in senior position in all spheres of the mining industry.[73]

Findings:

- The Mining Charter had no target for black women, e.g. mining companies were required to achieve a minimum of 10% women in mining and the definition of HDSA included white women and Chinese;
- There was an under representation of black women in management;
- Women had to be targeted with regard to skills development, ABET and higher education;
- There had to be a strategy for retention of women graduates in mining engineering field as many tended to migrate to other sectors, such as banking, consulting, and so forth;
- Mentoring of women was paramount;and
- Intervention by government was needed to support women entrepreneurs who wanted to purchase dormant and non–operational mineral rights from major mining

[71]Mutemeri N and Petersen F., '*Small-scale Mining in South Africa, Past, Present and Future*' Natural Resources Forum 26 (2002), 287

[72] This was a professional body that provided training and support to businesses and practitioners that had adopted BEE Scorecard and have the desire to implement sustainable BEE.

[73]MotauD.,Willingness for gender transformation from industry, but women remain underrepresented, accessed 07/12/2011<http//www.miningweekly.com/article/womem-stil-need to-benefit-from-bee.

companies. Such a move would increase black women representation in management and also create employment opportunities for disadvantaged women.[74]

Talent pool identification and fast tracking

The DMR study revealed that an average of 83% of mining companies did not have an identified talent pool and only 17% were in the process of fast tracking the employees that they had identified for management positions. The study, as indicated earlier, showed that employment patterns in the mining industry reflected that the 40% of HDSA participation in management as mandated by the Charter had not yet been achieved. The research further found that The Human Rights Commission report, dated 4th November 2008, confirmed these findings about the mining industry's lack of compliance with the employment equity targets, in terms of race and gender representations. This finding, the report stated, was corroborated by the findings of the 9th Employment Equity Commission Report which highlighted that top management positions were still occupied by white South Africans regardless of gender and that they earned more than blacks regardless of skills and experience.

The DMR study further revealed that racially discriminatory practices were still prevalent in the mining industry and these practices had impacted negatively on the progress toward attainment of equitably transformed workplace. The study stated that because of lack of investment in HDSA skills development by the industry, there was a limited pool of expertise to effect meaningful gender and racial representation.

Findings:

- Reports of identified talent pool required monitoring by independent verification agency as the DMR lacked the capacity to do so;
- Program of fast tracking to be monitored by an independent verification agency;
- Skills development should be a tripartite responsibility-industry/labour/government; and
- The tripartite had to address broader issues including discriminatory practices.

[74] A good example of this was the request brought before the portfolio committee on mineral resources on the 14 September by Women in Mining Mpumalanga (WMM) chief executive Ester Mhlongo of her company of 20 black women seeking to obtain the dormant, non-operational rights to coal reserves owned by BHP Billiton Energy South Africa. Mhlongo felt that women should be shareholders and run the mine.

5.2.3 Migrant Labour

As outlined in Chapter 2, the mining industry was developed by South Africans and migrant labourers and was the foundation of the apartheid system. Therefore, the Charter deemed it necessary to make a special provision to ensure the non-discrimination of migrant labourers. The DMR study's assessment of the adopted measures in the Charter to ensure non-discrimination against foreign migrant labour was deemed to have been significantly complied with, according to the objectives of the Immigration Act 13 of 2002. Evidence of the measure of compliance was shown by the benefits enjoyed by foreign workers in terms of skill development. The study, however, revealed that evidence of agreements to promote non-discrimination as agreed between companies and government was not readily available.

Findings:

- There had been overall compliance with this element; and
- Little availability of agreements to promote non-discrimination.

5.2.4 Mine community development

According to the Charter, the stakeholders agreed to address the issue of mine community development as mineral exploration and extraction activities, given their nature, were located in remote and under-developed areas of the country. These activities led to the proliferation of ghost towns because sustainable development was not taken into account during the lifespan of the mines. To ensure that future mining activities took this community development into account, the question raised by the Charter was as follows:

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

The DMR assessment showed that 63% of companies engaged in consultation with communities and 49% of companies were engaged in the formulation of Integrated Development Plans (IDP) in mine communities. The study further revealed that only 14% of companies were involved in the developments of IDPs for labour-sending areas. Thirty seven percent of companies provided proof of expenditure in accordance with commitments as

outlined in the approved Social Labour Plans. The study reported that 63% of the mining companies, implemented corporate social responsibility projects and, when submitting to the DMR, reported these as part of their contribution to IDPs.

Even though there was evidently high level community consultation, there was no direct link between the proposed and implemented community development projects with regard to the needs of affected communities. The study indicated that this was the result of inefficient consultation process, poor or lack of collaboration with communities and lack of alignment to established Local Economic Development (LED) frameworks. These factors had a huge impact on the development impact on communities for the mining industry. The study revealed that the poor correlation between the SLP commitments and related expenditure gave impetus to development impact on communities. The DMR study further revealed empowerment of handpicked individuals by the mining companies who were disguised as representing the broader interest in terms of Local Economic Development of the host communities.

The assessment study conducted on behalf of the mining industry (Chamber of Mines) revealed that local economic development and enterprise development had the lowest score of all the elements. This study revealed that most of this information was not available and was, in some instances, left blank. In fact, the ones that were completed were low amounts compared to the targets set by the DTI Codes. The results were a very low score of 66% when compared to the DTI Codes of 69% for Socio Economic Development. The Mining Charter targets were not achieved, even though companies reported that they had done enterprise developments. However, no information was provided to corroborate their claims.

Findings:

- Lack of meaningful consultation and engagement with communities;
- Inadequate capacities of communities and management in IDPs;
- Management of delivery of SLPs' deficiencies; and
- Mechanism for improvement of delivery and monitoring deficient.

5.2.5 Housing and living conditions

The Mining Charter mandated mining companies to address the living conditions under which mine workers had lived in the past as the conditions had led to a number of social ills. Companies were obligated to upgrade the mine hostels, convert the hostels to family units and promote home ownership options for mine employees. The Charter required that companies indicate what they had done to improve housing and to provide an implementation plan. The Charter further required that where companies provided nutrition to indicate what they had done to improve nutrition and provide an implementation and progress plan. The Charter did not set any targets as a benchmark in this regard.

The DMR assessment showed that 26% of the mining companies had provided housing for employees and only 29% had improved the existing standards of housing. The study further revealed that 34% of companies had facilitated employees' access to home ownership through a number of schemes. With regard to the provision of nutrition to employees, the study indicated that 29% of companies had offered nutrition to employees or had established plans to effect improved nutrition. The study also revealed that 9% of companies had achieved an upgrading of hostels and 6% had converted hostels to family units.

The positive result was that the mining industry, as a whole, had made reasonable progress towards the creation of descent housing and living conditions for mine workers through the adoption of various schemes. The study further indicated that despite this positive progress in the reduction of occupancy rate per unit, there was still room for improvement. The findings were that the rate of reduction of the number of occupants from 16 to 4 persons per unit was still too high. Employees dwelling in hostel were exposed to unhygienic standards of living. Overall, the study showed that the upgrade as well as the conversion of existing hostels into family units remained unacceptably low which meant that there was scope for improvement in this regard.

According to the findings of the study with regard to the provision of nutrition for employees, a third of the mining companies had outsourced this requirement to service providers with inadequate expertise. In addition, there were insufficient facilities for employees to prepare their own meals. Most mining companies had resorted to the granting to workers living out allowances. These allowances had an unintended consequence in the proliferation of informal

settlements, whose negative impacts then permeated to the wider society in the form of a high crime rate, substance and alcohol abuse and the spread of diseases.

In an attempt to address this housing problem and to enable the mining industry to accelerate the attainment of requisite levels of humane living conditions for the industry employees, consistent with international best practice, the DMR had, in consultation with the Department of Housing and in compliance with the Housing Act No 107 of 1997, gazetted a policy in April 2009, that set out various standards and guidelines.

Findings:

- Provision of houses to employees was still a desired goal;
- A need to improve existing housing infrastructure;
- Home ownership participation needed to be improved to higher level; and
- All mines with hostels had to upgrade them and convert them to family units.

5.2.6 Procurement

The following questions were considered by the mining stakeholders with regard to this element of the Charter:
Has the mining company given HDSA's preferred supplier status?

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

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

The DMR's assessment had revealed that 89% of companies had not given HDSA companies preferred supplier status. With regard to the "*progression of procurement from HDSA companies over a 3-5 year time frame"* the assessment revealed that 80% of companies had not shown a commitment to this target. The assessment showed that the current level of procurement reported from HDSA companies averaged a mere 37% of companies, even though companies could not always ascertain the ownership and management control status of their HDSA suppliers.

The procurement of capital goods, consumables and services managed and dispensed continued to favour the preferred non-transformed suppliers to the overall detriment of HDSA companies. In addition, the HDSA companies, to a huge extent, were only given procurement contracts of consumables and non-core services such as providing cleaning facilities, toilet paper and other non-core activities.

The DMR's assessment of the compliance level of industry with regard to procurement remained below 3%, consistent with the insignificant provisions of preferred supplier status to HDSA companies. There was no evidence to indicate compliance with procurement as per the undertaking made by the stakeholders at the time of adopting the Charter. In view of these findings, the opinion was this non-compliance demonstrated a lack of commitment by mining companies towards the procurement element of the Mining Charter. Furthermore, there was a pervasive resistance to transform and adhere to the procurement objectives as obligated under the Charter which continued to delay the achievement of broader economic freedom in South Africa.

The study undertaken by the Chamber of Mines also showed that preferential procurement was low for most of the mining companies surveyed in terms of the measures of the Charter

Findings:

- Procurement decisions were made mostly at head office before commencement of mining activities;
- Services and inputs for the industry were specialized, mostly beyond the means of HDSA; therefore, there was a need to build capacity to produce such specialized inputs and services; and
- Finance had to be made available for HDSA participation in procurement.

5.2.7 Ownership and joint ventures

In terms of the Charter, stakeholders considered the following question to measure compliance with this element:

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

The stakeholders agreed upon the adoption of the Mining Charter and made the following undertaking:

"The industry agreed to assist HDSA companies in securing finance to fund participation in an amount of R100 billion within the first 5 years. Participants agreed that beyond R100 billion-industry commitment in pursuance of the 26% target, on a willing seller willing buyer, at market value, where the mining companies are not at risk, HDSA participation will be increased".

The DMR's assessment with regard to this element showed that the net asset value of the South African mining industry averaged R2 trillion. This assessment indicated that to achieve 15% HDSA ownership threshold by 2009, it required not less than R300 billion to meet this target. Furthermore, what the industry committed to at the commencement of the Charter, that is R100 billion to facilitate HDSA ownership, represented 5% of the current net asset value of the mining industry, which fell far below the agreed 15% empowerment target within 5 years. The DMR study did, however, recognize the limitations of the commitment made by industry as well as the compounded annual growth of the industry which should have been factored in at the time of the commitment.

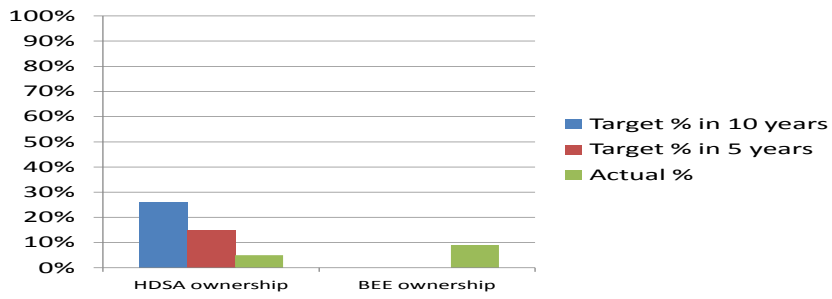


Figure 3: HDSA ownership target and progress

Figure 3 shows that, at best, when analysing the available data, the aggregated BEE ownership of the mining industry reached 9%. This figure of 9% showed that the majority of ownership was regrettably in the hands of anchor partners who were white and SPVs,[75] which

[75] SPV is an acronym for Special Purpose Vehicle.

reflected a very low number of black beneficiaries. The figure of 9% as constituting transformation of the mining industry came under scrutiny in Parliament on the 14th September 2011. The question that was raised was how this figure was measured:

"Was it measured on the basis of equity in listed, private companies and closed corporations? Does the 'measure' relate to the percentage of BEE companies in the mining industry or is it a combination of both."[76]

In connection with empowerment vehicles (ESOPs and Community Trust) to enable broad ownership transformation, these vehicles showed the prevailing constraints in their implementation presented in the form of the non-equitable distribution of benefits. The recipients of these benefits, in some cases, were non-HDSA, which was a major problem as it defeated the intention it was meant to address concerning the transformation agenda of the Charter.

The DMR study further noted that the underlying empowerment-funding model was contrary to transformation. In fact, the actual ownership of mining assets intended for transformation purposes was tied in loan agreements. The result was that the net value of a large proportion of empowerment deals was negative, because of the high interest rates on the loan and the moderate dividend flows, compounded by the recent global financial markets crisis.

According to the DMR study, most empowerment deals were entered into at operational levels which promoted ring fencing of transformation at holding company level. These ring-fencing deals fostered a culture focused on regulatory compliance at the expense of fundamental transformation of the mining industry. This observation was in agreement with the report conducted by KIO Advisory Services that pointed out that there was virtually non-existent black shareholding at holding company level when reviewing all empowerment transactions. This outcome was an unintended result of the Charter, which read *"The currency of measurement of transformation and ownership could, inter alia, be market share as measured by attributable units of South African production."* The result was that companies like Anglo Platinum and Lonmin, the country's largest and third largest PGM producers, entered into transactions at the level of operations or individual mines.[77]

[76]Business Report, Mining transformation data queried<http://www/iol.co.za/business-news/mining transformation-data queried.

[77] A good example was the creation of black-owned Northam and Anooraq.

Another company which the researcher had the opportunity to consult as an example of the above assertion was Gold Fields. Gold Fields' response to the Mining Charter was summarized in the annual report of the financial year, 2007. Regarding the transfer of ownership to achieve 15% HDSA by 2009, the group achieved the target by completing a transaction with Mvelaphanda Resources Limited, effective 1 May 2004. This transaction was done in terms of which Mvela Resources, through its wholly-owned subsidiary, Mvela Gold, would acquire a 15% interest in Gold Fields' South African gold mining assets within five years for a cash consideration of R4.1 billion.

The reports by KIO Advisory Services on the Charter (SAMDA document) revealed that the mining industry was nowhere close to achieving the target of 26% black ownership by 2014. In reality, the gross value of black shareholding amounted to 5.27% of the total R1.8 trillion market capitalizations of the top 25 mining companies as at the end of March 31, 2010.

Anglo Platinum's annual reports for 2004/2005, for example, reported that "*the group has already met its target of 15%."* This statement contradicted the findings of the DMR study. The claim was based on a report done by KIO Advisory Services of the metal group metals (PGM) industry, the largest subsector in the mining industry. KIO Advisory Services found that the gross value of black shareholding in the listed platinum sector was R30, 7 billion which translated to 7.95% of the sector's total market capitalization of R386 billion. The value of Impala Platinum (Implats), the country's second largest platinum producer, accounted for 19.9 billion or 65% of the sectors' BEE market capitalisation. The Royal Bafokeng Nation and an employee share-ownership program comprised this shareholding. If one excluded the Royal Bafokeng Nation shareholding from Implats because it had nothing to do with the Charter and, therefore, was not a traditional BEE deal, the gross value of black shareholding dropped significantly to about 2.79% of the sector's markets capitalisation. The platinum share price, in recent years, had a good performance since the signing of the Charter. However, the actions of the platinum mining did not have a significant impact on the BEE shareholding, taking into account Northam, Anooraq and Aquarius, which were created by Anglo Platinum. Statistics, as published, did not have much relevance as they did not take into account the debts acquired by black shareholders. A good example would be the Incwala, Lonmin's R4.5 billion black-owned offspring that declared bankruptcy. The future of Incwala was uncertain. The situation was exacerbated by the revenue collapse suffered by Lonrho of R1, 2 billion, a loss of R129 million, and the subsequent retrenchments.

BEE and the Mining Charter's overall objective was not about self-enrichment, which would result in the empowerment of an elite group within the black population group, but about creating equal opportunities, skills development, addressing the high unemployment rate, growing the economy of the country aligned with the Charter's emphasis on the need to develop a beneficiation strategy that would create more employment by processing raw materials and manufacturing products. If these factors could be understood and became the goals of the all major stakeholders, then the aim of the Charter would be achieved.

Finding:

- HDSA ownership was still unrealized in the majority of black economic empowerment transaction;
- The majority of black shareholders and owners of mines did not own mines because the shareholding had not been paid up; and
- The majority of mine ownership was still vested in the hands of historically advantaged producers who were mostly foreign-owned companies.

5.2.8 Beneficiation

In recognition to the significant opportunity of introducing mineral beneficiation programs to South Africa, stakeholders considered the following questions in the 2002 Charter:

Has the mining company identified its current level of beneficiation?

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

The DMR study on compliance revealed that these measures had not been achieved. It also revealed that there were pockets of local beneficiation of the country's mineral resources, although they uncoordinated. To address this major shortfall and create an enabling environment to effect co-ordinated beneficiation in the country, the Precious Metal Act. 37 of 2005, the Diamonds Amendment Act No. 29 of 2009 and the Beneficiation Strategy in 2011 were promulgated. The result of the Diamond Amendment Act was the establishment of the South African Diamond and Precious Metals Regulator (SADPMR) and the State Diamond Trader (SDT). These measures sought to create a broader framework to promote beneficiation in the country.

The study indicated that the review of the Mining Charter had presented an ideal opportunity to strengthen value addition to the country's mineral resources. This opportunity had to be aligned with the country's mineral beneficiation strategy. If the *status quo* was allowed to continue where beneficiation of the country's mineral resources were beneficiated elsewhere, it would be to the detriment of local skills development, creation of descent jobs, and increased Gross Domestic Product (GDP) value addition per capita. These factors would also affect economic growth.

The beneficiation policy concept had to be premised not only on the fact that South Africa was rich in mineral resources, but also on the fact that the country needed to build more capacity to beneficiate, in terms of skills, infrastructure and technology development.

Findings:

- Beneficiation should be enhanced by the broader beneficiation strategy adopted in 2011; and
- The implementation plan of the strategy had to be developed by the DME.

5.2.9 Consultation, monitoring, evaluation and reporting

The stakeholders recognized that the achievement of the objectives of the Charter required an on-going process of consultation, monitoring, evaluation and reporting and deliberated on the following question:

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

The DMR study showed that only 37% of companies had audited reports and 11% of companies claimed to have submitted their annual reports to the DMR. From these figures, it was concluded that a large number of mining companies had not subjected the Charter compliance data to an independent audit framework. As a result, there was lack of co-ordinated mechanisms within the DMR to effectively monitor and evaluate progress of the targets achieved on an annual basis. The study further showed that there was also lack of

adherence by stakeholders to the provisions of section 28(2) (c) and section 29 of the MPRDA.[78] It was pointed out that what was also lacking were stringent enforcement systems.

The DMR study indicated that the amount provided as penalty for non-compliance as provided for in section 28 (2) (c) was seriously inadequate. This inadequate penalty seemed to make it easy for companies not to comply with this element of the Charter.

Findings:

- There was lack of oversight/ supervisory work or obligations of the DMR. This oversight needed urgent attention.

5.3 Independent analysis of the mining industry charter compliance

The findings, as based on the reports of the ten mining companies with a listing in the JSE, concluded that even though the industry acknowledged the various challenges facing them, generally all of them met the Charter compliance targets as expounded above. The message was obvious: overall, all of them had surpassed the minimum 2014 targets as set out by the Charter. The COM report found that the majority of its members had not only met, but in certain instances, exceeded the Charter's targets. Northam and Anglo American were among the companies that had specified in their reports that the attraction and retention of HDSAs and women in management had not been without significant challenges. The companies reported concerning the attraction and retention of HDSAs and women and despite incentive schemes such as retention bonuses and others, there was still a mobility of skills. This lack of mobility, coupled with the fact that most of the mining operations were situated in remote areas, proved to be a significant deterrent for HDSAs and women with the necessary skills to fill core positions. This situation was exacerbated by the fact that that HDSAs and women university graduates preferred to work for companies closer to urban areas.

[78] Section 28 is titled: Information and data in respect of mining or processing of minerals 28(2) (c) An annual report detailing the extent of the holder's compliance with the provisions of section 2 (d) and (f), the charter contemplated in section 100 and the social labour plan. Section 29 provides that the Minister may, in order to achieve the objects of this Act and to fulfill any of the functions in terms of this Act, direct in writing that specified information or data be submitted by-

(a) an applicant for a prospecting right, mining right, retention right or mining permit, as the case may be;
(b) any holder of a prospecting right, mining right, retention permit or mining permit; or
(c) any owner or lawful occupier of land which is the subject of a prospecting right, retention permit or mining permit, or which is the subject of an application for such a right or permit or of a prospecting or mining operation.

Anglo American, in its transformation reports, contradicted the COM report and claimed that diamond and coal members could have met and, to some degree, even exceeded the 10% women target of the Charter by 2009. The company, however, claimed that the gold and platinum members had not as yet achieved the target. The reason given for this lack of achievement, among other factors, was that the working conditions were far harsher in gold and platinum than those in the diamond and coal industries. Women found it easier to work in the coal industry as it was more mechanized, which meant less physical work needed. It was apparent that gold and platinum companies had to rethink the issue of attracting and retaining women, for example through mechanisation. The Gold Fields report supported that they were yet to achieve the 10% target set for the mining industry by the Charter. The company reported that, coupled with inadequate availability of skills, the physical demands of mining made it difficult for the sector to attract women.

All of the companies surveyed acknowledged immense challenges in attracting and retaining skilled people due to the global shortage in technical, mineral resources and engineering skills. To strengthen the skills shortage in South Africa, most of the mining companies reported investment in skills development. Some had even partnered with academic institutions, such as the University of the Witwatersrand and the University of Johannesburg, by investing in the mining faculties. Goldfields, for example, had invested in awarding of bursaries to improve the quality and quantity of engineering graduates in South Africa for many years. Because of this initiative, the company reported that the results were positive and were assured that the investment in bursaries generated a supply of engineers and technicians for the company and the sector at large.

Sustaining this growth required ongoing commitment to eliminate barriers in order to ensure the retention of skilled employees in the workplace. The one barrier worthy to be mentioned was the “last in first to go” principle that was applied in terms of the Labour Relation Act to address dismissal based on operational requirements to ensure fairness when retrenching employees. In order to ensure retention of skilled employees in the workplace, strict adherence was the one instance where this principle had to be adapted. An audit and analysis of the employees’ qualification and career pathing had to be done before the strict application of the principle. The principle should not be used to undermine an agreed affirmative action program.

The COM reported that, concerning human resources development, its members had made significant progress in meeting the target of 40% HDSAs in management by 2009. What was clear was that if white women were removed from the equation, there would be a significant drop in the statistics. This situation was because of the challenges that the mining industry was faced because of the skills shortage in South Africa. The skills shortage made it very difficult to find skilled HDSAs that could be appointed to senior management level. As a result of the skills shortage, when suitable candidates were found, they came at a high price and it was difficult to retain them. Mentoring of candidates through the ranks to reach senior management level took time.

However, Anglo American, like most of the other mining companies, reported that by the end of 2012, the proportion of HDSAs employed in managerial level, that is from junior to senior management, had risen significantly to 42.34% of HDSAs occupying senior management positions because initiatives had been implemented to address the challenges. By the end of 2008, the overall figure of women in management rose from 15% to 17%. By year end of 2012, this figure had improved substantially, resulting in the overall achievement of the Charter's targets. Anglo American Platinum reported, at the end of the year 2011, there were 22% in top management; 11% in senior management; 21% in middle management and 20% in junior management. These statistics meant that, at all management levels, the minimum Charter target of 40% had been exceeded.

Northam also reported that, as at 30 June 2012, 473 women were employed and of this number 257 were working in mining, metallurgy and engineering core disciplines. The overall figure of 473 translated to 7% women in employment.

In conclusion, all the companies investigated, when reporting to their Mining Charter compliance, reported positive compliance with all the Charter elements in their scorecards. These findings contradicted the compliance report done by the DMR. This discrepancy was expected because the DMR figures were the averages for the industry. The evidence of these selected companies proved that it was possible to achieve the targets when there was the determination to succeed. This evidence suggested the expansion of the scorecard to include initiatives that companies had made to address each element. Lessons could be learned from successful and unsuccessful companies so that corrective actions could be taken to achieve the results by all.

5.4 Results and analysis of the shortfalls of the Charter

1. The main shortfall of the 2002 Charter concerning the Scorecard was its focus on ensuring that all employees who were not literate should have the opportunity to become functionally literate, rather than pegging functional literacy and numeracy at a specific level. All the mining companies and National Union of Mineworkers had to do was to encourage and assist employees to utilize the opportunities to upgrade their literacy levels. It was, however, important to accommodate two realities. The first was the high illiteracy rate in the mining industry. It would, therefore, be impossible to bring the workforce up to the desired ABET Level 3 within the given time frame. It was also important to note that a large number of the workforce who were illiterate chose not to attend ABET classes. Taking these factors into consideration, it was important in terms of this issue on the Scorecard to focus on ensuring that all employees who were not literate should have the opportunity to become functionally literate.
2. Another issue was the prevention of token appointment. The Charter did not implement measures to prevent token appointments taking place.
3. The Charter did not stipulate targets for learnerships, which affected mining companies expenditure's on skills development, which, in turn, affected the overall impact in terms of reporting and targets set by the Charter.
4. Another issue that had to be considered was that a too-strict application of the last-in-first-out principle during retrenchments could have an adverse effect on employment equity progress and could undo all progress made. The retention of staff and of skills should be a high priority to avoid the industry losing newly-promoted and newly-skilled personnel.
5. The HDSA targets should be reviewed because they distorted the overall picture of transformation in the mining industry in most aspects. For example, there was a significant overrepresentation of white women in management. The mining sector had shown low levels of transformation in the workplace. The DMR report revealed that there was a large shortfall in the representation of black people, especially black women, in top senior, middle and junior management.
6. On the transfer of equity in the hands of black ownership, most of the empowerment deals happened at operational level and not at holding company level, which was an unintended consequence of the Charter.

7. Regarding beneficiation, the country lacked the required skills and competencies. South Africa had to develop a manufacturing beneficiation area which was where the manufacturing sector had the competency and skills to engage effectively in mineral beneficiation.
8. The Mining Charter Scorecard had questions that only required yes/no answers in terms meeting targets. When 100% of the target had been achieved, then obvious answer was yes, given on the question. The no answer would be given if less than 100% was achieved for the specific element.

5.5 Recommendations

A mining charter that would bring effective transformation needed the following:

- Accurate scores had to be stated to measure specific targets accurately and move away from the yes/no answers as they allowed for inaccurate and subjective feedback;
- Specific targets of the elements to be measured would eliminate ambiguity and ensure an accurate scorecard. Such targets would eliminate subjectivity;
- To obtain a clear vision that would contribute to the transformation process, mines, mining companies, and commodity companies had to be measured separately, thus achieving accurate benchmarking; and
- The planning for transformation should be done on the right baseline once measurements against targets were achieved. The targets should comply with EAP as such compliance would obviate over-representation.

These recommendations could be achieved by reviewing the 2002 Charter as is to address the issues that prevent transformation. In compliance with these recommendations, the DMR concluded the revised Mining Charter in 2010. According to the objective of this research, it was imperative to review whether the findings of the challenges regarding compliance with each element had been addressed by the revised Charter.

Table 8: Compliance challenges of the revised Charter

Elements of Charter	Identified gaps	Provisions of the revised Charter	Gaps remaining
Human Resource	• More effort was needed to address Human Resources in	• Provision made that a percentage of annual	• Prevailing conditions less attractive for employees to

Development	the sector. • ABET training had to be addressed to benefit South Africans as beneficiary were mostly non-South Africans • Career patching and retention incentives • Common understanding of the need for HDSA's representation at the management and professionally qualified level.	payroll be used in essential skills development activities reflective of the demographics.	enroll on the programs for skill development • Measures to be implemented to in address retention of staff in management and to chart the economic agenda
Employment Equity	• The DMR had to follow-up on individual companies in terms of Equity Plans for development and publication, that is, allocated resources (people and time) to ensure compliance; • There was a need to revise the 40% target and to set new targets for black people, black women and black disabled employees. These targets should be set to comply with EAP (Economically Active Population) targets, as they would prevent over representation; • Employment equity policy had to be based on the demographics of South Africa; • Positions occupied in Mining Companies had to demonstrate related quality of relevance and not become window dressing; and • Occupied positions had to demonstrate ongoing development of candidates as managers and as executives • The Mining Charter had no target for black women, e.g. mining companies were required to achieve a minimum of 10% women in mining and the definition of HDSA included white women and	• Had to achieve a minimum of 40% HDSA representation at board and EXCO by March 2015 based on demographic representation • Talent pool, had to be identified and fast tracked to ensure high level operational exposure in terms of career path programs.	• DMR had to capacitate its inspectorate to ensure compliance by industry • Revision of targets to comply with EAP targets. • No targets for black women had been set as the term is encompassing of white women and Chinese. • Establishment of a Ministry's of Women Affairs to deal with issues of empowerment in the workplace.

	Chinese people; • There was an under representation of black women in management; • Women had to be targeted for skills development, ABET and higher education; • There had to be a strategy for retention of women graduates in mining engineering field as many tended to migrate to other sectors, i.e banking, consulting, etc; • Mentoring of women was paramount; and • .Intervention by government was needed to support women entrepreneurs who wanted to purchase dormant and non–operational mineral rights from major mining companies. Such a move would increase black women representation in management and also create employment opportunities for disadvantaged women		
Mine Community Development	• Lack of meaningful consultation and engagement with communities; • There was inadequate capacities of communities and management in IDPs; • Management of delivery of SLPs deficiencies; and • Mechanism for improvement of delivery and monitoring deficient.	• Provision made for investment in ethnographic community consultative and collaborative processes to comply with international best practices.	• SLP as a mechanism for community development was not according to international best practice, when compared to Community Development Agreements (CDA) to ensure effective transfer of social and economic benefits to the community.
Housing and Living Conditions	• Provision of houses for employees was still a desired goal; • There was a need to improve existing housing infrastructure; • Home ownership participation had to be improved to a higher level; and • All mines with hostels need to upgrade them and convert them	• Provision made to convert and upgrade all hostels into family units by March 2015. • Attain the occupancy rate of one person per room by March 2015. • Facilitation of home ownership options for all mine employees in	• Continued proliferation of informal settlements around mine areas.

	to family units.	consultation with organized labour by 2014.	
Procurement	• Procurement decision were made mostly at head office before commencement of mining activities; • Services and inputs for the industry were specialized, mostly beyond the means of HDSA, thus there was a need to build capacity to produce such specialized inputs and services; and • Finance had to be made available for HDSA participation in procurement.	• Procurement of a minimum of 40% of capital goods from BEE companies by March 2015. • Procurement of 70% of services from BEE entities by March 2015. • Procurement of 50% of consumer goods from BEE entities by March 2015.	• The issue of fronting to be addressed • The issue of financial empowerment of HDSA to enable them to have the expertise to supply capital goods should be addressed
.Ownership and Joint Ventures	• HDSA ownership was still unrealized in the majority of black economic empowerment transaction; • The majority of black shareholders and owners of mines did not own mines because the shareholding had not been paid up; and • The majority of mine ownership was still vested in the hands of historically advantaged producers who were mostly foreign-owned companies.	• Definition of *"Effective ownership"* • 26% was the minimum target set for *"meaningful economic participation*" and 26% full shareholder right for HDSA BY March 2015.	9. On the transfer of equity in the hands of black ownership, most of the empowerment deals happened at operational level and not at holding company level, which was an unintended consequence of the Charter-in as much as the revised Charter addressed this issue, time was too short to be achieved- A mindset shift was needed for true transfer of equity..
Beneficiation	• Beneficiation should be enhanced by the broader beneficiation strategy adopted in 2011; and • The implementation plan of the strategy would be developed by the DME.	• The term "Beneficiation" was defined. • Provision was made for Mining companies to offset the value of the level of beneficiation achieved against a portion of its HDSA ownership requirements not exceeding 11%	• Attention focused on manufacturing beneficiation by government, labour and business rather than putting pressure on mining companies. • Creation of an enabling environment to allow the manufacturing sector to be massively competitive. • Legacies of the past needed to be addressed with regard to

			education and skills development
Consultation, Monitoring, Evaluation and Reporting	• There was lack of oversight/ supervisory work or obligations of the DMR. This needed urgent attention.	• Provision made to report level of compliance with the Revised Charter annually in compliance with Section 28(2)(c) of the MPRDA. • DMR to monitor and evaluate, taking into account the impact of material constraints which could result in not achieving set targets.	• DMR lacked inspectorate skills for effective consultation, monitoring, evaluation and reporting.

Source: Gaps identified when analysing the revised Mining Charter of 2010

In summary, this analysis was done to see how far transformation had progressed with meeting the targets set by the Mining Charter of 2002. From the review of the studies and of companies' annual reports, it was only the analysis of the level of compliance as shown by the figures that they presented that the true picture emerged. The statistics presented by the DMR and COM differed greatly. These differences represented the discrepancies in as far as compliance was concerned. The analysis of all statistics revealed that industry was still far below the targets of the Mining Charter. One of the biggest weaknesses of the Mining Charter in terms of compliance levels and the meeting of the targets was its lack of a rigorous measurement system with clear targets and definitions to remove ambiguity and possibility of different interpretations by mining companies. Consequently, the scorecard had to be reviewed. DMR had to share the blame, for granting new-order mineral rights to companies that did not have to prove that ownership would eventually vest in black people. The lack of capacity was another reason for government having to shoulder the blame in the failure to meet targets. The former Department of Minerals and Energy lacked the capacity to evaluate complex funding structures and, therefore, companies like Anglo Platinum could claim to have already met the Charter's ownership target for 2009 five years ago.

Table 9: Industry and DMR evaluation results

ELEMENTS	**INDUSTRY**	**DMR**
Human Resources Development	72.73%	15.2%
Employment Equity	72.73%	37%

HDSA participation in management		26%
Women participation in mining		6%-support functions 1% in core management
Talent pool identification and fast tracking		17%
Migrant labour		90%
Mine Community development	66.67%	63%- engaged in consultation processes 49%- formulations if IDP 37%-proof of expenditure
Housing and Living conditions		26% provided housing 29% improved the existing standard's 34% facilitated employees homeownership 29% offered nutrition 9&6% upgraded hostels
Procurement	57.58%	3%
Ownership and joint venture	72,27%	9%
Beneficiation		
Reporting		11%

Source: Review of the studies done by the DMR now the DMR and the COM

5.6 Conclusion

It probably was a mistake to name the transformation agenda in South Africa, BEE, because the black in BEE has created negative connotations and distorted the whole redress of past

injustice. The greatest criticism to the implementation of the Charter was the concept of reverse apartheid, where only black people benefited at the expense of white people. Transformation was an imperative and the price would be too high to pay as a country, if it was not achieved. The meeting of the targets as set out had to be a priority for all promoting stakeholders. The industry transformation agenda of action beyond 2014 had to be broader based than mere figures and tick boxes. The DMR, as regulator, had to set up a reliable database to enable it to measure BEE in the mining industry. This database would address the present problem of a contradiction in figures, with industry presenting one set of figures and other stakeholders presenting contradicting figures.

The findings indicated that the Mining Charter was paramount to effect transformation and the report was a good starting point to engage the industry, government and labour to have a fresh insight at the Charter. The DMR study also revealed the challenges and opportunities regarding the effective implementation of the Charter and was thus worthy to use as basis of discussion and analysis. The independent analysis as conducted by the author showed huge discrepancies in the two reports and, therefore, it is imperative to find a means of making all companies achieve targets to drive the transformation agenda forward.

The next chapter examines the international scan as this chapter brings an end to examination of the local scan in terms of the South African mining industry transformation agenda.

CHAPTER SIX

TRANSFORMATION EXPERIENCE IN SELECTED COUNTRIES

6.1 Introduction

This Chapter examined and drew lessons from other countries that have undergone social and economic transformation similar to South Africa. The previous chapter examined industry's compliance to the Charter to date. However, in order to add depth to the study, it was prudent to make a comparative analysis with countries that had undergone similar social and economic engineering. This comparison would enable the research to draw lessons from these countries. The review would focus mainly on four countries: Malaysia, the United States of America, Brazil and New Zealand. The reasons for choosing these countries were the similarities with South Africa in the discrimination suffered by a disadvantaged group as a result of colonization and its consequences. The analysis was based on primary and secondary legal sources as well as books, journal articles, newspaper and internet sources. The purpose was to learn from their experience of policies designed for the social and economic integration of ethnic groups aimed principally at equal participation of previously disadvantaged people in the mainstream economy. The conclusions drawn from this review would contribute immensely in informing recommendations of the strategies to be adopted beyond 2014 in order to achieve success in the affirmative action program in the mining sector.

Malaysia, the United States of America, Brazil and New Zealand had adopted comprehensive strategies of affirmative action designed to benefit a group of people who had previously been disadvantaged by the enactment of legislative instruments and to ensure some form of equality of the different ethnic groups.[79] This legislation was intended to ensure that one group did not remain subservient to an economically and, in most instances, politically dominant group in these countries.[80] These countries sought to address the invidious distinctions among individuals based on their race, ethnicity, or national origin. Remedial

[79] Affirmative action is defined by the Oxford dictionary as action favouring those who tend to suffer from discrimination, positive discrimination.

[80] Affirmative action policies are highly encompassing as they permit the use of race and other factors such as gender and ethnic origins in decisions to allocations of public benefits, such as employment, admissions to schools, where different ethnic groups live and allocations of resources. They are implemented in diverse spheres such as economic, political, educational and healthcare.

actions had been taken by these countries where certain groups had been disadvantaged for a long time and where there was a need for affirmative action to level the playing field. The term "affirmative action" means different things in different contexts to different people, so it had to be used with caution. The term, nonetheless, sufficed as an amalgam of measures taken by governments to redress past historical imbalances in opportunities for education, employment, economic participation, ownership of assets and control. These historical imbalances necessitated interventions by states to redress sharp racial divisions that ultimately resulted in unequal income levels. These affirmative action programs were necessitated by pressing problems of economic inequality between the races. Affirmative action policies' main purpose was to address and redress systematic economic and political discrimination against any group of people that had been historically underrepresented or had a history of being discriminated against in particular institutions. Their primary emphasis in most instances was on addressing racial discrimination. Studies have shown that racism, rather than being self-correcting, was self-perpetuating. The disadvantages to the discriminated group and the benefits to the advantaged group would be passed on to each succeeding generation unless remedial action was taken.

Affirmative action has been given international status and the right of states worldwide to implement it has been granted by Article 2.2 of the International Convention on the Elimination of All Forms of Racial Discrimination which stipulates that affirmative action could be demanded of states that have ratified the Convention in order to rectify systemic discrimination. It, however, stipulates that such programs *"shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."* The United Nations Human Rights Committee believes that:

> *The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve the granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination, in fact, it is a case of legitimate differentiation under the Covenant."*

A comparative analysis would bring to the fore that national unity was unattainable without greater equity and balance among a country's social and ethnic groups in the participation of the country's development and in the sharing of the benefits derived from economic growth. It would be virtually impossible to achieve national unity if a vast section of the population and, in some instances, even a minority of the population remained poor. In addition, if economic equality were not achieved, peaceful co-existence could never be achieved as chaos and riots would be the order of the day.[81]

Affirmative action or preferential policies are international phenomena. The concept is a feature of societies which consist of plural ethnic or religious groups at such different levels of economic and social development that levelling the playing field and overcoming disadvantages by introducing some equality required government intervention. Affirmative action policies help mitigate the historical effects of institutional racism. It also addresses the effects of current discrimination, intentional or not. South Asia and India, in particular, embarked on such policies much earlier than the United States of America. The concept was actually wrongly perceived as originating from America. It was the international publicity and controversies attached to the preferential and affirmative action's programs in the US's social policy since the 1960s that had created the misconception that variations of these policies had spread to other parts of the world in imitation of the US prototype of such policies. It was worthy to note that affirmative action or preferential policies had common features in all four of these countries. They all had salient and distinctive features. (KM de Silva)[82]

6.2 Malaysia

The Federation of Malaysia originally consisted of Malaya, Singapore, Sarawak and Sabah. The federation was formed in 1963. Singapore left the federation in 1965 due to internal politics. Malaysia is now known as Peninsular Malaysia and the capital is Kuala Lumpur. The other territory is known as East Malaysia. Prior to the formation of the federation, these territories were under the British rule. The population at the end of the twentieth century was approximately 22 million and consisted of ethnically diverse groups of people, comprising 57% Malays and other indigenous peoples, collectively known as bumiputera, 24% Chinese,

[81] The Malaysian affirmative action began after the bloody riots between affluent Chinese and impoverished Malays in 1969 which killed hundreds. Similar examples can be cited for elsewhere in the world where race-based paradigms at restructuring society has occurred.
[82] Ethnic Studies Report, Vol. XV, No. 2, July 1997.

7% Indians. The rest included a high proportion of non-citizen Asians, for example, Indonesians, Bangladeshis, and Filipinos.

Malaysia was significant as a case study in affirmative action because of its diverse ethnic groups and was regarded as one of the most successful countries to have achieved economic growth over the last century. It had been a major supplier of primary products to industrialized countries, such as tin, rubber, palm oil, timber, oil, liquefied natural gas, and so forth. Since the 1970s, it had seen major development in the export-oriented manufacturing industries such as textiles, electrical and electronic goods, rubber products, and so forth. The 1999s had seen the country's transition economically to Newly-Industrialized Country (NIC) status. Malaysia was perhaps the best example of a country that had seen significant economic growth, which necessitated the economic roles and interests of the various racial groups to be pragmatically managed in the long term without significant loss of economic growth momentum, despite inter-ethnic tensions which manifested in violence, notably in 1969.

Malaysia had a long history of trading and its commercial importance enhanced by its strategic position athwart the seaborne trade routes from the Indian Ocean to East Asia. What made Malaysia so significant in relation to South Africa's political economy was its focal point for both local and international trade as it was also penetrated by the European trading interests. The first were the Portuguese from 1511 who used it as a trading destination of the Dutch East India Company (VOC) for trade in pepper and various spices. In about the 1600, there was also competition for trade in the area by the English East India Company (EIC) in the same commodity, that of spices. By the 1800s, the VOC was dominant. These countries saw Malaysia as a staging post in the growing trade with China and it was also strategic for the British to expand control of the Malay Peninsula from about 1870. Over the centuries, a growing inflow of migrants from China attracted by the trading opportunities and as a wage labour force for the growing production of export commodities, such as gold and tin. The indigenous people were also engaged in the commercial production of rice and tin but remained relatively within a subsistence economy and were not keen to offer themselves as a

permanent wage labour.[83] The growth of the trading sector around these times was already foreign dominated, even though it was still in its infancy (Drabble, 2000).

6.2.1 The Creation of a plural society in Malaysia

The history of social and economic differences among the various ethnic groups in Malaysia cannot be separated from the growth of its multi-ethnic society. To gain an insight in the ramifications of the multi-ethnic society in Malaysia, a brief historical perspective is necessary. The 1920s saw the large inflows of migrants into Malaysia which created a multi-ethnic population which the British scholar, J.S Furnivall (1948), described as a plural society in which the different racial groups co-existed under a single political administration. They did not interact with one another either socially or culturally, apart from economic transactions. Many of the migrants ended up being permanently domiciled in Malaysia despite their original intention to stay for a limited period of three to five years, save money and then return home. Circumstances changed and the country saw a growing number having children and staying permanently.

The economic developments happening at that time saw, in boom times, the immigrant inflow in certain areas by far outnumbering the indigenous Malays. The Indians and Chinese, in terms of social and cultural aspects, recreated the institutions, hierarchies and linguistic usage of their countries of origin. This recreation led to social stratification of society. The stratification was particularly blatant in the case of the Chinese. The Chinese, who came as traders or mine workers, were shipped in by colonial rulers. They comprised 25% of the population, but held 40% of the nation's wealth. They monopolized the major commercial centres, such as Penang, Singapore and Kuching and also controlled local trade in the smaller towns and villages through a network of small shops (Kedai) and dealerships that served as a major route along which export goods like rubber were exported. In return, imported manufactured goods were brought in for sale. The Chinese also dominated the mining and agricultural sectors. This domination led to the creation of immense wealth and division of labour in which economic power and function were directly related to race. The Malays were mainly rice growers in the rural areas.

[83] Over these centuries, the VOC was dominant in the Indonesian region, while the EIC was dominant in Malaysia, starting with Penang (1786), Singapore (1819) and Melaka (1824)

The economic disparities led to a growing discontent among the Bumiputera who were not part of this economic growth and were losing their ancestral inheritance, that is, their land. This disparity also led to it becoming a source of fear to the Malays whose claim of ownership to the land dated back thousands of years. This fear was among the early factors, coupled with resentment against British colonial rule, which saw the emergence of Malay nationalism in the periods between the two World Wars. This economic marginalization planted the seed for the 1969 violence that was to follow (Ghee 1977).

The fear and jealousy of the Chinese was and still is considered an important factor in organizing the Malays politically. The British colonial rule maintained peace in a way as the marginalized ethnic groups looked to them to protect their interests and maintain some sort of peace. An example of this was the designation from 1913 of certain lands in Malaysia as Malay Reservations in which only the indigenous people could own and deal in property (Lim Tech Ghee, 1977). A similarity could be drawn here with the 1913 Land Act of South Africa, which led to the creation of the Bantustans mentioned in Chapter two. When Malaysia was under British colonial rule and was known as Malaya, it was described as "an example of a multi-racial par excellence" (Vasil, 1971). Such a description was due to the extremely heterogeneous nature of the Malaysian society. By then, the society was divided along various dimensions; racially, religiously, regionally, linguistically, economically and socially. In every ethnic group, differences could be discerned economically, socially and regionally. The result of this was the emergence of a plural society defined by Furnivall (1956) as "comprising two or more elements of social orders which live side by side, yet without mingling into one political unit."[84]

During the British colonial rule, certain privileges were bestowed on the Malays over their non-Malay counterpart, such as quotas for public scholarships and employment in the civil service. Upon independence in 1957, the Constitution provided in Article 153 special rights for the Malays. The intent of Article 153 was to address the economic imbalance between the Malays and the Chinese. This initiative, however, did not result in the increase of Bumiputera's participation in the economy. At independence, it was estimated that Malays held only 2.4% of the economy. When Malaysia gained independence from British colonialism in 1957, it was said of the Malaysian political economy, that the Malays had

[84] Malays make up more than half of Malaysia's population and are mostly Muslim, yet they owned just above 19% of the economy, well behind minority ethnic Chinese. The government wanted Malays to own 30% of the economy by 2020.

political control but the economy was in the hands of the Chinese. This claim was an over-simplification as in the real sense one was aware that political and economic power were intrinsically intertwined so that not all Malays benefited from the Malays political power. Similarly, not all Chinese benefited from the Chinese economic power. It was evident that social and economic imbalances were developing along racial lines in the Malaysian society. These imbalances led to friction between the Malay and Chinese communities that ultimately reached its peak in 1969 resulting in the May 13 race riots. The table below shows the economic disparities of the society.

Table 10: Economic disparities of the Malaysian society

Early 1970s			
	Property owned by Malays and Chinese	**Ownership of companies in the Stock Exchange**	**Capital Ownership**
Chinese	More than 75%	89.2%	22.8%
Malays	Less than 5%	1.3%	1.5%

Source: SudhirAnand, Inequality and Poverty in Malaysia-Measurement and Decomposition, (Oxford University Press, 1983) p 30.

In terms of demographics, the Malays made up more than half of Malaysia's population of 26 million and were overwhelmingly Muslim, yet they owned just 19% of the economy, well below that of the minority ethnic Chinese. The objective of the government was for them to own 30% of the economy by 2020. [85]

6.2.2 Affirmative action policy in Malaysia

The immigrant population was large and gave a new life to the peninsula's economic activity to the great disadvantage to the indigenous Malays. The overall result was that, until late 1960s, some 85-90% of the new intelligentsia, the new intellectuals and professionals, consisted of mainly the immigrant communities, who had become permanent residents of

[85] In 1970, statistics showed that 67.6% of Malays and 19.9% of Chinese were employed in Agriculture. One has to note that in Malaysia, even though the Chinese were the advantaged group, they were not the colonial masters and this insulated the community, to a large extent, from moral imperative of restitution, although there was agreement that the inequalities that existed between the two groups and resulted in race being an issue was not sustainable.

Malaysia. Less than 15% of the intelligentsia was from the indigenous people, even though they formed the majority of the population. It was evident that the economic imbalances in the Malaysian society were developed along racial lines. Such imbalances led to clashes and violent riots along racial lines.

The inter-racial economic disparities became the source of political campaigns and these became a potentially explosive phenomenon underlined by sharp racial undertones that resulted in the violent incidents of the May 1969 riots. All these factors made remedial measures complex which required political will, strong tactful leadership and well-planned strategies. It was against this background that Malaysia's ambitious affirmative action policy was promulgated in 1971, under the title of the New Economic Policy (NEP) under the leader of Tun Abdul Razak. He was the leader that spearheaded the introduction of the affirmative action policy embodied by the NEP.

The NEP was promulgated in conjunction with the Second Malaysia Plan 1971-1975. Its main objective was to forge national unity. NEP was described as the last chance for the survival of the people and the country when it was launched in Parliament by Prime Minister Tun Abdul Razak. It contained a two-pronged development program. The first program's main aim was the reduction and the eventual eradication of poverty by raising income levels and increasing employment opportunities for all Malaysians, irrespective of ethnic background or race. The second program's main aim was accelerating the process of restructuring Malaysian society to correct economic imbalances, thus reducing and eventually eliminating the identification of race with economic functions. This process had a multiple effect, that is, modernization of rural life, a rapid and balanced growth of urban activities and the creation of a Malay community in all categories of commercial and industrial activities. The aim was that Malays and other indigenous people would partake fully at all levels of operations of the economic life of the nation. These two-pronged agendas could be summarized as distributive objectives and other restructuring objectives. Of these objectives, the most controversial one was the restructuring objective as it was intended to "*correct economic imbalances…to eliminate the identification of race with economic functions…to create a Malay commercial community*." This objective was clearly biased in favour of the Malays (and the other indigenous groups otherwise referred to as the Bumiputeras - sons of the soil) and received a fair amount of resistance from, albeit latent and indirect, from the non-Bumiputera. The restructuring objectives formed the basis of the affirmative action discussed in this chapter.

The government had the political will, determination and assertiveness to implement the restructuring targets as reflected in the Second Malaysia Plan. To achieve these objectives, the government set a timeframe of a period of 20 years from inception of the NEP to meeting the targets as outlined in the Second Malaysia Plan. The targets were as follows:

1. Malays and the other indigenous group referred to as the Bumiputera would own at least 30% of the total commercial and industrial activities in all categories and scale of operations;
2. The creation of a Malay commercial and industrial community by means of deliberate training and human resources development programs;
3. The employment pattern at all levels and in sectors, particularly the Urban and Rural Sectors had to reflect the racial composition of the population; and
4. The establishment of new industrial activities in selected new growth areas.

To achieve these targets, especially the objective of creating a Malay commercial and industrial community, the government's political will was very visible as it made clear that it would play a significant interventionist role. The Second Malaysian Plan stated further that the government would be directly involved in the establishment and operation of a wide range of productive enterprises and joint ventures with the private sector. This strategy by government for direct participation in commercial and industrial undertakings represented a significant departure from past practice.

To meet these objectives among the important measures taken to accelerate the creation of a Malay (Bumiputera) Commercial and Industrial Community was either to upgrade or create specialized agencies to perform special functions. An example of these agencies included: The National Trading Corporation; Council Trust for Indigenous People; State Economic Development Corporations (SEDCs); Urban Development Authority UDA), Federal Agricultural Marketing Authority (FAMA), Bank Bumiputera and Permadalan National Berhad (The National Equity Corporation, (PNB)). The result of these public enterprises created an economic activity that was much needed for the advancement of the objectives of the Second Malaysian Plan. The objectives of improving the Bumiputera's economic participation and benefits could not have been accomplished without active government intervention in the economy.

Human Resources development was another important component of the New Economic Policy in order to achieve the 30% target of Malays and other indigenous people managing and owning commercial and industrial activities in all categories and scale of operation. The government introduced a large scale program in human resource development, including the establishing a chain of junior colleges throughout the country, sending students overseas for tertiary education, instituting quotas for enrolment in local universities and granting scholarships and bursaries. A parallel elite education for Bumiputera was established and this consisted of residential junior science colleges and technical institutes. Firm affirmative action programs were implemented from about 1975, five years into the NEP program, when the government began sending students overseas for tertiary education because Malaysia then had few universities which that meant few qualifying prospective students, could be accommodated (Lee 1994). Also introduced in this regard that was important and significant was the employment restructuring of private companies of certain sizes by instituting a racial quota at all levels. To effectively implement this, government enacted a special legislative instrument called the Industrial Coordination Act (ICA) in 1975. Large companies were required to restructure their ownership to ensure Bumiputera's participation and ownership either through individual ownership or trust agencies.

It was evident that the task outlined in the NEP's two-pronged objectives, especially the restructuring targets presented some challenges. The Malays had high expectations of the policy improving their position. The non-Malays, especially the Chinese, were naturally concerned that the change of socio-economic status quo would upset their advantageous position adversely. To implement the Malaysia's plural society, affirmative action programs of the NEP, the right combination of strong political will, tactful leadership and proper strategies had to be present.[86]

[86]Noteworthy is the fact that before the NEP was formulated and decades before the independence of Malaysia, concerns had been repeatedly voiced about the plight of the Malays, calls were made for remedial measures from the authorities by Malay interest articulators, politicians, intellectuals and literary personalities. For example, the All-Malaya Malay Youth Congress in 1955 was convened to articulate the plight of the Malays and call for remedial measures to be taken by the government of the day. This action could be compared to the 1955 Freedom Charter, which articulated the socio, economic and political aspirations of the African National Congress and people of South Africa. South Africa and Malaysia are both societies with plural ethnic groups that co-exist in the same country. Both the 1955 Freedom Charter and the Youth Congress was prompted by a sense of realization that a new socio-economic order was needed and articulated aspirations for the future.

6.2.3 Brief analysis of affirmative action under the NEP from the period 1971-1990

In 1990, the year that marked the end of the NEP:

Rural development and urbanization

Rural development and urbanization improved remarkably during this period. Official poverty statistics in rural areas fell from 58.6% in 1970 to 21.1% in 1990. In 1970 there was relatively high unemployment and poverty and by the 1990, there was a significant reduction (Shireen 1998).

Education

At the start of the NEP program, the exclusion of Malays from higher education was most evident. In 1970, the University of Malaya was the only university and the Bumiputera's enrolment was significantly low. By 1986, there were more universities and the Bumiputera's enrolment had risen to 54% at the University of Malaya, close to 73% at the National University and 81% at the Agriculture University (Lee, 1994).

Employment

The growth in higher education rose significantly in the ranks of the skilled workforce, with Bumiputera making the most gains. The total registered professionals rose from 4.9% to 29.0% in 1990 (Lee, 2007). Overall, Bumiputera's participations in professions had increased. The number of accountants rose from 4% in 1970 to 28% in 1990 and architects from 4% to 24%, engineers from 7% to 35%, doctors from 4% to 28% (Funston, J 2001).

Equity redistribution and entrepreneurial development

In 1970, the share capital ownership was unequal, with Bumiputera owning 2.4% and non-Bumiputera holding 32.3% and 63.3% in foreign-interest control. By the 1990, there was a major shift and transformation had taken place: 20.3% Bumiputera, 46.2% non-Bumiputera; and 24.1% foreign interest (Lee, 2007). These results revealed that the 20% wealth in the hands of Bumiputera fell short of the intended 30%, but went a long way in ensuring the reduction of poverty in the population from 50% to 68% (Funston, 2001). The government believed the aim of having 30% equity participation in the hands of Bumiputera's had yet to be achieved (Malaysian Government, 1991).

The affirmative action policy did not end in 1990 as stipulated in the NEP. The NEP was followed in 1991 by the New Development Policy (NDP), which was mainly geared toward the assistance only to Bumiputera with potential, commitment and good track records rather than the previous overall measures to redistribute wealth and employment. The NDP was viewed as part of longer-term project known as Vision 2020. The plan of this program was to transform Malaysia into a fully industrialized country and to quadruple per capita income by the year 2020.

The Malay affirmative action was not without its critics. The policy created a Malay middle class and made millionaires of Malay fishermen's sons. Affirmative action policy in Malaysia under the NEP made considerable advances in the process of restructuring the society in the initial timeframe, 1971-1990. Many Malays took advantage of the education and urbanization routes to social mobility and higher income. However, there was a significant number of Malays who believed that over the last few years, the policy had strayed from its original aim of fostering competition among the groups and mainly enriched only a few small elite, while many rural Malays still lived hand-to-mouth in wooden huts. Malays had also complained that well-connected businessmen rather than deserving candidates had been the recipients of this affirmative action policy. Historian Khoo Kay Kim claimed that "*the implementation of the policy fell short of the intention. This policy was not just a policy intended to address major imbalances but also a political policy."* The Prime Minister Abdullah Ahmad Badawi of United Malays National Organisation (UMNO) party was under immense pressure to address the future of the race-based policy. The challenge the party was faced with was to juggle Malay interests while keeping minorities happy. "*It's a thick minefield for UMNO to maneuver its way through"* said OoiKeeBeng of the Institute of South East Asian Studies.[87] Even among all the criticism against the Malaysian Affirmative Action, few political experts believed that Malaysia would abandon it; instead the policy would likely return to its old aim of creating a Malay industrial community based on competition.

6.2.4 Lessons from Malaysia for South Africa

- Political will, determination and assertiveness to implement restructuring targets;

[87]Beng,O.K., Between UMNO and a Hard Place: The NajibRazak Era Begins, (Institute of Southeast Asian Studies, Singapore, 2010) pp 87-95.

- Affirmative action was geared towards a demographically, political dominant but economically disadvantaged majority, who were the Malays as compared to the Africans in South Africa;
- Tactful leadership and proper strategies were present;
- Political will was visible by government playing an interventionist role to establish and operate a wide range of productive and joint ventures with the private sector;
- The government created a Malay commercial and industrial community by means of deliberate training and human resources development programs;
- Establishment of industrial activities in selected new growth areas;
- Government participated directly in commercial and industrial activities;
- Government created or upgraded specialized agencies to perform special functions;
- Government granted scholarships and bursaries for study abroad;
- Government established many junior colleges;
- More universities were established by 1986 and growth in higher education rose significantly in the ranks of skilled workforce, with Bumiputera making the most gains;
- The employment patterns at all levels and in all sectors, particularly the Urban and Rural Sectors, had to reflect the racial composition of the population;
- The major challenge that the government was faced was juggling Malay interest, while keeping minorities happy; and
- The policy created a Malay middle class and made millionaires of Malay fishermen's sons. It made considerable advances in the process of restructuring the society in the initial period timeframe, 1971-1990.

In view of the lessons identified above, some in South Africa had already been implemented. Those listed below had not been implemented and would be recommended in the strategies. The same procedure would be followed for all countries

- Government participated directly in commercial and industrial activities;
- Government created or upgraded specialized agencies to perform special functions;
- Government granted scholarships and bursaries for study abroad;
- Government established many junior colleges;

- The employment patterns at all levels and in all sectors, particularly the Urban and Rural Sectors had to reflect the racial composition of the population;
- The policy created a Malay middle class and made millionaires of Malay fishermen's sons. It made considerable advances in the process of restructuring the society in the initial period timeframe, 1971-1990.

6.3 The United States of America

The United States of America is a federal constitutional/republic consisting of fifty states and a federal district. It was founded as 13 British colonies. The indigenous people of the United States are the American Indians who are of Asian origin and had inhabited the country for thousands of years. Slavery in the United States was introduced around 1619. Most slaves were of African origin and were brought from Africa as forced labour in the large plantations of high value cash crops, such as tobacco, cotton, sugar and coffee. The United States, throughout its history, had been inhabited by a number of interacting racial or ethnic groups. Historians claimed that there was no country in world history in which racism has been more prevalent for such long a time as in the United States. The problem of the colour line as W.E.B. Du Bois stated[88], still persist.[89] There have been important social distinctions among those of white or European ancestry, in addition to the obvious colour line structuring relationships between dominant whites and lower-status blacks, mainly of African origin, Indians and Asians. The most influential and durable conception of the relations among the racial groups viewed as significantly dissimilar has been hierarchical. The hierarchical model had its origins and most enduring consequences in the conquest of Indians and the slave trade during the colonial period. It also applied to European immigrants who differed in culture and religion from old-stock Americans of British origin. The hierarchical models have always been highly visible in the sharpest and most consequential distinction between white and non-white.

[88] DuBois, W.E.B., The Philadephia Negro, A Social Study, (Schocken Books, New York, first published in 1889, 1967)-This quote was taken from Introduction to the 1967 Edition written by E, DigbyBaltzell, pp. xxv.

[89] DuBois was an American civil rights activist, Pan-Africanist, historian, sociologist, author and editor. He rose to prominence for campaigning for increased political representation for blacks in the United States, in order to guarantee civil rights and the formation of a Black Elite for the progress of the African American. He tried virtually every possible solution to the problem of twentieth-century racism-scholarship, propaganda, integration, national self-determination, human rights, cultural and economic separatism, politics, international communism, expatriation, third world solidarity and so forth. He has been labeled the father of Pan-Africanism.

The Declaration of Independence of 1776, which is the founding document of the United States declares: "*All men are created equal; that they are endowed by the Creator with certain unalienable rights; among these are life' liberty and the pursuit of happiness*." Had this document been followed literally, it would have signalled the birth of a nation in which the criteria for equal citizenship regardless of race, colour and gender would have been membership in the human race.[90] The Constitution of the United States, founded in 1789, provided no definition of national citizenship that might have precluded the federation of states from discriminating on the grounds of race. The only reference to race in the Constitution is in Article IV, section 2 which states that: "*The citizens of each state shall be entitled to the privileges and immunities of citizens in the several States."*

A major reason in the United States for the African American to be greatly disadvantaged in comparison to their white compatriots was based on the long history of enslavement and racial oppressions. The call for reparations was based on a belief that African-Americans had been victims of past historical injustices caused by man, for which the entire society should assume responsibility. It was historically evident that former enslaved blacks contributed immensely to the economic development of the country that became a world super power, the richest in the world, a veritable land of opportunity for all Americans, native or foreign-born whites. It was then justifiable that the previously advantaged group, that is, the white beneficiaries, should pay for the uncompensated labour that laid the foundation for national growth and prosperity. These reparations could be viewed as some form of tax to pay the debt owed to former slaves. Affirmative action policies in employment and education would be another way to level the playing field and overcome the handicaps resulting from past discrimination.

The policy of affirmative action in the United States of America originated as a pragmatic response by those in the federal government for the advancement of disadvantaged US citizens by the use of quotas for enforcing employment provisions of the Civil Rights Act of 1964. The policy was aimed, in particular, at black-American and Hispanic-American ethnic groups, who were in the minority. It also took into consideration and covered gender discrimination.[91] It was the result of the civil rights movement of the 1960s which was meant

[90] Women were then generally subsumed under the category of men or man

[91] Gender relates to the relationship between men and women in society. Historians tended to forget the discrimination women suffered in the United States. The explorers were men, the landholders and merchant men, the political leaders men, the military figures men, which led to women is society being invisible. White women because of this invisibility had the same status as black slaves which meant women slaves faced a

to address the issue of education and employment and that it should be biased towards non-white ethnic groups to overcome the effects of centuries of prejudice against the ethnic minorities. The policy had challenged white –American domination in education, employment and government. The Civil Rights Act of 1964 legislated that any form of discrimination was illegal and established equal opportunities for all Americans regardless of race, cultural background, colour or religion. This act was the most sweeping civil rights legislation.

The affirmative action policy in the United States was implemented by federal agencies enforcing the Civil Rights Act of 1964 and three executive orders, that is, the Executive Order 10925 and Executive Order 11246.

Executive Order 10925 was the first Executive Order issued in March 1961 to refer to affirmative action. It was issued by President John F. Kennedy and created the Committee on Equal Employment Opportunity. The legislation made it compulsory that projects financed with federal funds take affirmative action to ensure that hiring and employment practices were free of racial bias. The order mandated that 15% of funds for public works had to be set aside for qualified minority contractors.

This Executive Order was followed by the Executive Order 11246 in September 1965 which was issued by President Johnson mandating the implementation of affirmative action goals for all federally-funded programs. This legislation moved monitoring and enforcement of the policy out of the White house to the Department of Labour. It compelled government contractors and educational institutions who were recipients of federal funds to develop such programs.

The next order to follow under the authority of Executive Order 11246 was the Revised Philadelphia Plan of 1969, based on an earlier plan of 1967. This Order was initiated by President Richard Nixon and was the most forceful plan to ensure and guarantee fair hiring practices in construction jobs. The reason Philadelphia was chosen as the test case, in the words of Assistant Secretary of Labour, Arthur Fletcher, was "*The craft unions and the construction industry are among the most egregious offenders against equal opportunity law….. openly hostile toward letting blacks into their closed circle.*" The Order included

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double oppression. The fact that women were child bearers also resulted in them being pushed back in society, not taking into consideration those who did not bear children, or too young or too old for that. Their physical characteristics became a convenience for men who exploited these to their advantage, subjugating them to servants, sex mates, companions and bearers-teachers-wardens of his children.

definite goals and timetable. President Nixon with regard to this Order said that "*we would not impose quotas, but would require federal contractors to show affirmative action to meet the goals of increasing minority employment."*

In 1970, President Johnson framed the concept underlying affirmative action in an eloquent speech to the graduating class at Howard University, asserting that civil rights alone were not enough to remedy discrimination:

"*You do not wipe away the scars of centuries by saying: now, you are free to go where you want, do as you desire and choose the leaders you please. You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, 'you are free to compete with all the others,' and still justly believe you have been completely fair .This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity-not just legal equity but human ability-not just equality as a right and a theory, but equality as a fact and as a result."*

The Equal Employment Opportunity Commission (EEOC) set up under the Civil Rights Act of 1964 lacked the staff to investigate discrimination claims in employment on an individual basis. It also lacked the legal basis to act effectively on behalf of complainants. The only way to implement the policy was to request government contractors to provide statistics on the racial composition of their labour force. It found that minorities' compositions were underrepresented in comparison to percentage of the local population. The Commission set numerical goals for minority recruitment to ratify this disproportion. Studies have documented important gains in racial and gender equality as a direct result of affirmative action since its implementation (Bowen & Bok 1998). The Department of Labour in the United States had assisted a vast number of people, calculated in the millions of minority members who moved to the workforce (Kravitz, D.A.). The policy of affirmative action in the United States had been directed at a minority group, while in South Africa and Malaysia it had been directed at the majority of the population who, because of various factors, found themselves at the end of social, economic and political spectrum.

Race was the underlying problem that the affirmative action policies were to address in the United States. Racism, rather than being self-correcting, was self-perpetuating as research has shown. The disadvantages to people of colour and the benefits to white people would be passed to each succeeding generation unless remedial action was taken (Kivel, P).

The disadvantages to people of colour coalesced into institutional practices which although racially neutral in intent, adversely affected people of colour. It was proven necessary to take positive steps to eliminate and compensate for the institutional effects of racism, even when there was no discernible discriminatory intent. In the US, as in most countries in the world, for example, most job opportunities were heard about through informal networks of friends, family and neighbours. Since there was co-relation between racism, segregated communities, schools and workplaces, the informal networks available to whites did not include people of colour and thus left them out of the loop for many jobs, advancement opportunities, scholarships and training programs. Federal law made it mandatory for the widespread and public advertisement of such opportunities to reach people from all walks of life in order to have an equal opportunity to apply for these positions.

Another area affirmative action addressed was preferential hiring programs. Research has shown that people of colour had often been excluded from job opportunities, overtly discriminated against, unfairly eliminated because they lacked appropriate qualifications or were deemed unqualified because of discrimination in education and housing. Judicial decisions on affirmative action rendered those qualifications that were irrelevant to one's ability to do the job illegal. These decisions also mandated that employment of people reflected the racial mix of the general population from which they were drawn. The policy did not in any way mandate the hiring of unqualified people. The only mandate was that in choosing between qualified candidates, the hiring preference should be for a person of colour where past discrimination favoured white people receiving preferential treatment.

The affirmative action policy and, especially, the use of quotas were challenged in a number of cases in the courts of the United States. The implementation of affirmative action, in most cases, was left to the discretion of the various organizations in the different sectors of government and industry. However, many such programs were challenged in the courts of law. The courts made several judicial pronouncements in the implementation of affirmative action programs. Substantial jurisprudence had been built by the judiciary in the implementation of the affirmative action program in the United States. Below is a discussion of some of the most prominent cases decided in this regard.

Regents of the University of California v Bakke, 438 US (1978)

This landmark Supreme Court case decided that affirmative action was unfair if it led to reverse discrimination. The Supreme Court imposed limitations on affirmative action to

ensure that providing greater opportunities for minorities did not come at the expense of the rights of the majority of the population. The case involved the University of California, Davis, Medical School, which had two separate admissions pools, one for standard applicants and another for minority and previously and economically disadvantaged students. The admission policy reserved 16 of its 100 places for minorities. The facts of the case involved were as follows: A white applicant, Allan Bakke, had applied for admission and was rejected twice even though minority applicants with far lower scores than his were admitted. The main point of contention raised by Bakke was that his not being admitted by virtue of his race was a violation of the Equal Protection Clause of the Fourteenth Amendment. The decision of the Supreme Court was that while race was a legitimate factor in the school admissions, the use of such inflexible quotas as set by the medical school was not. In this case, strict admissions quotas were struck down.

Fullilove v Klutznick, 448 U.S. 448 (1980)

In this case, in contrast to Bakke's case which struck down strict quotas, the Supreme Court decided that some modest quotas were perfectly constitutional. The court upheld a federal law requiring that 15% of funds for public works be set aside for qualified minority contractors. The court ruled that the narrowed focus and limited extent of the affirmative action did not violate the equal rights of non-minority contractors. The Supreme Court claimed that, in this case, there was no "*allocation of federal funds according to inflexible percentages solely based on race or ethnicity."*

Wygant v Jackson Board of Education, 476 U.S. 267 (1986)

This case challenged a school board's policy of protecting minority employees by laying off senior non-minority teachers first. The seniority of the employees was not taken into consideration when the laying off was considered, namely, the more junior minority employees. The Supreme Court's judgment against the school board, maintaining that the injury suffered by non-minorities affected could not justify the benefits to minorities. The court stated that "*we have previously expressed concern over the burden that a preferential layoff scheme on innocent parties. In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burdensome innocent individuals, they simply do not impose the kind of injury that layoff imposes. Denial of a future employment opportunity is not as intrusive as loss of an existing job."*

United States v Paradise 480 U.S. 149 (1987)

A federal court in July 1970 ruled that the State of Alabama's Department of Public Safety systematically discriminated against blacks in hiring: "*in the thirty-seven year history of the patrol there has never been a black trooper.*" The court ordered that the state reform its hiring practices to end "*pervasive, systematic, and obstinate discriminatory exclusion of blacks*." Fast forward 12 years and several lawsuits later, after this ruling, the department still had not promoted any blacks above entry level nor had they implemented a racially fair hiring system. The court ordered that this policy be ratified and ordered the implementation of specific racial quotas to ratify the situation. The court ordered that for every white hired or promoted, one black would also be hired or promoted until at least 25% of the upper ranks of the department were composed of blacks. The use of numerical quotas was challenged. However, in this case the Supreme Court upheld the use of strict quotas as necessary to combat the department's overt and defiant racism.

City of Richmond v Croson, 488 U.S. 469 (1989)

In this case, the use of racial quotas to implement affirmative action was challenged. This case involved affirmative action programs of setting aside 30% of city construction funds for black-owned firms at the state and local level. For the first time, affirmative action was judged as a highly suspect tool. The Supreme Court ruled that an "*amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."* The court claimed that affirmative action had to be subject to strict scrutiny and that it was unconstitutional unless racial discrimination could be proven to be widespread throughout a particular industry. The Court ruled that the "purpose of strict scrutiny was to smoke out illegitimate uses of race by assuring that the legislature was pursuing a goal important enough to warrant the use of a highly suspect tool. The test to be subjected to was that the means chosen "fit this compelling goal so closely that there is little or no possibility that the motive for classification was illegitimate racial prejudice or stereotype."

Adarand Constructors, Inc. v Pena 515 U.S. 200 (1995)

The court in this case applied the same strict interpretation of affirmative action as was applied to the case of City of Richmond v Croson above, but in relation to federal programs.

The Court again called for strict scrutiny in determining whether discrimination existed before implementing a federal affirmative action program. The question that had to be asked was whether discrimination existed before implementing a federal affirmative action program.

Two of the judges in case called for a complete ban on affirmative action, but the majority of judges believed that "*the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country' still justified the use of race-based remedial measures in certain circumstances."*

White House guideline on affirmative action, July 19 1995

In a speech by the then President Clinton, he stated that while the Supreme Court in Adarand case set "*stricter standards to mandate reform of affirmative action, it actually reaffirmed the need for affirmative action and reaffirmed the continuing existence of systematic discrimination in the United States*." In a White House memorandum on July 19, 1995 he called for elimination of any program that: (a) created a quota; (b) created preference for unqualified individuals; (c) created reverse discrimination, or (d) continued even after its equal opportunity purposes have been achieved."

Grutter v Bollinger 539 U.S. 306 (2003)

The facts of this case were similar to that of the University of Michigan. In this case, the judge drew an opposite conclusion to that of the Bakke's case and invalidated the law school's policy and ruling that "*intellectual diversity bears no obvious or necessary relationship to racial diversity.*" The case was taken to appeal and on May 14, 2002, this decision was reversed and the Appeals Court ruled that the admissions policy was in fact constitutional.

Parents Involved in Community Schools v Seattle School District No.1, 551 U.S. 710 (2007) decided together with Meredith v Jefferson County Board of Education

In both these cases, affirmative action suffered a setback when a bitterly divided court ruled, five to four (5-4), that programs which tried to maintain diversity in schools by considering race when assigning students to schools were unconstitutional. The Supreme Court declined the practice of assigning students to public schools solely for the purpose of achieving racial integration and refused to acknowledge racial balancing as a compelling state interest. In a 5-

4 opinion delivered by Chief Justice John Roberts, five judges held the view that the School Boards did not present any compelling state interest that would justify the assignment of school seats on the basis of race.

Ballot measure to Ban Affirmative Action goes before Voters

From the decided cases, an inference could be drawn that affirmative action was a highly contentious issue in the United States. In November 2008, a measure was proposed to ban affirmative action, that is, race and gender preferences by public entities. This ban was presented to the voters in the states of Nebraska. In the state of Nebraska, the ban of affirmative action passed with more than fifty percent, but voters in Colorado rejected the proposed ban.

Ricci v DeStefano No (07-1428) U.S. (2009)

The issue raised in this case was to find out what steps employers could take where avoidance of discrimination against one group could mean discrimination against another group. The Supreme Court ruled in favour of the fire-fighters, saying New Haven's action in discarding the tests was a violation of Title VII. Thus, they were discriminated against. The decision of the Court would have far-reaching effects on disparate impact jurisprudence. The decision clarified what employers had to take into consideration and the steps they could take in an effort to create a more diverse workplace, while avoiding Title VII[92] lawsuits alleging reverse discrimination that is, discrimination against traditionally advantaged groups.[93]

The examination of the judicial decisions above bore testimony to the role the judiciary had played in defining and implementing affirmative action in the United States. The courts had, from time to time, affirmed that there was a constitutional foundation for affirmative action in the United States as laid by Justice Powell in the Bakke's case and had endured since 1978.

[92] According to Title VII: Statutory protection against employment discrimination, an employer could not "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individuals race" 42 U.S.C.2000e-2(a)(i). Furthermore, an employer could not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." 42 U.S.C. 2000e-(a) (2), Furthermore , employers could not "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race" for promotion decisions 42 U.S.C.2000e-2(1)

[93] The Equal Protection Clause-U.S. Constitutional amendment, XIV states that 'no state shall….deny to any person within its jurisdiction the equal protection of the laws. The issue in this case was whether New Haven violated the Equal Protection Clause, which required a determination of the correct standard of review and an evaluation of the action under the standard. The decision of the Supreme Court in this case found to the affirmative.

Justice Powell who had the casting voice in that case, held that race could still be used as a positive factor in considering the qualifications of candidates for admissions as long as two criteria were satisfied: (i) in giving such preference to blacks, the University had to establish a direct connection between the claim for special consideration and a specific historical injustice such as the exclusion of blacks from admission to professional schools by virtue of race over the years (generalized claims of historical racism would not suffice); (ii) the argument for racial preference had to serve a compelling public interest or purpose. The Supreme Court had overall forbidden a numerical point system as well as statistical quotas, but held the constitutional validity to use race among factors to determine qualifications for university admissions and employment.

In conclusion, it has been noted by Fredrickson (2008) that the situation of African Americans, because of the application of affirmative action policies, had definitely improved to a certain extent over the last half century. To a much greater extent, there was evidence of high achievers rising to positions of power and prestige than in the past. To this growing African-American bourgeoisie, the privileges associated with class had overcome the liabilities associated with race to some extent. It was the poorer blacks, confined to the inner-city ghettos from which the middle class has emigrated to more affluent suburbs, who suffered from a double handicap of race and class that was difficult to overcome. Fredrickson, (2008) further stated that the current situation of blacks and other racialized minorities, such as Mexican Americans could not all be blamed on past injustices. There have been other contributory factors, such as the partial dismantling of the welfare state in the United States that had deprived the poor, who were mainly black and brown, of access to the social citizenship adumbrated by the New Deal[94]. They were the groups that continued to suffer discrimination in access to housing, employment, loans, medical care and education. The antidiscrimination laws were either inadequately enforced or failed to cover some of the more subtle ways in which racial bias is expressed.

[94] The New Deal was a series of economic programs enacted by the US Congress from 1933 to 1938 during the first term of President Franklin Roosevelt. They were a response to the Great Depression and were passed to provide relief for the unemployed and poor, recovery of the economy to normal levels and reform of the financial systems to prevent another depression occurring. Most historians refer to them as the three "R's", that it relief, recovery and reform.

6.3.1 Lessons from the United States of America for South Africa

- The call for reparations was based on a belief that African Americans had been victims of past historical injustices caused by man, for which the entire society should assume responsibility;
- The courts had, from time to time, affirmed there was a constitutional foundation for affirmative action.
- Discrimination was self-perpetuating unless remedial actions were undertaken;
- The policy of affirmative action in the United States of America originated as a pragmatic response by those in the federal government for the advancement of disadvantaged US citizens with the use of quotas for enforcing employment provisions of the Civil Rights Act of 1964;
- The policy had challenged white –American domination in education, employment and government;
- It had proven necessary to take positive steps to eliminate and compensate for these institutional effects of racism, even when there was no discernible discriminatory intent; and
- Substantial jurisprudence had been built by the judiciary in the implementation of the affirmative action program in the United States.

The following lessons recommended to be incorporated in the strategy:

- The policy of affirmative action in the United States of America originated as a pragmatic response by those in the federal government for the advancement of disadvantaged US citizens by the use of quotas for enforcing employment provisions of the Civil Rights Act of 1964;
- Substantial jurisprudence had been built by the judiciary in the implementation of the affirmative action program in the United States.

6.4 Brazil

Race-based affirmative action was established for the first time by several Brazilian institutions in 2001, following the United Nations Conference on Racism in Durban, South

Africa.[95] The implementation of such a program represented a major step in Brazil's process of democratization and nation-building which was contrary to the country's long-held ideology of racial democracy (Schwartzman, S 2010). This ideology which had been held since the 1930s claimed that racism and racial discrimination were minimal or non-existent in Brazilian society in contrast to other multiracial societies in the world. By the 1990s, as the country democratized and saw the emergence of a small but active black movement, the long held popular view of racial democracy was denounced, as it was alleged that racism was widespread. Evidence was produced of official statistics showing Brazil's tremendous racial inequality.

The ideology of non-racism in Brazil had led to the social and economic exclusion of members of a certain racial group.[96] Research showed that, in Brazil, whites earned 57% more than blacks with the same levels of education. Whites also attended on average of two years more school than blacks and more than 90% of the country's diplomats and judges were white.[97] These inequalities existed despite the country constitutional prohibition of racial discrimination. The Constitution of Brazil also guaranteed equal access to education. It mandated that the country aimed to "*promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination*."[98] The country's constitution further provided that international treaties had the force of law, and specified that "*The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the international treaties in which the Federative Republic of Brazil is a party*."[99] In conformity to this constitutional obligation, Brazil had ratified The International Convention on the Elimination of Racial Discrimination (ICERD), The International Covenant on Civil and Political Rights (ICCPR), The International Covenant on Economic, Social and Cultural Rights (ICESCR) and The Committee on the Elimination of Discrimination Against Women (CEDAW). In May, 2003, the government also established a

[95] The Durban Conference was the most comprehensive discussion undertaken by the international community concerning "Racism, Racial Discrimination, Xenophobia and Related Intolerance" and resulted in the Brazilian government making international commitments following the recommendations of the Conference.
[96] Committee on the Elimination of Racial Discrimination, Reports submitted by States Parties under Article 9 of the Convention, CERD/C/431/Add.8,16 October 2003.
[97] See id.
[98] Brazil Constitution, 1988, Art 3 (IV)
[99] Brazil Constitution, 1988, Art 208(V)

new ministry called the Special Secretariat for Devising Policies for the Promotion of Racial Equality.[100]

The economy of Brazil was based on agriculture and mining from the 16th through to the 19th century and depended on a large African-origin slave population. In a period of more than 300 years of slavery, the country was the world's largest importer of African slaves, which resulted in Brazil importing seven times more African slaves than the United States.[101] In 1888, Brazil became the last country in the Americas to abolish slavery, and had, by then, a population of mostly black and mixed-race. The abolition of slavery and its past consequences did not create a change in the country's racial inequality or the beliefs about black people. Throughout much of its history, Brazil's miscegenation and the fluidity of racial classification had largely been used as proof of its racial democracy.[102]

The absence of classificatory laws and high rate miscegenation in Brazil resulted in a racial continuum with racial categories from black to white and passing on to intermediate colours that were quite mixed. This mixture resulted in some Brazilian's racial classification being ambiguous, in some instances varying according to the classifier and the social context.

Most Brazilians acknowledged that there was racial prejudice and discrimination in their country. Research and statistical analyses of census and surveys highlighted evidence that racial inequality and racial discrimination existed in the labour market and other spheres of Brazilian society. Research showed that, on average, black and brown (mulatto and mixed race) Brazilians earned half of the income when compared to white Brazilians, despite the historical and contemporary absence of race-based laws.

In Brazil, the people in need for advancement were the Afro-Brazilian, who were poor. Research showed that the working class, that is the middle class, and the elite were almost entirely white.[103]The absence of Afro-Brazilians in the middle and the elite of society was

[100]Brazil Constitution, 1988, Art 5(LXXVII) (2)

[101] By the time Brazil ended slavery in 1888, the population was already colourful: 37% white, 44% brown and 19% black. It is estimated that today those with African origins make up almost 60% of Brazil's population- Wilson G, The Effect of Legal Tradition on Affirmative Action in the U.S. and Brazil. <http:www.garretwilson.com/essays/law/brazilaffirmativeaction.html

[102] During slavery and colonialism, Brazil experienced greater miscegenation or race mixture when compared to the United States because its European settlers were mostly male of Portuguese origin in contrast to the family-oriented colonization in North America. As result they sought out female mates among the African slaves, indigenous and mulatto population. In Brazil, when compared to the United States or South Africa, there were no anti-miscegenation laws which they were proud of.

[103] This has anthropological roots dating back to the days of slavery, when the first law in regard to ownership of land was enacted, 'Lei de Terras"(Law of Lands passed in 1850) which excluded slaves and their descendants from land ownership as they were not viewed as Brazilians, and thus denied citizenship. If slaves had access to

closely related to their poor representation in Brazilian universities. The government realized that if this poor representation was not addressed, it would become a melting pot of problems in the future. Until the implementation of affirmative action in 2001, non-white Brazilians were rarely found in Brazil's top universities. It was because of this that university admissions were found to be the most appropriate place for race-conscious affirmative action.[104] Race-based affirmative action policy was established and the result was that by 2008, roughly 50 Brazilians universities adopted the policy to address the issue of racial inequality. For the first time in Brazilian society, affirmative action policies brought the issue of racism into to the open for discussion. Previously, there had been little formal discussion of race, when other countries like the United States and South Africa were viewed as obsessive about race and racial difference.

Affirmative action policy in Brazil mandated many leading universities to admit a fixed percentage of non-white students and others to use a point system that awarded additional points to Afro-Brazilian students.[105] Quota systems were introduced for the indigenous people, the disabled and those who come from poorly funded public schools. As in any country where affirmative action was introduced, many controversies surrounded the policy. In Brazil, although some people acknowledged that the quotas were an imperfect tool,, The solution was to expand education opportunities to accommodate people who were otherwise disadvantaged, that is Brazilians, both black and white. To achieve redress, the process had to start from somewhere. Whatever happens with quotas, Brazilians were talking about the issue of race and discrimination and there was no going back.[106] The constitutionality of the

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ownership of land, they could have been competition with white farmers and thus their economic status elevated. The economist and sociologist Marcelo Paixao, from the UniversidadeFedera do Rio de Janeiro did a lot of research proving that the colour of poverty in Brazil is black. This information is published in his dissertation with accompanying data proving to this effect (Ramos, I.,2006).

[104] Brazilian universities have in the past depended on a standardized test, known as the *vestibular*. This is a competitive entrance examination and is the primary and widespread system used by Brazilian universities. The term vestibular comes from the word "vestibular" which means entrance hall in Portuguese. The original reason for its introduction was to prevent nepotism or any other form of unfair or beneficial selection of candidates. Until 1996 when the New Education Law was passed, it was, by law, considered as the only authorized selection method. In 2000 and 2001, the Rio de Janeiro state legislature passed laws mandating that two public universities under its jurisdiction reserve 50% of their admissions intake for applicants from public schools, 40% for students who identified themselves as black or pardo (mixed race) and 10% for students with disabilities. The first intake of these students under the quota system which began in 2002 were admitted in universities in 2003.

[105] In 2005, the combative chancellor in favour of the system, Naomar de Almeida Filho of the Universidade Federal da Bahia-UFBA supported by other academics showed for the first time that year that the percentage of black students which was 73.4% was close to the percentage of the university's black population.

[106]Bulbul- Supra

affirmative policy and the laws that followed led to an onslaught of legal challenges, with claims that they were unconstitutional.[107]

6.4.1 The Policy of affirmative action in practice in Brazil

Other than public universities, the affirmative action policies were implemented in other organizations: private universities; the Public Sector, and so forth.

Private universities

In 2005, private universities were mandated by law to reserve 20% of their admission intake for poor students and, as incentives, the universities were given a tax break.[108] President Luiz Lula da Silva reportedly said, '*We're not doing people favours; we're paying a debt built up over 500 years."*[109] Universities were encouraged by Law to provide scholarships for admitted students, something not done by public universities. As to whether this program would open doors to disadvantaged students who might not normally be able to gain entrance, remained to be seen.

Government

A good example of the implementation of affirmative action policy in the public sector was that of Brazil's Minister of Agriculture issuing an order in September 2001, mandating 20% of his staff to be black. In addition, he required that firms with which his ministry had contracts be made up of 20% African descendants and 20% women.[110]

[107]The most significant challenges was brought by the National Confederation of Education Establishments before the Supreme Court and discussed on Global Rights: Partners for Justice, Affirmative Action Affinity Group, Afro Descendants in Brazil and Uruguay, Background Information. Also discussed in Marion Lloyd.*In Brazil, A New Debate over Colour,* CHRONICLE OF HIGHER EDUCATION, February 13, 2004. The plaintiffs alleged that the laws violated the equal protection and access to education clause in the constitution and the principle of proportionality. It was argued that other less severe measures could have been used. Before the cases were decided, the laws were modified. The quota was brought down from 50% to 20% for people who identified themselves as black, 20% to those who had attended public schools and 5% for the disabled or other minorities. A requirement was made that all students admitted to these seats had to have a family income that fell below a certain maximum approximately $200 per month, or $110 for each working member of the student's household.

[108]See Andrew Hay, Brazil's Poor to Get Private University Quotas, REUTERS, Jan, 2005.

[109] See id.

[110] Global Rights, Partners for Justice, *Affirmative Action: A Global Perspective,* 2005, pp 20

The federal Supreme Court established similar affirmative action hiring targets to that of the Minister of Agriculture. This action was supported by the President of the Court who publicly declared that affirmative action programs were necessary to fulfil guarantees of equality.[111]

The Ministry of Justice also followed by making it mandatory for all firms that they would contract with to have 20% black or brown employees. The Labour Ministry followed suit and reserved 20% of its job training budget for courses for Afro-Brazilians.[112]

The Ministry of Foreign Relations followed suit in 2002 and instituted its own affirmative action program at the Instituto Rio Brance diplomatic training school by creating scholarships for students of African descent. It also created an internal mentoring system to provide guidance to students throughout their career to ensure effective success rate.[113]

In conclusion, racial equality policies were at the centre of the government of Brazil's agenda and the results were evident, even though the affirmative action policy was relatively new. President LuizInacio Lula da Silva, who was a former metalworker and trade unionist, chose a cabinet that included four blacks, including one in the most recently created position of Secretary for the promotion of Racial Equality[114]. In 2003, he established a National Policy for the Promotion of Racial Equality which established quotas for certain jobs.[115] The most prominent member of his cabinet was perhaps the Minister of Culture, Gilberto Gil, an internationally renowned musician, of African descent who was outspoken on issues of African cultural heritage. President Lula undertook to ensure that blacks would account for at least a third of the federal government within five years.[116]Dilma Rousseff succeeded President Luz Inacio Lula da Silva in 2011, making her the first female president of Brazil. Rousseff's presidential election represented an endorsement of the signature achievements of Lula's two terms in office: job creation and government social programs that moved nearly 30 million people into the lower-middle class as observed by Julia Sweig in an analysis for the Council

[111] See id, pp 21.
[112] See id, pp21.
[113] The mentoring system was as a result of the failure rate of the program. In 2002, it was discovered of the 20 scholarships recipients, only one student, a black woman passed the last of the three stage selection process. The number was increased to 40 in 2004. The internal mentoring program was implemented to ensure the success rate of the program was increased.
[114] Global Rights: Partners for Justice, Latin America Program, Affirmative Action Affinity Group, Policy Updates-Brazil, July 2003-April 2004.
[115] Brazilian Ministry of Foreign Relations-Institito Rio Branco Affirmative Action Program: Scholarships for Diplomacy descriptions and results-http://www2.mre.gov.br/irbr/cartabolsapremio.htm.
[116] There were many people who were opposed to affirmative action policy in Brazil. This opposition led to debate in call-in radio shows, in university classrooms and cafes. Many Brazilians believed that affirmative action was a U.S invention and had no prospect of success in Brazil. "We don't have the kind of anger between blacks and whites like you find in the U.S., Said, Zizimo Bulbul, a 65 year old filmmaker. "We have always had segregation here, but it's never been legally mandated like it was in other places. People say, "We never had the Ku Klux Klan, and wonder if this kind of acrimony is good for Brazilians."-ttp:www.washingtonpost.com/ac2/wp-dyn/A62685-2003June15?language=printer, accessed on the 08/10/2010

on Foreign Relations. It has been noted that Roussseff's ruling Workers Party and its allies also won a majority of seats in the lower house and Senate. This majority would assist with passing legislative proposals that were widely expected to continue Lula's policies. She has pledged to build on the accomplishment of her predecessors by maintaining strong economic growth and fostering greater social inclusion.[117]

6.4.2 Lessons from Brazil for South Africa

- Research and statistical analysis of census and surveys highlighted evidence that racial inequality and racial discrimination existed in the labour market and other spheres of Brazilian society;
- The country's constitution further provided that international treaties had the force of law;
- Racial equality policies were at the center of the government of Brazil's agenda and its effects were evident, even though affirmative action policy was relatively new;
- The absence of Afro-Brazilians in the middle and the elite of society was closely related to their poor representation in Brazilian universities. The government realized that if this issue was not addressed, it would become a melting pot of problems to come in the future;
- Affirmative action policy in Brazil mandated many leading universities to admit a fixed percentage of non-white students and others to use a point system that awarded additional points to Afro-Brazilian students;
- Quotas system were introduced for indigenous people, for the disabled and those who come from poorly funded public schools;
- Like in any country where affirmative action had been introduced, many controversies surrounded the policy. In Brazil even though some people acknowledged that the quotas were an imperfect tool, they were the solution to expand education opportunities to accommodate people who are otherwise disadvantaged, that is Brazilians, both black and white. To achieve redress, the process had to start from somewhere;
- The affirmative action policies were more race-based as more were geared toward the advancement of the Brazilian of African descent. Photographic evidence as proof of

[117]Rousseff inherited a country that benefited from 16 years of stable and capable governance as viewed by most analysts, under President Cardoso (1995-2002) and Lula (2003-2010).

- belonging to the designated group for remedial actions was a requirement as many people who looked white claimed African ancestors;
- In 2005, private universities were mandated by law to reserve 20% of their admission intake for poor students and, as incentives, the universities were given a tax break;
- Creation of scholarships for students of African descent and of an internal mentoring system to provide guidance for students throughout their career was implemented to ensure effective success rate;
- Mandating that staff in the Ministry of Agriculture had to be 20% of African origin (black) and further that firms doing business with the ministry had to comprise 20% African descendent and another 20% women;
- On the implementation of affirmative action policies, President Luiz Lula da Silva reportedly said, "*We're not doing people favours; we're paying a debt build up over 500 years";*
- Creation of the position of Secretary for the promotion of Racial Equality; and
- Establishment of a National Policy for the Promotion of Racial Equality which established quotas for certain jobs.

The following lessons recommended to be incorporated in the strategy:

- Quotas system had also been introduced for indigenous people, for the disabled and those who came from poorly funded public schools;
- Creation of scholarships for students of African descent and creation of an internal mentoring system to provide guidance for students throughout their career to ensure effective success rate;
- Companies to be given tax breaks for adhering to affirmative action policy
- Creation of the position of Secretary for the promotion of Racial Equality; and
- Establishment of a National Policy for the Promotion of Racial Equality which established quotas for certain jobs.

6.5 New Zealand

New Zealand was established as a British colony on 6 February 1840 through a treaty cession achieved by means of declaration and the unilateral actions of William Hobson, Lieutenant-Governor of the British settlements. Most of the immigrants who came from Britain were

escaping repressive laws in Britain because of the stratification of the society. Other significant immigrants were the Chinese, who came as gold prospectors and Dalmatian Kauri-gum diggers. The colonization of New Zealand was characterized by a period of Maori land alienation which resulted in a number of conflicts, for example, the New Zealand Wars of 1850s and 60s. These wars were about sovereignty and not race. The confiscation and land alienation were devastating for tribal communities and the wars reflected Maori resistance to the insatiable demand for land by the immigrants. These wars resulted in tribal communities being impoverished which severely affected the diet, health and living conditions of the Maori. According to historians, even though colonialism was not generally as overtly repressive or violent as other parts of the world, it had its negative effects. The process of colonization in New Zealand resulted in economic and social disadvantages for the Maori community.

Affirmative action in New Zealand had long been a public policy tool and had been specifically authorized by legislation in 1977.[118] Affirmative action in New Zealand was two pronged: First, it was used to justify the hiring and promotion of women;[119] second, it was a justification for special educational measures being provided for Maori and Pacific Island students.

In New Zealand, there were two different laws, with two different standards governing affirmative action. These laws were the: Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 (BORA).

6.5.1 The New Zealand Bill of Rights Act

This Act provides a wide range of broadly worded rights, including freedom from discrimination. The overall exception for limiting these rights is in Section 5 of the Act: "*reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*" The Act is applicable to all spheres of government, that is, the

[118] The Human Rights Commission Act 1977 gave legislative power to the Commission to approve such special plans to ensure the advancement of women and all were for education or training. The purpose as advanced by the Human Rights Commissioner was to achieve equality of outcome.

[119] It was actually surprising that in 1893, New Zealand was the first country in the world to give women the right to vote - a quarter of a century before Britain or the USA. Under the leadership of the Prime Minister and leader of the Labour Party then, Richard "King Dick" Seddon, pioneering systems such as old age pensions, minimum wage requirements and children's health services were implemented making New Zealand a world leader in social welfare.

legislature, executive and judiciary. It is also applicable to other persons or bodies exercising any "*public function, power, or duty conferred or imposed on them by or pursuant to law."* Section 19(1) provides that:" *Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993*."

6.5.2 Human Rights Act

This Act addresses the issue of discrimination only. It applies to all citizens of the country. The Act applies to employment matters even to those covered by BORA.[120] Section 21 outlines the grounds for discrimination: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation.

6.6 Affirmative action

Affirmative measures were governed by ostensibly different regimes under these two Acts. Mere differential treatment was *prima facie* unlawful under the Human Rights Act. This Act did not require it to be adverse discrimination to be unlawful. Affirmative action was legalized through an explicit exception in this Act. Section 73 provides for measures to ensure equality and states the following:

(i) Anything (…) which would otherwise constitute a breach of (…) this Act shall not constitute a breach if-

(a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of the Part of this Act; and

(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

Regarding affirmative action, Paragraph (b) was most relevant. Evidence was needed that the group in question would need assistance to achieve an equal place with others (of the

[120] In Part II of the Act, approximately 53 sections detail what was and what was not allowed in terms of discrimination. It also set up the Human Rights Commission and the complaints procedures.

community). Even though the term "community" is not defined in the Act, it was assumed for employment matters, it would be the community of relevant employees as can be seen in the following case:

Amaltal Fishing Co Ltd v Nelson Polytechnic (No 1) (1994) 1 HRNZ 369; Amaltal Fishing Co Ltd v Nelson Polytechnic (No2) (1996) 2 HRNZ 225

In this case, the Polytechnic had set aside all its 14 places in the fisheries training course for Maori applicants. Evidence was required to have been led in terms of Section 73 that Maori community needed or could reasonably have required assistance or advancement in order to achieve equal place with other members of the community. It was the reasonableness of the measure of dedicating all available places in the course for a need that was never advanced which the non-Maori complainant disputed.

6.6.1 The Bill of Rights Act

This Act also regarded affirmative action measures as remedial measures for those disadvantaged by discrimination more in-depth than the Human Rights Act. The relevant section in s 19 which provides:

> *19. Freedom from discrimination*
>
> *(1) Everyone has the right to freedom from discrimination*
>
> *(2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of the Human Rights Act do not constitute discrimination.*

It was clear that subsection 19(2) was inserted to make it clear that affirmative action programs would not constitute discrimination. In addition, this subsection applied to programs to assist persons suffering from actual past unlawful discrimination. It did not apply to those who were simply reasonably supposed to need assistance or advancement. Under section 19, it would be easier to prove that unlawful discrimination had occurred on the grounds of race than for sex or for other reasons For this reason the two Acts had to be read together as they had different views on the meaning of discrimination. [121]

[121]Richworth and others, The New Zealand Bill of Rights, Melbourne, Oxford University Press, 2003)

The huge challenge in New Zealand concerning affirmative action was that both Acts which were most relevant to the implementation of affirmative action did not define what discrimination entailed. The question how this lack of definition would affect the consideration of affirmative action measures was unclear and how it would depend on the approach adopted by a New Zealand court to the meaning of discrimination in BORA.

6.7 The Treaty of Waitangi

The Treaty of Waitangi was entered into by the British Crown and various Maori Chiefs on 6 February 1840. The treaty gave Maori ownership of their lands and other properties. It also gave Maori the rights of British subjects. The treaty is today considered the founding document of New Zealand despite the major controversy that surrounds the two versions, that is, English and Maori language as they differ significantly in interpretation.[122] The Treaty of Waitangi imposed an extra factor which had to be taken into consideration when assessing the legality of affirmative action measures for Maori. One of the core provisions of the treaty is article III which states that:

> *In consideration thereof of her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.*

The relationship between the Maori and the British crown, despite the treaty's guarantees and equivalent status conferred as signatory parties was marred by wars over land settlement and sovereignty, abrogated treaty rights and land confiscation and alienation. The Maori's political and economic position and interests were subordinate and marginal to the interest of the Europeans. There were huge disparities between the Maori and the Europeans in income, housing and education as identified by a report by the Department of Maori Affairs on 24 August 1960.[123] These disparities led to grievances and to the formation of the pan-tribal

[122] To the Maori people, the Treaty of Waitangi was understood as power sharing and governance contract between two parties, Maori people and the British Crown. The Maori understood it to mean they would be equal parties with the British in the cultural, social, economic and political life of New Zealand (Kingi 1994; Hanare 1994). In the interpretation, however, the English and Maori texts differed profoundly. In terms of the English version of the treaty, indigenous Maori ceded "all the rights and powers of sovereignty over their territories" to the Queen in exchange for "royal protection" and "all the rights and privileges of British subjects" The Maori version, said that the Maori ceded *Kawanatanga*(governance) not sovereignty and retained *rangatiratanga* (Chieftainship). The distinction is paramount for the Maori in that the fundamental difference between the two versions, from the Maori perspective, is that confirmation of chieftainship also confirms sovereignty, in return for a "*limited* concession of power."

[123]Lashely, M.E. *Implementing Treaty Settlements via Indigenous Institutions:Social Justice and Detribalization in New Zealand,* The Contemporary Pacific, Volume 12, Spring 2000, 5-10.

organization, NgaTamatoa (The Young Warriors) in 1968, by the young, urban-based and largely university-educated Maori. They drew attention to the Treaty of Waitangi and demanded the restoration of tribal lands and redress of grievances common to all tribes (Kingi 1994). In response to these demands and the heightened Maori activism, the Treaty of Waitangi was placed at the centre of New Zealand governance and policymaking. The result was the enactment in 1975 of the Treaty of Waitangi Act by parliament. The international principle of *contra preferentum* was invoked as a result of this Act giving interpretation to the Treaty, which held that where there was a divergence or ambiguity in a treaty, a provision should be construed against that party who drafted the document. The government of New Zealand accepted the tenets of international law, which state that: "*each of the parties to a treaty drawn up in two languages has the right to rely on its own version for purposes of interpretation, unless there is an express stipulation that only one of the texts shall be authoritative*." The act established the Waitangi Tribunal which consisted of up to sixteen appointed members and a chairperson (chief judge of the Maori Land Court). This tribunal was part of the Department of Justice and was staffed by civil servants. The main aim of the Tribunal was to inquire into claims lodged by Maoris and make recommendations to the Crown.

The Treaty of Waitangi imposed obligations in which extra considerations had to be taken into account when assessing the legality of affirmative action measures for Maoris. The government had developed measures designed to improve outcomes for Maoris based on two different grounds:

1. *The Treaty of Waitangi as an issue of partnership and governance including Maori capacity-building; and*
2. *Remedying disadvantage which is targeted not only at Maori but at all to who suffer the same disadvantage in disproportionately large numbers.*

Where the two overlap regarding the basis of the meaning of the grounds for affirmative action, was not clear, for example in terms of university admissions. Universities, in most instances, chose to target Maoris' special assistance because of the combination of the obligations under the treaty of Waitangi and current disadvantages they experienced in society.

In conclusion, the law of affirmative action in New Zealand needed to be clarified. To justify affirmative action measures, New Zealand would have to depend on the legislation that it fell

under: whether section 19 of BORA, or section 73 of the Human Rights Act. Justification for measures taken for affirmative action if a situation was covered by the BORA would depend upon the approach taken to the interpretation of the term "discrimination". The interpretation to be used could be formal or substantive and would affect how much scope there was for the operation of the justification in subsection 19(2) and in section 5. If the United States model was favoured then different tests would be adopted for different types of discrimination. The result would then depend upon the grounds of discrimination alleged: whether it was on the basis of race or gender, for example. Evidence had to be supplied of the disadvantage suffered by the target group seeking the adoption of any affirmative action measures. What should follow would be the chosen definition of the target group. In addition, the disadvantage to be remedied would have to be carefully defined. In terms of the Human Rights Act, the disadvantage to be remedied need not have been actually suffered by a particular person or group wishing to take advantage of the remedy. The test in this case that needed to be applied was whether they "*may reasonably be supposed to need assistance or advancement*". In contrast, in terms of the BORA section 19(2), affirmative action was designed to assist persons or groups of persons actually disadvantaged by unlawful discrimination. Under the Treaty of Waitangi, the role of consideration had to be considered to invoke affirmative action measures.

In New Zealand what was most notable about the law of affirmative action to address past injustices from an interdisciplinary perspective was that the result ultimately depended on the interpretation of the legislation that was adopted on the concept of equality or discrimination. The debate over the meaning of "equality" and "discrimination" did not only fall under the ambit of lawyers, but was an issue that had to be discussed on a wider scale, with an exchange of views between a wide range of disciplines in order to contribute to resolving those important social issues even if the debate fell within the jurisdiction of the legal sphere.

6.8 Lessons from New Zealand for South Africa

- Affirmative action in New Zealand had long been a public policy tool and had been specifically authorized by legislation since 1977;

- Affirmative action in New Zealand was two pronged: First, it was used to justify the hiring and promotion of women; second, it was used as a justification for special educational measures being provided for Maori and Pacific Island students;
- In New Zealand, there were two different laws, with two different standards governing affirmative action. These laws are the: Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 (BORA). Affirmative measures were governed by ostensibly different regimes under these two Acts;
- Affirmative action was also governed by Treaty obligations-The Treaty of Waitangi had been placed at the center of New Zealand governance and policymaking;
- Justification of measures to be taken for affirmative action if a situation was covered by the BORA would depend upon the approach taken to the interpretation of the term "discrimination" as what constituted discrimination was not defined in both Acts;
- The law of affirmative action to address past injustices from an interdisciplinary perspective was that the result ultimately depended on the interpretation of the legislation that was adopted on the concept of equality or discrimination; and
- The debate over the meaning of "equality" and "discrimination" did not fall within the ambit of lawyers only, but was also an issue that should be discussed on a wider scale.

The following lessons recommended to be incorporated in the strategy:

- Affirmative action in New Zealand was two pronged: First, it has been used to justify the hiring and promotion of women; second, it has been used as a justification for special educational measures being provided for Maori and Pacific Island students;

6.9 Observation

Comparisons involving the United States, Malaysia, Brazil, and New Zealand had to rest on three pillars. First, all of these societies were as a result of European expansion and subsequent colonization of the non-Western world around 1500. The English, the Dutch and the Portuguese established colonies that displaced, marginalised or subordinated indigenous people. Second, each of these colonies imported non-European slaves or other race groups to meet the demand for labour that the settlers found they were in need of as a result of the indigenous groups being unable or unwilling or deemed unsuitable. A master-servant relationship between settlers and indigenous people was created. Third, each of these colonies

applied a divide and rule strategy, in which the different races were separated by race, economic, social and political status. In South Africa, the United States, Brazil and New Zealand a colour code developed at a very early age to determine status. In all these countries, society's ethnic hierarchy was established by the colonial state and the original white settlers who would continue to exist long after these states became independent, after the abolition of slavery or after self-determination.

From country to country, significant variations had been found in the way racial groups were defined and how their subordination was justified. Significant variations were also evident in the nature and rigidity of the racial order and in the way historical developments or changing conditions adjusted, strengthened or weakened the primary hierarchies. In the current comparison of race and ethnicity, there was one dominant assumption: race was a social and cultural construction and not a fact of nature. What was evident in these case studies was that the legacy of discrimination and attitudes to race was difficult, if not impossible to overcome or fully transcend when racial orders were being reconstructed or reinvented. Historical burdens inherited on the issue of race could be lightened, but it would be Utopian to think that it could be entirely eliminated.

Malaysia's affirmative action policies were the most comprehensive of these case studies. In Malaysia, the policies were designed to protect the interest of the social and economically disadvantaged Malay majority against the Chinese minority which was more dynamic and much wealthier. These policies had a more unmistakable ethnic content. In the United States, the affirmative action policies had a more race and gender content as they were designed to protect the interest of the African and Mexican Americans and women in general. The United States affirmative policies had a restricted scope; they focused on university admissions and employment equity only. They were designed to provide preferential support more to the African Americans who were of slave descent and Jim Crows laws, which were specifically designed to suppress people of colour in the United States. In Brazil, The situation was more race based as it was more geared toward the advancement of the Brazilian of African descent. In addition, there was a requirement for photographic evidence as proof that the people definitely fell within the designated group for remedial actions. In New Zealand, the distinctive feature of the country's reservation policies was their focus on evidence needed for the disadvantages to be remedied. The target group for remedial action would have to be

explicitly defined, as would the disadvantage to be remedied. Research in New Zealand showed despite the affirmative action measures regarding the Maori and that they enjoyed some measure of advancement, the reality was that significant socio-economic gaps still existed between the Maoris and non-Maoris, in terms of education, health, income and labour market status. The broad-based policies geared towards the Maori community which had gone a long way in closing the gaps (such as fisheries settlement, other treaty settlements etc.) risked the major beneficiaries being the considerable number of Maoris already empowered by virtue of having jobs, skills, high income and good prospects. [124]

A common feature of the lessons learnt from the affirmative action policies in the four countries was that these policies were all intended to be temporary features of social engineering programs. In all these countries, they developed vested interests with a strong political will which prevented their abolition, even where they had proven to patently harmful to a country's social harmony and economic advancement or where the original circumstances which justified their introduction had long since changed for the better and could no longer be used to justify the perpetuation of such policies.

Another common feature regarding these policies was that they often changed in character in the course of time. Affirmative action was not a cure-all. It would not eliminate racial discrimination, nor would it do away with competition for scarce resources. What cannot be disputed in this Chapter was that affirmative action could ensure that everyone had a fair chance once the playing field had been levelled to the economic resources available in societies. Even in a case of past discrimination not being a factor, a recipient in administering a program could take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular ethnic group, race, colour or national origin. The common feature that had been highlighted in this chapter was that, in most cases, as in Malaysia and South Africa, affirmative action policies' main aim had been to seek to uplift race groups. However, in South Africa and the United States, historical disadvantage in principle also applied to women and the disabled.

[124] This argument had been advanced by Simon Chapple in a Labour Markets Bulletin of New Zealand. Throughout the 20th century, substantial absolute and relative socio-economic gaps still existed in most areas of the socio-economic sectors

Another common lesson that had been highlighted by these comparative analyses was that all these countries had implemented some of the world's most progressive, sustained and successful founding documents and legislations for rendering reparative justice[125], for example, the Constitution had proved inadequate in remedying the intertwined problems of economic inequality and chronic poverty of the previously disadvantaged people of these countries. All needed distributive instruments, namely targeted policies, to embark on a process of levelling the social and economic playing field.[126]

Malaysia constituted a useful example on to how much policy makers could learn and how best policies could be managed, from other countries' experiences of affirmative action. What the analysis showed was that affirmative action in other countries had been an attempt to redress the historical disadvantage suffered by minorities of the population. Malaysia is similar to South Africa in that, the affirmative action program was the result of a demographically and politically dominant, but economically disadvantaged majority of the population. The affirmative action program was launched as a measure to level the playing field and to advance the majority's economic position. Malaysia also had a similar level of economic development to South Africa which countered the argument that affirmative action was a luxury that only rich countries could really afford. The Malaysian case study demonstrated that affirmative action was not the reserve of the rich countries and that developing countries could also undertake such action, as long as there was economic advancement and opportunities for all are being created.

6.10 Conclusion

In all the countries researched in this chapter, the conclusion was that effective transformation policies needed to be enforced, strong incentives provided and good monitoring introduced to ensure the desired outcome was obtained and that low-skilled citizens without work and living in high density areas were empowered to acquire better socio-economic outcomes. The one paramount lesson learnt from the comparative analyses

[125] Reparative justice was applied to breached rights to property caused by dispossession in most cases.

[126] In all these countries, the introduction of affirmative action program had a significant effect on the changing educational demographics, increasing the number of the previously marginalized in universities through a strict set aside system that provided for the admissions and subsequent hiring, thus leveling their economic participation. In all these countries the affirmative action policies had not been without its critics, but despite all this, it remained clear that they were often critically needed to make real any promises of equality.

was that implementation of affirmative action policies was a process and not an event. It required long-term plans to be effective and for its impact to be felt in a country.[127]

The next chapter summarises the local and international scan. The results and analyses of the scans were modelled in a matrix. The results would inform the strategies to be adopted in the future concerning the transformation of the mining industry to chart the course to a strategy beyond 2014.

[127] In all these countries the preliminary effects of affirmative action could be noted, e.g. in Malaysia the impact of the NEP could be seen in the number of Malays driving in the streets of Kaula Lumpar in luxurious cars, even though in the 20 years of its implementation the set targets to redress the past had not been achieved. In Brazil many of the students admitted in accordance with the quota system remained unable to attend school due to a lack of financial resources and a dearth of scholarships funds-Global Rights Partners for Justice- *Affirmative Action, A Global Perspective.* 2005.

CHAPTER SEVEN

COMPARATIVE ANALYSIS OF INTERNATIONAL OBSERVED PRACTICES AND SOUTH AFRICA

7.1 Introduction

Chapter six discussed international practices of countries that had undergone a transformation agenda to redress racial discrimination similar to South Africa. It researched countries that enacted affirmative action strategies to deal with historical disabilities and the measures implemented to ensure that previously disadvantaged categories of people, on the basis of race, were advanced in professional, economic, political and social categories. In investigating the international scan, one important distinction that could not be overlooked was that, in some countries - for example, the United States of America, the affirmative action agenda applied to the minority. In South Africa, the action applied to the majority, an important and undeniable significant factor. In Malaysia, the transformation agenda was geared towards the Malays referred to as the "son of the soil" who were the indigenous and majority people when compared to the Chinese and Indians. The significance of this information proves that a nation could not develop to its ultimate capacity if a section of the population is oppressed, whether the minority or in the majority. Mainstream economic theory claimed that economic, particularly, market discrimination had a number of effects; it hampered economic growth, induced income inequality and created potential for conflict among the societal groups by not granting rights to opportunity to discriminated groups (Birdsall & Sabot 1991). South Africa and Malaysia shared the rare commonality of implementing affirmative action agendas in favour of a majority group of people who were politically dominant and economically disadvantaged. Malaysia, in implementing such a policy with much celebrated success, was considered the mentor as it preceded South Africa in the implementation of affirmative action.

Other countries that had pursued affirmative action measures to address the various forms of oppression and inequity that marginalized groups in societies were investigated for the purpose of this research. Affirmative action, in an increasingly globalised world and economy, was, furthermore, seen of value and used by corporations and their clients who saw

the benefits and competitive advantages of a workforce comprised of people from diverse backgrounds with a wide variety of skills and cultural competencies. A number of countries around the world, with different histories, ideologies and populations have adopted various forms of affirmative action to advance social justice and the full use of their citizens. This chapter scrutinizes the research findings of South Africa's transformation agenda in the mining sector in comparison to the transformation agenda of other countries. In addition, the resulting transformation agenda policy instruments were compared and analysed. It was acknowledged that while studies in other countries covered the whole economic sector, the case of South Africa was analysed at the mining sector level. The principles remained the same as the mining sector was essentially part of the national economy. The result of the analyses and research findings - the basis of this chapter - would inform the strategies of the transformation agenda beyond 2014.

7.2 Research Findings

In Chapters two and three of this thesis, the research investigated the local scan and touched on the unacceptable position in the mining sector and the reasons why the industry had to be transformed. The findings were that the implementation of the transformation agenda was not a new concept in South Africa as it had been previously implemented by the National Party after World War 11 in alleviating the plight of the Afrikaner to address the social and economic issues during that period when compared to the situation under the British. The policy of apartheid was introduced as a strategy to solve many contentious issues that threatened the Afrikaner as a nation, both socially and economically. The Afrikaner Model - its intentions and actions - was to gain political and economic power.

The National Party's agenda brought to the fore before the 1948 elections was to create a new socio-economic order. The agenda comprised three main elements: first, to ensure the restructuring of the economy to liberate the Afrikaners from foreign capitalism by creating a system of Afrikaner volkkapitalisme (National capitalism) and to adapt this system to the needs of the Afrikaner folk; second, to implement the policy of apartheid as a solution to the native problem. This policy was to ensure the purity of the Afrikaner folk and to avert the conflict that was an integral part of racial integration. The results were the structured exclusion of black people from economic power. This process began in the late 1800s and lasted for over a century, up to the 20th century. It began first with the dispossession of land

and continued with the enactment of the first Mines and Works Act, 1911, the Land Act of 1913 and culminated in the Apartheid laws, passed after 1948. Third, they wanted to solve the problem of poor white Afrikaners and remedy the alleged injustices occasioned by British imperialism by implementing a comprehensive welfare policy.

The first 46 years of National Party rule resulted in the restructuring of the economy by creating state corporations. These state corporations became not only an important and even strategic instrument for industrial development in general, but also contributed to increasing the share of Afrikaner capital and Afrikaner entrepreneurship in the industrial sector.[128] The formation of ESKOM[129] and ISCOR (The South African Iron and Steel Corporation) enabled access to markets dominated by foreign companies and solved the inherent problem of white Afrikaner unemployment. The Industrial Development Corporation (IDC) was created as a vehicle to attract direct foreign investment in local ventures. Its original task was to ensure the funding of public corporations in partnerships with private business. Subsequent to that, the Industrial Development Corporation Act was amended, to enable the IDC to establish business undertakings on its own, rather than assist private enterprises.

The state corporations became an important tool in the National Party's economic and racial policies. The NP government's strategy was to gain control over strategic industries and to create state corporations in which a new generation of Afrikaner businessmen could gain entrepreneurial experience in a protected environment. SASOL (international integrated chemical and energy Company) and FOSCOR (The Phosphate Development Corporation) were created in 1950 via the IDC. The Industrial Conciliation Act of 1956 protected white skilled workers in state corporations. It was worthy to note that no English-speaking whites were appointed to the management of these state corporations.

When the international arms embargo was imposed against South Africa in 1963, the Armaments Corporation (ARMSCOR) was established. ARMSCOR played a vital role in protecting and perpetuating the apartheid regime during the 1970s and 1980s. These State corporations also resulted in the public sector's share of the economy almost doubling during the first 25 years of the NP rule. Between 1946 and 1973 the share of state corporations in gross fixed investment rose from 6.2% to 11.5%, while that of the private sector declined

[128] Tereblanche, S (2002)pp 344.
[129] The establishment of Eskom in 1923 was as the Electricity Supply Commission (ESCOM), in terms of the Electricity Act of 1922. The Afrikaans version of the name was Elektrisiteitsvoorsieningskommissie (EVKOM), in 1986, the English and the Afrikaans acronyms were combined and the company became Eskom.

from 63.5% to 53% (O'Meara 1996: 79). The result was that the state became the largest employer in South Africa, accounting in 1980 for 34% of economically active whites (and an even larger percentage of Afrikaners), 16% of coloureds, 14% of Africans, 12% Asians and, including employment in the state corporations such as ISCOR (Lipton 1986: 235).[130] The NP developed and modelled these state enterprises/corporations on the gold mining industry and because of that the South African economy attained a unique character.[131]

The results for each country, for ease of reference and comparison, have been clustered into six themes. The chosen themes emerged from the issues that were raised and needed to be addressed to ensure effective transformation in these countries. They were taken from the examination of the final transformation agenda document of each country. These themes are: Political democracy (Political Will); Institutional Framework; Economic and Social issues; Human Resources Development; Transformation management and Identifiable milestones for transformation and Strategic Outlook.

7.2.1 Malaysia

The Federation of Malaysia was established in 1963 and consists of 13 states. Malaysia is a constitutional monarchy based on the British Westminster model, a legacy of British colonialism. Politically and officially, the country is divided into two categories: Bumiputera and non- Bumiputera. This divide was evident in all aspects of Malaysian life from politics to food to university admissions. The New Economic Policy (NEP) or DEB for DasarEkonomiBaru in Malay was promulgated to eradicate poverty irrespective of race and to reorganize society in order to eliminate the identification of race from the economic function in society. It was viewed as an ambitious and controversial socio-economic restructuring affirmative action program. The NEP commenced in 1971 and officially ended in 1990, even though it was still operational as the Malaysian government refused to abandon it because of the credibility attached to the country's successes in achieving some measure of restructuring of the Malaysian society.[132] Malaysians still refer to the NEP in the present

[130]Tereblanche, S (2002) pp 344

[131] What is meant by unique character was that the South African economy was contradictory as on the one hand, it was the most developed economy in Africa and on the other, it had major socio-economic problems, most affecting black Africans.

[132] The celebrated success was a subject of heated debate in Malaysia. The NEP's target of 30% share of the economy in the hands of the Bumiputera has not been achieved according to government statistics. One cannot deny some level of success though as evidenced by the number of Malays seen driving luxurious cars in the streets of Kaula Lumpar, a rare sight before the NEP.

tense because many of the tangible economic benefits the policy offered to the 'son of the soil' are ongoing.

The summary of the transformation status of Malaysia follows in the six themes:

Political democracy

- Promoted all fundamental issues because of the existence of political will;
- Enacted efficient legislations and provide a conducive environment to transformation;
- Played a significant interventionist role;
- Held free and fair elections, even though the ruling party (Barisan National) sometimes used repressive laws to restrict the opposition and control the media;
- Effectively empowered to govern since the elected rulers had power over the all arms of government;
- Addressed growing discontent as years of affirmative action had left a trail of failed Malay tycoons and struggling Malay-managed conglomerates; and
- The national development policy to prevent Malays risks from becoming a flash point that would split the politically dominant Malays, disturb the peace and weaken the economy.

Institutional framework

- Discretionary executive authority; and
- Government pressurized to address future of the race- based policy.

Economic and social issues

- Ensured that the economic and social disparities were addressed;
- Eliminated the identification of race with economic functions;
- Lost some of its best and brightest because of racial quotas that ensured that non-Malays were kept out of universities;
- Developed strategies to support Malaysians Bumiputera's citizens participate in all sectors of the economy;
- Actively supported implementation of NEP and made it imperative that companies adopted it;
- Ensured industry complied with all relevant legislation that enabled equal opportunity for all Malaysians;

- Established and operated a wide range of productive enterprises and joint ventures with the private sector;
- Foreign investment fell as investors baulked at rules that kept strategic assets either in Malaysia or government hands;
- Had to address the complaints by Chinese and Indians of being marginalized as the economic pie shrank; and
- Needed to address delicate race relations in Malaysia as the economic growth rate had seen a huge reduction from the 1980s.

Human resources development

- Encouraged and facilitated development of skills to meet the ultimate requirements and challenges of all sectors of the economy of the country;
- Provided scholarships for international studying to meet the ultimate requirements and challenges to effective transformation;
- Facilitated the building of schools, colleges and universities;
- Introduced significant employment restructuring of private companies of certain sizes by instituting a racial quota at all levels;
- Ensured that the employment pattern at all levels and in sectors, particularly the Urban and Rural Sectors reflected the racial composition of the population; and
- Created a Malay commercial and industrial community by deliberate training and human resources development programs.

Transformation agenda

- Not likely to abandon affirmative action policy, instead likely to return to the original aim of creating a Malay industrial community based on competition;
- Identified milestone for transformation;
- Established quotas for public scholarships and employment in the civil service;
- Promulgated the NEP in conjunction with the Second Malaysia Plan 1971-1975 and its main objective was to forge national unity;
- Introduced employment restructuring of private companies of certain sizes by instituting a racial quota at all levels;
- Enacted a special legislative instrument to this effect called the Industrial Coordination Act (ICA) in 1975;

- Rural development and urbanization; and
- Equity redistribution and entrepreneurial development.

Strategic outlook

- Economic transformation;
- Ensured that the implementation of future policy took into account the mistakes of the past and avoided the concepts of making individuals rich;
- Needed strong policies and key reforms to face its political and economic challenges;
- Required a transformation strategy as the Malays, the policy's target group still constituted the poorest group in Malaysia;
- Needed to strengthen the rule of law and the judiciary;
- Strove to strengthen political and interethnic dialogue;
- Actively advanced reform and improved Malaysia competitive capacity with reference to its economic output strength; and
- Needed to strengthen the Malaysian education system to generate social and economic development in order to compete with other emerging countries in the region, such as China and India.

Examination of the above themes towards a transformation agenda in Malaysia showed that it contributed to socio-economic advancement of the Bumiputeras when measured in terms of the national poverty level, infrastructural development in the educational level and significant ethnic heterogeneity. A number of factors suggested that Malaysia's transformation process was not yet finalized and subsequently, the Malaysian government refused to abandon the process and all indications point to the fact it would not be abandoned, instead, affirmative action would likely return to its original aim of creating a Malay industrial community based on competition. Ethnic Malays dominated the country's key political institutions, such as parliament, cabinet, the sultans and the armed forces. This domination led to constant criticism from the Indians and Chinese, who constituted about 40% of the population as evidenced by the success of the opposition parties in cultivating a multiracial constituency during the last general election of March 2008.

Malaysia has gone a long way in achieving its transformation agenda because the government invested substantially in the educational system, even though statistics showed that to compete with other emerging countries in the region, such as China and India, the country

still needed to increase its investment in the education sector to generate social and economic development. Overall, under the NEP, the transformation policy provided guidelines for other countries to implement in order to achieve some measure of effective transformation. The National Economic Policy (NEP) was deemed as one of the longest and most developed forms of racial action in the world as it promoted structural changes in various aspects of life from education to economic to social integration.[133] There was still high expectation among political and civil society actors in regard to transformation of the Bumiputeras as evidenced by the outcome of the last election of March 2008.

7.2.2 The United States of America

The focus of affirmative action in the United States was on school admissions, employment and government and corporate contracts. Its intended beneficiaries were disadvantaged ethnic minorities, women, people with disabilities and veterans. The affirmative action policy in the United States practically pioneered affirmative action and attained international publicity because of the numerous court cases and that it had been contested on constitutional grounds. The emergence of the black civil rights movement was pioneered in the United States. After the abolition of slavery, the first task was desegregation followed by affirmative racial integration in society, in general, and education, in particular. The United States Supreme Court had, from the beginning, guided this process by issuing decrees against those not willing to change and thus dragging their feet on implementing desegregation laws. In addition, it provided an interpretation to the constitutionality of the laws. These measures resulted in America being regarded as the mother of affirmative action that gave hope to the aspirations of oppressed groups in the world, thus providing an impetus for social change. The myth existed that affirmative action in the United States was a domestic policy that reflected an obsession with races peculiar to America. This myth could not further be from the truth as affirmative action was an international phenomenon and fully supported by human rights principles, including the International Covenant for the Elimination of Race Discrimination. Several states banned various forms of affirmative action by government organizations.

[133] Since its inception, under the leadership of Tun Abdul Razak, there had been persistent attacks on the policy from other members of the Malaysian society, claiming it gave the Malay an unfair advantage and was self-defeating as it arguably rendered Malaysia less economically competitive compared to its neighbours in the region and entrenched structural privileges not based on merit. The policy, according to the government's own study, had yet to achieve its target of equity redistributing 30% of national wealth to the Malays. However, there were studies which contradicted this. In addition, there were questions pertaining to each study's methodology.

The United States affirmative action's policies are hereby discussed in the six themes as had been done with Malaysia:

Political democracy

- Promoted the advancement of disadvantaged US citizens by the use of quotas for enforcing employment provisions of the Civil Rights Act of 1964;
- Addressed the issue of education and employment ;
- Allocated resources to fight address affirmative action; and
- Implemented remedial policies and government action.

Institutional framework

- Executive authority;
- Judicial authority; and
- Legislative authority.

Economic and social issues

- Required government contractors to take affirmative action toward minority employees in all aspects of hiring and employment;
- Ensured and guaranteed fair hiring practices in construction jobs;
- Ensured monitoring and enforcement of affirmative action programs;
- Eliminated and compensated for these institutional effects of racism; and
- Addressed preferential hiring programs.

Human resources development

- Mandated the hiring of qualified people into employment positions;
- Ensured that people of colour were not discriminated against with regard to employment opportunities, advancement opportunities, scholarships and training programs;
- Federal law made it mandatory for widespread and public advertisement of such opportunities to reach people from all walks of life;
- Ensured equal opportunity for all American citizens.

Transformation agenda

- Mandated that employment of people reflected the racial mix of the general population from which they were drawn;
- Mandated that in choosing between qualified candidates, the hiring preference should be for a person of colour when past discrimination had favoured the white people receiving preferential treatment;
- Encouraged the courts to make judicial pronouncements in the implementation of affirmative action programs;
- Harmonised admissions quotas to universities;
- Ensured that reverse discrimination is avoided; and
- Reformed hiring practices to end "pervasive, systematic, and obstinate discriminatory exclusion of blacks".

Strategic Outlook

- Substantial jurisprudence built by the judiciary in the implementation of the affirmative action program in the country;
- Encouraged the judiciary to play a huge role in defining and implementing affirmative action in the country;
- Ensured that affirmative action did not lead to reverse discrimination;
- Ensured that providing greater opportunities for minorities had not come at the expense of the rights of the majority of the population; and
- Ensured that while race was a legitimate factor in the school admissions, the use of inflexible quotas was not.

The affirmative action policy instruments indicated the addressing of the unique history of discrimination against African Americans. The aim of these policies was to ensure that the historical and social reality that minorities, blacks included, had been subjected to for centuries, was reversed. The policies aimed to ensure the upward mobility of the groups. The affirmative action programs were geared to raising the social and economic sphere of women and minorities by providing them with employment and opportunities for advancement. The term "affirmative action" was first introduced by President Kennedy in 1961 as a method of redressing discrimination in spite of the various civil rights laws and constitutional guarantees that persisted. The affirmative action policies were never proposed as a cure for all solution to

inequality and, therefore, were never meant to address deeper societal problems by redistributing wealth and developing true educational equality. It was meant to redress discrimination in hiring and academic admissions. Finally, the programs were meant, in the absence of sweeping societal reforms which were likely to occur anytime soon, to alleviate continuing injustice caused by discrimination. In summary, the affirmative action policies were meant as a temporary remedy that would end once there was a level playing field for all Americans and would thus address equality not just as right and a theory, but as a fact that produced results.

7.2.3 Brazil

For a long time, Brazil harboured a national myth of racial harmony and equality between the various races. This myth, in recent times, was revealed as an untruth that had prevented the full incorporation of Afro-descendants, indigenous peoples and members of other groups in the society who had been discriminated against. In early 2000, the government of Brazil ratified the International Convention on the Elimination of Racial Discrimination (ICERD), the International Covenant Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Committee on the Elimination of Discrimination against Women (CEDAW). The country's constitution was amended to provide for international treaties to have the force of law in Brazil.

In May 2003, the Brazilian government established a new ministry - the Special Secretariat for Devising Policies for the Promotion of Racial Equality. This ministry was a follow up of the affirmative action experiment that began in 2000 where the state legislature of Rio de Janeiro enacted laws mandating that the two public universities in its jurisdiction set aside 50% of their student intake for applicants from public schools, 40% for students who racial category was black or pardo (mixed race) and 10% for students with disabilities.

Brazil's affirmative action's policies are discussed in the six themes as had been the case with the preceding two.

Political democracy

- Provided for the constitutionality of affirmative action in Brazil and also guaranteed equal access to education;
- Promoted the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination;

- Mandated many leading universities to admit a fixed percentage of non-white students and others by using a points system that awards additional points to Afro-Brazilian students;
- The State Legislative Assembly in Rio de Janeiro set aside 40% of the state university seats for black and brown people; and
- Provided for the promotion of racial equality which established quotas for certain jobs.

Institutional framework

- Statutory and codified system.

Economic and social issues

- Ministry of Justice mandated that no less than 20% of its high level staff, consultants and subcontractors be black;
- Federal Supreme Court mandated that not less than 20% of the employees of subcontracting firms be black;
- Provided for the use of the quota system for indigenous people, for the disabled and those who came from poorly funded public schools;
- Mandated the public sector to engage in the redress of past discrimination; and
- Provided for incentives, such as tax breaks to be given to universities.

Human resources development

- In 2002, the Workers Assistance Financing budget was allocated to professional training for blacks, particularly black women;
- Provided for the expansion of education opportunities to accommodate people who were otherwise disadvantaged;
- Provided for the awarding of scholarships for students of African descent entering the diplomatic training school and created an internal mentoring system to provide guidance for students throughout their career to ensure effective success rate; and
- Provided scholarships for admitted students in private universities.

Transformation agenda

- Provided for an undertaking that blacks would account for at least a third of the federal government within five years; and
- Ensured that other than public universities, other organizations such as Private Universities; the public sector complied.

Strategic outlook

- Ensured that racial equality policies were at the centre of the government of Brazil's agenda.

In the early 2000s, Brazil began to address the issue of affirmative action and enacted various legislations to re-address the marginalization of people of colour. These laws led to an onslaught of challenges from the white Brazilians who felt that they were unconstitutional as they violated the constitutional guarantees to equal protection and access to education. The challenges were also based on the argument that the burdens of affirmative action programs were greater than its benefits. A common contention claimed that other less severe measures could have been used as they violated the principle of proportionality. Even though the law was modified before most of the cases were brought before the courts, Brazil had crossed the Rubicon in realizing that race was an issue that could no longer be ignored. A new law was passed in 2003 that lowered the quota percentages to 20% for people who identified themselves as black, 20% for those who went to public schools and 5% for those who were disabled or other minorities.

7.2.4 New Zealand

The legacy of marginalization and dispossession in New Zealand contributed to the on-going problems of racial and ethnic economic inequality, despite some of the most progressive policies to render reparative justice.[134]Affirmative action in New Zealand had been implemented to justify the hiring and promotion of women and as a justification for special educational measures for Maori and Pacific Island students.

[134] Reparative justice was, in most cases, applied to breached rights to property caused by dispossession. In New Zealand, the settlement to the Treaty of Waitangi provided reparative justice successfully as it provided collective redress to tribal entities that proved wrongful confiscation of tangible assets, such as land, fisheries, forests and treasures.

Political democracy

- Maori activism in the 1960s and 1970s, and the Treaty of Waitangi was placed at the centre of governance and policymaking;
- Treaty of Waitangi Act was enacted in 1975 and the rule of *contra preferentum*[135] was invoked and
- Tenants of international law were invoked.

Institutional framework

- Statutory and codified system.

Economic and social issues

- Justified the hiring and promotion of women in academic institutions;
- Provided for preferential access to university courses and scholarships for the advancement of the individuals of Maori and others of Polynesian descent;
- Established equal employment opportunity programs;
- Created and expanded the Maori middle class and increased their participation in great numbers significantly into occupation to ranks of mid to senior level in private and public sector;
- Initiated several economic development programs directed to Maoris;
- Ensured that the budget authority was increased to carry out these policies; and
- Provided for the formation of Maori Development Corporation.

Human resources development

- Provided special educational measures for Maori and Pacific Island students;
- Provided race-based educational assistance;
- Provided for entry quotas and extra tutorial assistance;
- Addressed the promotion of women to senior levels;
- Provided that if a criterion for merit review consistently disadvantaged women, there was a legal duty to abolish it and replace it with one that provided equal opportunity. and

[135] This was a doctrine of contractual interpretation which provided that an ambiguous term in a treaty or a contract would be construed against the party that imposed its inclusion in the treaty or contract when it came to interpretation. This meant that the interpretation of the ambiguous term would, therefore, favour the party that did not insist on its inclusion.

- Ensured that Maoris were employed in professional, technical, administrative and managerial occupations.

Transformation agenda

- Provided that the law on affirmative action from an interdisciplinary perspective depended on the conception of equality and/or discrimination.

Strategic outlook

- Ensured that steps would be taken to eliminate discrimination, whether in employment, housing or education to redress the effects of past discrimination.

New Zealand was one of first of the multi-ethnic states to confront the rising tide of nationalism by recognizing the national consciousness of its ethnic minorities by reserving four Maori seats in parliament in 1867 to provide political representation in Parliament. In 1953, Parliament established the Department of Maori Affairs and the Maori Education Foundation to address the special needs for the Maoris' education and unique social needs. As well as education, affirmative action was extended to employment and economic development. In 1980, the government introduced the Maori and Pacific Island Recruitment Scheme to encourage their participation in the public service and to facilitate promotion of the Maoris to senior levels in government. The enactment of affirmative action in New Zealand had not been without its critics. Recent treaty settlement provoked much debate and criticism of the disbursement of commercial and treaty assets to tribal members and of the use of these assets to provide social welfare assistance to Maoris.

7.2.5 South Africa

In 1994, a new constitution was adopted by South Africa because of the new political dispensation from the past racial discrimination to democracy. The democratic government in 1994 inherited an economy in deep structural crisis, economic exclusion as a result of the international community's outcry that apartheid was a crime against humanity and the consequent disinvestment result in low growth equilibrium and underdevelopment. The government had a major task to redress the legacy of apartheid that had resulted in

disempowerment. It had fundamentally to transform the country's political, social and economic landscape. The principles of equal protection, affirmative action and non-discrimination in South Africa, given the legacy of apartheid were not an option, but a necessity. The Constitution did not only support affirmative action policies, but also demanded it, as it sought to introduce laws, policies and practices that would advance equality and human dignity. The Constitution enshrined the rights of all South Africans to equality and provided for specific measures to be taken to redress historical imbalances. In this endeavour, the Mining Charter was enacted to set out a comprehensive plan for mobilizing the entire mining sector towards the final eradication of apartheid and the building of a new democratic, non-racial and non-sexist mining sector and economy.

For the purpose of this research, the Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry, September 2010, was categorized in the same six themes as discussed regarding the other countries:

Political democracy

- Ensured the endorsement of Section 9 of the Bill of Rights was dedicated to equality;
- Provided for the promotion of legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination;
- Ensured the advancement of human rights and the elimination of racial discrimination;
- Ensured that humanity and dignity of all South Africans were protected in the transition to a constitutional democracy;
- Actively supported strategies towards an open society in which government would be based on the will of the people and that every citizen was equally protected by law; and
- Ensured a South Africa able to assume its rightful place as a sovereign state in the family of nations.

Institutional framework

- Statutory and codified system.

Economic and social issues

- Addressed the high rate of unemployment, and abject poverty of HDSA;
- Developed strategies to address the inequalities in the distribution of income and opportunities;
- Ensured that government addressed the high level of violence and crime;
- Ensured compliance with a pattern of self-sustaining growth to the benefit of all;
- Ensured the improvement of the quality of life of all citizens and the development of the potential of each person;
- Provided for the creation of a non-racial and non-sexist mining sector in South Africa;
- Developed a housing and living conditions' standard for the mineral industry;
- Provided for the beneficiation of South Africa's mineral commodities.
- Advanced the social and economic welfare of all South Africans; and
- Ensured that holders of mining and production rights contributed towards the socio-economic development of the areas in which they operated.

Human resources development

- Promoted employment;
- Promoted the advancement and employment of women in the mining sector;
- Ensured the availability of mining and production operation specific skills and competencies of the work force;
- Ensured access to managerial jobs;
- Ensured the improvement of the quality of life of all mining industry employees by equipping them with the required skills;
- Provided skilling of employees for portable skills utilizable by the employees outside the life of mine;
- Ensured that mines had a pool of necessary skills and competencies that would enable it to meet present and future production and operational needs;
- Ensured that, over a period of time, employment and skills levels within the mine broadly reflected the demographics of the country;
- Ensured that employees were offered the opportunities for training and development as well as portable skills;
- Provided for the utilization of the existing skill base for the empowerment of HDSAs;

- Ensured the expansion of the skills base of HDSAs in order to serve the community;
- Promoted the employment and advanced the social and economic welfare of mining communities and the major labour sending areas; and
- Actively promoted economic growth and mineral and petroleum resources development in South Africa.

Transformation agenda

- Provided the legal basis for equality in access to mineral resources and overall transformation of the mining sector;
- Ensured the deep scars of the apartheid system which were still visible in the society were addressed and healed;
- Ensured the healing of the divisions of the past and established a society based on democratic values, social justice and fundamental human rights;
- Implemented government's attempt at driving transformation through its power to grant licenses;
- Actively addressed the imbalances of the past based on race, gender or disability of the HDSA;
- Promoted equitable access to the nation's mineral resources to all the people of South Africa; and
- Ensured the expansion of opportunities in a meaningful way for HDSAs including women entering the mining and mineral industry and benefiting from the exploitation of the nation's mineral resources;

Strategic outlook

- Transformation was a process and not an event;
- Facilitated a major overhaul of the law, which would clarify how much change major multinationals operating in the country had to make to be within the framework of the law in order to stay in business in South Africa;
- Ensured that the mining industry remained vibrant and viable while ensuring effective participation of HDSA; and
- Facilitated stakeholder's engagement to work together in transforming the South African mining industry.

The imperative to redress past historical racial discrimination posed a constitutional paradox. To redress the past to achieve economic and political equality for all South Africans, especially HDSAs could not be achieved without affecting that group in society which for centuries enjoyed and continue to enjoy those rights. Research[136] showed that the move to advance HDSA interests met with resistance from those who in the past enjoyed economic benefits.

The Mining Charter was an all embracing transformation policy to ensure meaningful inclusion of black South Africans in the economy, particularly with regard to ownership, the creation of investment opportunities for new entrants and the occupation of senior positions in the private sector.

7.3 Analysis of results

Despite the difference in formal policies, South Africa was similar to the United States and Brazil in that blacks were among the least privileged groups in society and were underrepresented in professional occupations and in higher education. In the case of Malaysia and South Africa, they were similar as they shared a trait of implementing preferential policies in favour of a politically dominant and economically disadvantaged majority group who was part of the indigenous people of the countries. In the case of South Africa and New Zealand, they were similar in the fact that it was the indigenous people of the countries that were economically disadvantaged. The implementation of affirmative action policies in all these countries gave hope to the aspirations of oppressed groups in the world, thus providing an impetus for political, economic and social change. The six themes were analysed above and first column in Table 11 indicates the themes and the other columns indicate each country as researched.

[136]The Mining Charter Impact Assessment report by DMR, The KIO Advisory Services Report by SAMDA, and the Report for the Chamber of Mines Broad Based Black Economic Empowerment Transformation

Table 11.Comparative analysis of the affirmative action policies

Theme	Malaysia	Brazil	United States	New Zealand	Averages of International Practice
Political democracy	-Affirmative action provisions in the Constitution -Basis: prohibition of unfair discrimination.	-Affirmative action provisions in the Constitution -Basis: Prohibition on racial discrimination and equal access to education	-Affirmative action provisions in the Constitution Basis: Prohibition on racial discrimination and equal access to education	-Affirmative action provisions in the Constitution - Prohibition on racial discrimination and equal access to education	-Codification in Constitution
Institutional Framework	-Discretionary executive authority. -Introduction of quotas	-Statutory and codified system -Executive and Judicial authority. -Implemented quotas	-Statutory and codified system -Executive and Judicial authority -Implemented quotas	-Statutory and codified system. -Judicial authority -Implemented quotas	Statutory and codified system. -Executive and Judicial authority -Implementation of quota system to disadvantaged groups.
Economic and social issues	Robust economic growth and major advancement of the Bumiputera	Robust economic growth and major advancement of the Afro Brazilian and indigenous groups	- Robust economic growth and major advancement of the minorities (except for 2009/10 recession)	Robust economic growth (except for the 2011 natural disaster)	Economic growth and bridging of economic and social disparities.
Human Resources Development	The policy ensured education and urbanization routes to social mobility and higher income for many Malays. Advancement of Malays into the economic sphere	Affirmative action policy in Brazil mandated many leading universities to admit a fixed percentage of non-white students and others use a point system that awards additional points to Afro-Brazilian students. Quotas system introduced for indigenous people, for the disabled and those from poorly funded public schools Advancement and opening of careers others not accessible to non-	- Evidence of improvement to a certain extent in the last half century. Addressed the issue of education and employment and that it should be biased towards non-white ethnic groups to overcome the effects of centuries of prejudice against the ethnic minorities	Affirmative action ensured that Maoris were employed in professional, technical, administrative and managerial positions by the provision of special educational measures.	Advancement of educations and employment opportunities to non-white ethnic groups

		white ethnic groups			
Transformation agenda	The NEP provided for identifiable milestones for transformation. -racially based as the majority of the poor were Bumiputera	Racial equality policies were at the centre of the government of Brazil's agenda and its effects were evident, even though affirmative action policy was relatively new	Reform hiring practices to end "pervasive, systematic, and obstinate discriminatory exclusion of blacks."	Enactment of laws that provided interdisciplinary measures	Identifiable milestones for transformation
Strategic Outlook	Policy would not be abandoned; instead it was likely to return to its original aim of creating a Malay industrial community based on competition	In 2003 they established a National Policy for the Promotion of Racial Equality which established quotas for certain jobs	Substantial jurisprudence had been built by the judiciary in the implementation of the affirmative action program in the United States	Affirmative action was a public policy tool authorized in legislation since 1977. The role of consideration was based on the Treaty of Waitangi	Transformation was imperative for economic and social stability

Source: Information derived from the comparative analysis of the International scan

Table 12: Comparative analysis of international practice and South Africa

Themes	**International Practice**	**South Africa**	**Gaps**
Political democracy	-Codification in Constitution -Government stability led to economic success. Macroeconomic management led economic success. -Taxes were levied on both rich and poor. No resort to an inflation tax which affected the poor more and damaged the economy.	-Affirmative action provisions in the Constitution -Basis: preferential programs for the black majority. -Government stability -Economic management is good	-Economic disparity still existed. -Policy had to be crafted to meet Constitutional objectives. -Incorporation of opposition viewpoints to facilitate co-operation rather than opposition. -Export-led growth which would result in high employment.
Institutional Framework	Statutory and codified system. -Executive and Judicial authority. -Quotas were introduced (should be treated in a very	-Statutory and codified system. - The Mining Charter had a ten year life-span. -quotas were never introduced as they had undesirable effects	-Statutory obligations to address affirmative had to be addressed to ensure effective implementation and effective enforcement mechanism was needed for companies that did not comply. - The Mining Charter as agent of

	circumspect manner as they tended to be difficult to remove once instituted. -Time scale for affirmative action stretched over a 20 year lifespan for ultimate goals to be far reaching even though targets had not been met.	such as reducing efficiency, creating dependency and fostering resentment.	transformation in 10 years was too short for effective transformation
Economic and social issues	Economic growth and bridging of economic and social disparities. -Focus on industrialization and economic growth..	-Sluggish economic growth and no major advancement of HDSA. -Mineral sector was in secular decline	-High urban unemployment and persistent rural poverty. -State-led interventions-more public sector enterprises. -Mutually satisfying remedies to provide redress to historically marginalized groups. -Time scale-the Charter's 10 years' time scale was too short for the ultimate far-reaching goals. -Limited opportunities for HDSA participation-e.g. resources, etc.
Human Resources Development	Advancement of educations and employment opportunities to non-white ethnic groups. Building of colleges and universities and granted scholarships to study abroad.	Ensured the quality of life for all mining industry employees by equipping them with skills and competencies so enable them to also have access to managerial positions -Limited educational infrastructure	-Lack of advancement of educational opportunities- any transformation agenda had to emphasize education for is success. -Transformation of the educational system. -Mining schools and technikons
Transformation agenda	Identifiable milestones for transformation. Racially based	The Charter promoted equitable access to the nation's mineral resources for all the people of South Africa.	Effective national unity top priority. Transformation to be placed on the top of the political agenda.
Strategic Outlook	Transformation is imperative for social and economic stability	Government viewed transformation of the mineral sector as a process and not an event and acknowledged the past injustices would take a long-time to eradicate.	-Greater external constraints imposed on the state (external capital). Policy autonomy had to be adhered to.

Source: Information derived from the comparative analysis of the Local and International scan

Table 12 identifies the gaps between the local and international scan. These identified gaps would inform the strategies to be embarked on beyond 2014 in South Africa's mining sector transformation agenda (new knowledge) to be explored in Chapter 8. The gaps between the original and revised Charter would be analysed according to a SWOT analysis. The gaps would be examined as to how to solve them and those solutions would ultimately inform the new strategies.

The purpose of looking at international practice was to draw lessons that could be learnt by South Africa in its endeavour to continue the process, to implement a successful affirmative action program in the mining sector and to improve the socio-economic circumstances of historically disadvantaged South Africans.[137] The socio-economic disparities that existed in South Africa, if not effectively addressed, would lead to mutual suspicion and separation in many areas of life. It should be replaced by a conviction that co-operation offered greater benefits to economic development. If the gaps were addressed, South Africa could achieve the same sort of success as for example in Malaysia. Such success would be hailed a great milestone in the transformation agenda.

7.4 Conclusion

The legal foundation for all the countries in this comparative analysis was embedded in their Constitutions. It was notable that with the exception of Malaysia, the rest of the countries had the same outlook regarding an institutional framework in that they all relied on the statutory framework specific to affirmative action to drive their transformation agenda.

It was evident from the research and the comparative analysis that reparative statutory redress in the absence of distributive instruments, namely targeted policy, was inadequate to remedy past historical racial discrimination and the resultant social and economic effect of economic inequality and chronic poverty. The aim of targeted policies was to provide material uplift and increased opportunities to offset the harm caused by past discriminatory actions and thereby contribute to moving societies toward equality. It was essential for the political and economic growth of a country to find mutually satisfying remedies to provide redress to historically marginalized groups. A country could never be truly peaceful without remedying

[137] The Mining Charter (Affirmative action strategy document) had been described by the Minister of Mineral Resources as a process and not an event and thus would be panel beaten until it achieved some level of success.

racial and ethnic economic inequality and chronic poverty. What was apparent was that the role of the state and policy mechanisms in providing social justice was a highly contentious issue among policy makers, citizens and marginalized groups. Almost every society with multi-ethnic populations faced these problems.

Transformation and affirmative action in the mining industry were promoted primarily through the Broad Based Socio Economic Empowerment Charter for the Mining Industry - in short the original Mining Charter promulgated under section 100 of the MPRDA and its subsequent amendment in 2010, the revised Mining Charter. The major problem with these instruments, as agents of transformation for the mining industry, was an over-emphasis on the elements of ownership when compared to the other equally important elements, such as human resources development, employment equity, procurement and enterprise development, beneficiation, mining community development, housing and living conditions, sustainable development and growth and reporting, monitoring and evaluation. These factors were some of the major shortcomings of affirmative action in the mining industry.

The result of the over-emphasis on ownership led to the narrow promotion of affirmative action of the mining sector. In South Africa, the result was the enrichment of a few, politically connected individuals rather than fulfilling the Charter's main intention of empowering workers and marginalized mining communities, who should have been the principal beneficiaries of affirmative action in the mining sector. This lack was contrary to the spirit and aspiration of the Freedom Charter and, of course, the Mining Charter.

The next chapter aims to show how the Mining Charter, both in its original and revised versions, and consideration of international practices could be combined to produce an affirmative action strategy post-2014 that would yield a much more positive result with regard to transformation of the mining sector.

CHAPTER 8

STRATEGIES FOR THE MINING SECTOR BEYOND 2014

8.1 Introduction

This chapter recommends strategies that could be adopted by the South African government and mining industry post-2014, in the likely event that effective transformation of the mining sector has not been achieved as set out in the Mining Charter of 2002 and the Revised Mining Charter of 2010. The intention is to recommend strategies on a way forward. The approach in recommending strategies for the mining sector beyond 2014 are based on the Mining Charter's policy objectives, which are; '*the promotion of equitable access to mineral resources; (b) substantially and meaningfully expand opportunities for HDSA to enter and benefit from the mining and minerals industry; (c) utilize and expand the existing skills base for the empowerment of HDSA and to serve the community; (d) promote employment and advance the social and economic welfare of mine communities and major sending areas; (e) promote beneficiation; and (f) promote sustainable development and growth of the mining industry.'*

A major problem with the application of the transformation agenda in South Africa, as championed by the original Mining Charter and the revised Mining Charter, was the over-emphasis on the elements of ownership, with less focus on the other elements: procurement and enterprise development, employment equity, human resources development, beneficiation, mining community development, housing and living conditions, sustainable development and growth. Reporting (monitoring and evaluation) are equally important for the effective transformation of sector. The result of this over-emphasis has been continued with promotion and application of a narrow transformation agenda, that enriched a few, politically connected individuals, instead of empowering a wider range of the people of South Africa, in particular the mine workers and marginalized mining communities, who should have been the principal beneficiaries of the Mining Charter. Affirmative action of the mining sector had to give equal weight to the all the other elements in order to deal with the historical inequalities.

The strategies are informed by the gaps identified in Chapter 7 and the gaps between the 2002 and 2010 Charters. The strategies consist of an introduction, a policy statement and a

statement of the principles that government should use consistently and predictably. The strategies for the mining sector beyond 2014 would not in any way endeavour to follow the chronological order of the Revised Mining Charter, but would encompass all elements. This arrangement was because the strategies would recommend a new agenda for the industry beyond 2014. The strategies were drawn up on an examination of the questions that Albie Sachs (in Emsley 1996) called proportionality as he claimed, plausibly, that the problem was not to declare targets but to ensure that the targets were reasonable and reachable.[138] What was reasonable and reachable depended considerably on the rate at which opportunities were created in the mining sector. The various targets set for HDSA effective participation in the mining sector depended on the growth rate of the industry. If the industry was static, then the proposals would be very different. If, for example, in terms of employment equity, the numbers of managerial positions did not grow or, in the worst case scenario, declined then the targets had to be adjusted as they would well be neither reasonable nor reachable.

From the lessons of chapter 7 and from the in-depth review of other countries' transformation strategies, it emerged that for any affirmative action program to succeed, a key requirement was an aggressive human resources development plan and the political will to implement it.[139] The time frame in South Africa for the transformation agenda in the Mining Sector was 10 years. A comparative analyses of other countries revealed that 10 years was too short a period of time.

8.1.1 The over-arching principles

The principles that guided the development, formulation and implementation of the strategies for the transformation of the mining sector beyond 2014 are:

[138]Emsley,I, The Malaysian Experience of affirmative action: Lessons from South Africa with a foreword by KarimRaslan, Human &RousseauTafelberg (Pty) Ltd, Cape Town, South Africa, 1996, pp 96.

[139] Once one generation has the right value system with regard to education, the likelihood was greater that a positive value system about putting a premium on education and skills training would be passed on to the next generations. The skills development problems in South Africa could said to be attributed to the weakness in the education and training system, starting from early childhood development, through school and post-school system and right through workplace professional development.

Government, mining companies, mining employees and communities should, as a minimum:

1. Provide an investment framework for the mining sector to thrive and be sustainable;
2. Ensure that the transformation agenda of the mining sector in South Africa was informed by an aggressive human resources development plan;
3. Ensure that, through the Department of Education of South Africa, South Africa adopted a universal basic education that would lead to an informed, competent and confident society able to chart its own destiny to a just and equitable society;
4. Address the skills development problems attributed to the shortcomings in the education and training system from early childhood development, the educational system through school up to the workplace professional development;
5. Place a premium on education at all stages to inform the work environment and ensure the reversing of national inferiority complex of HDSAs;
6. Instill the right value system to HDSA's through education. The main components of the value system was a positive attitude to work, acquisition of skills and knowledge;
7. Ensure a growing mining sector, that was transformative in character and whose targets were reasonable and reachable in relation to the rate of job creation in the sector;
8. Ensure that male managers were sensitive to gender issues that affected female employees in the mining sector to enable the retention and advancement of women in the mining sector;
9. Recognise that the strategies were a living document to be updated periodically, taking into account the most relevant emerging issues affecting the mining industry. The strategies did not replace but rather added value to the Mining Charter; and
10. Use information and communication technologies to access markets that, in the past, had not been accessible to the private sector investment.

Table 13 shows the outline of the fundamental principles that will inform the development of the strategies

Table 13: Fundamental Principles

Fundamental principles	Outcome	Milestones	Milestone achieved Yes/No	Challenges of Strategy
Transformation agenda informed by an aggressive human resources development plan	Transformation-40% HDSA	2009-2014	No	-Proportionality of job created by industry.
Adoption of a universal basic education that will lead to an informed, equitable society.	Raise the literacy status, support professional development and thus increase quality in education-100%.	2014 onwards	No	-Outcome depends on an aggressive human resources development plan taking effect.
Workplace professional development	Serves an important role in supporting the educational goals of the mining sector	2014 onwards	No	Professional development translates into improvements in targeted student outcomes
Ensure that male managers are sensitive to gender issues to enable retention and advancement of women in the mining sector	-Women in mining-10%	2014 onwards	-No	-HDSA graduates are insufficient for the employment equity targets as the annual output of engineers competes with the global demand for HDSAs graduates.
Address the skills development problems attributed to the shortcoming in education and training systems	-Employment Equity - Board Participation, Senior management, Middle management, Junior management)-40%	2014 onwards	-No	
Provide an investment framework that is sustainable	Ownership and Joint venture15%	2009=15% 2014=26%	No-Yet to be determined	-Challenge the corporate morality of the mining industry.
Ensure a growing mining sector that is transformative	Preferential procurement - Local suppliers spend on capital goods-30% Local suppliers spend on services-70% Local suppliers spend on	2009-2014	Yes	-Critical decisions with regard to procurement are made at design and construction phase. There are few specialized companies at community level able to service the mine -Goods are mostly imported and local suppliers are only middle men. (Countries such as China have become rich as the preferred destination to

	consumables-30% Spend from local SMME's-20% Spent on suppliers that are more than 50% Spent on suppliers that are more than 30% black women owned			acquire goods) Local suppliers are only middle men. There is no compulsory local content of local suppliers.
Provide an investment framework that is thriving and sustainable Use information and communication technologies to access markets that, in the past, have not been accessible to the private sector investment	Beneficiation -42%	2009-2014	No	-Mind set shift of industry as exporter of raw materials. -Long-term contracts of sales linked to capital
Ensure a growing mining sector that is transformative in character	Mine Community and rural development -1% of net profit after tax	2009-2014	No	-Legacy of apartheid, different economic expectations and needs make it impossible to predict numerous consequences.
Ensure that all mine workers are properly accommodated in safe and affordable houses.	Housing and living development -100%	2009-2014	No	-Many workers are not originally from the vicinity of mines. -Inappropriate model of dealing with the problem.

Source: Created from information to outline fundamental principles guide the development of strategies for the transformation of the mining industry beyond 2014, using data from the Broad Based Socio-economic Empowerment Charter for the South African Mining Industry

8.1.2 Parties to the strategies

(a) ***Government***

The government is the custodian and regulator of all the mineral wealth in trust for the people of South Africa. It is empowered to grant mining and prospecting rights. The MPRDA placed the State in a position to promote equitable access to the nations' mineral and petroleum resources. In doing so, it had to be more forceful, but also take cognizance of industry position and the needs of the investors. Government should proactively increase its involvement in the mining sector by acquiring meaningful equity stakes, entering into joint ventures to take forward the transformation agenda.

In fulfilling its mandate for transformation, therefore, Government should assume the following roles and responsibilities:

(i) Revise the current investment framework for the mining sector to thrive;
(ii) Ensure the continuous promotion of the transformation agenda of the mining sector to ensure that all South African citizens had a right of equitable access to the benefits of mineral resources;
(iii) Continuously ensure that manpower requirements of the industry were met by the establishment of appropriate well-resourced educational and training facilities;
(iv) Revise the sustainable development measures that ensured the mining sector benefits present and future generations;
(v) Stimulate and ensure economic growth;
(vi) Utilize information intelligence gathering methods to avoid potential conflict;
(vii) Regulate the industry and fully use its political leverage; and
(viii) Promote research and development in search of solutions for the challenges of the mineral sector.

(b) ***Mining Industry***

Industry played a significant role as a driver for mining development and should continue to contribute to the national economy for the foreseeable future. It had to continue to be nurtured to ensure transformation rather than transfer of equity as just ceding equity to HDSAs did not, in any way, alter the economic structure. The sector should create new markets and invest in new ventures. Industry should also deliver quality jobs and living conditions that adhere to health and safety conditions. Industry should be encouraged to introduce new role players, who will be a catalyst in creating new jobs.

In fulfilling its mandate, therefore, the mining industry should assume the following roles and responsibilities:

(i) Contribute to the macroeconomic goals of the economy;
(ii) Facilitate the growth of the sector by entering into joint ventures and search for new reserves;
(iii) Search for new markets to exploit the discrepancies between mineral products and services bought in local and foreign currency;

(iv) Explore ways in which mines could become closely integrated with local economies;
(v) Support local procurement with significant local content thereby assisting local business development;
(vi) Provide sustainable jobs, housing and conducive work environment; and
(vii) Promote and undertake mineral beneficiation.

(c) ***Mine employees and communities***.

The relationship between the employees, communities and mining companies could be positive or negative depending on the how it was managed. To be able to engage effectively with all in the mining industry, labour and communities should adhere to the minimum educational system requirement of South Africa and obtain grade 9 which, under the National Qualifications Framework (NQF), enabled one to obtain the General Education and Training Certificate and allowed people to pursue employment or technical training at Further Education and Training (FET) institutions.

In fulfilling their mandate, therefore, the mine employees and communities should assume the following roles and responsibilities:

(i) Seek access and recognition to the official bargaining process available;
(ii) Acquire education and skills to enable them to engage effectively with other stakeholders at bargaining councils;
(iii) Create a culture of self-reliance to counter the effect of the culture of entitlement that exists;[140]and
(iv) Be productive by giving something, not only receiving.

It is important to note that that the parties to the strategies, as outlined above, in fulfilling their mandates, had already implemented some of the roles and responsibilities, which meant that the framework was available to build upon.

[140] BEE was designed to empower HDSAs. However it has, in a sense, done the reverse by introducing an entitlement attitude that has killed entrepreneurship initiative. It has been abused in post-apartheid South Africa and resulted in the empowerment of the few and politically well connected.

8.2 A Strategy for human resources development

8.2.1 Introduction

The purpose of this strategy was to propose practical steps that would ensure transformation into the future. The feasibility of the proposed strategy could be expressed as short term (one to ten years) and long term (ten to twenty years).

Fundamental principles

The human resource development strategy had been evaluated against the following fundamental principles:

- Mandatory and free basic education for all South African children as a good and early education was paramount and inform future capabilities;
- Strengthening of HDSAs nationalistic spirit;
- Substantial advancement in the teaching of mathematics and science, especially in rural schools;
- Compulsory national service of science and engineering graduates who had completed their studies to teach in schools across the country for a year before embarking on their careers. This measure should ensure transfer of skills and act as peer mentorship, particularly in the subjects required by the mining industry;
- Introduction of compulsory summer/winter camps at school to foster a spirit of the importance of education for a better tomorrow, and, thus, a transformed South Africa;[141]and
- A significant increase in the number of HDSAs in executive and senior management of mining companies.

8.2.2 Elaboration of principles

This strategy was underpinned by five principles explained below:-

1. *Universal and free primary education is the foundation of human resources development*

[141]In such camps, students would be taught subjects such as mathematics and science which would instil the value of education. This education would go a long way in alleviating the inferiority complex suffered by HDSAs as a result of Apartheid.

For the sector to operate profitably and impact directly on the economy, quality and effective education had to receive top priority to cater for the labour and skills demand and the supply issue. This area had to be addressed as it undermined the economic performance of the mining sector in the past.

2. *Human resources development would improve the national inferiority complex*

A well-crafted human resources development plan would ensure a reduction in economic and educational disparities. It would go a long way in addressing the social disparities and inferiority complex experienced by HDSAs and would succeed in reducing the jealousy and envy of the HDSAs towards the whites and owners of capital.[142] The removal of the inferiority complex, which undermined the desire to improve and to catch up with others, would instil a sense of accomplishment which could claim "we can do what others can do".

3. Political will is the foundation of a quality human resources development

The South African government should assume increased responsibility of leadership, that is, politicians, administrators, principals and teachers should lay the foundation for improved learner performance across the system to improve the economic performance of the mineral sector may be improved into the future.

4. Continued education is essential for human resources development

The mining industry was highly technical and needed educated people who had the requisite knowledge to operate in it and for it to be economically viable. Only effective education could ensure and promote diversity and equitable representation in terms of HDSA participation in all areas of the industry, from key decision-making positions to core-occupational categories.

5. *Human resources development is part of the growth strategy of the mining sector*

Human resources development, economic growth and BEE were related and complementary processes. Government's approach was that education was a priority as no economy could grow if it lacked requisite skills. Without growth, no economy could integrate all of its

[142] The former Prime Minister of Malaysia, Dr Mahathir claimed that without the right value system, the training and consequent growth of self-confidence, even the best of systems and with the best intentions would not empower the people that an affirmative action plan is geared towards.

citizens in a meaningful and proper way. This strategy stressed a human resources development strategy that should be growth and development-oriented.

6. Human resources development in the mining industry had to address the "macho culture" that existed in mines to the detriment of women employees

The Mining Charter targeted 10% women employment in the mining industry and remedial action should be taken to create a conducive working environment where women were not in the lowest paid category and were not in the minority, with 10 women out of every 100 workers in each shift. This imbalance created conditions for sexual harassment and exploitation. To address this problem and create a workplace conducive to the career advancement of women, a national strategy was needed as the issue was too complex and important which could not be addressed effectively under the human resources development. Therefore, a separate strategy was recommended below.

8.2.3 Strategic outcomes

The human resources strategy would ultimately produce educated, trained women and correct the gender imbalance in the mining industry.

8.3 A strategy for the advancement of women in the mining industry

South African needed a step-change if it was ever to achieve economic performance that would contribute to a better life for all South Africans and create sustainable jobs for all. Gender equality in the mining sector was not only about social justice, but was also a critical source of competitive advantage for the industry. Since legislative intervention in South Africa had not achieved the desired results and culture change, a new model for employment equity that would ensure basic conditions of employment were adhered to, was required.

To achieve this, ideally in the long term, South Africa needed to create a new Ministry to drive this agenda.[143] A recommendation was, therefore, made for the creation of The Ministry

[143] In South Africa, the Department of Women, children and people with disabilities was established to emphasize the need for equity and access to development for vulnerable groups within South African society. This department was established in 2009. Several challenges this ministry faces are that it has to co-ordinate, facilitate and provide the oversight on too many structures. The mandate and functions of the department was too broad and there was a need for a more specialized Ministry to deal with only issues affecting the

of Women's Affairs which would be the Government's principal advisor on achieving better outcomes for women. The Ministry would have three priority areas:

- More women in leadership (This department should ensure that key-decision-makers had the data and information to make informed decisions on strategies about increasing the number of women in leadership positions);
- Greater economic independence for women; and
- Increased safety from violence against women.

Taking into consideration the constitutional implications of creating a new Ministry and the political hurdle this would entail, what would be realistically achievable was the creation of a Directorate of Women in Mining in the DMR which would have the same agenda as that proposed for the Ministry.

8.3.1 Fundamental principles

The advancement of women in the mining industry strategy was evaluated against the following fundamental principles:

- To promote gender diversity (taking into consideration that women were different physically and had special needs and requirements);
- To promote women to positions of leadership, thus making them more visible in society;
- To address working conditions of women in the mining industry as they were in the minority and the lowest paid;
- To make good use of available human capital in the face of a global shortage;
- To promote the importance of diversity to achieve economic performance in the mining sector;
- To stimulate mining companies to explore opportunities to improve their diversity and encourage genuine progress on gender diversity;

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advancement of women. The current ministry needed to be split into two. This recommendation had been taken into consideration in South Africa in 2014. The ministry was part of the many changes announced by the president when he unveiled his Cabinet on the 25 May 2014. The Women's Ministry would champion the achievement of women's socio-economic empowerment and women's rights. The functions in relation to disabilities and children had been transferred to the Department of Social Development.

- To enable investors to make informed investment decisions by having access to reports on diversity metrics, policies and progress;
- To create cultures in the main-stream organization that were more acceptable to women, offering flexible working conditions and acknowledging domestic responsibilities;
- To encourage women to network among themselves, and to plan their careers in advance;

8.3.2 Elaboration of principles

This strategy was underpinned by the following principles explained below:-

- *Simultaneity principle*
  This principle basically stated that the act of observing a phenomenon changed it. When issues of women and possibilities for women were brought to the forefront of the economic and political debate and were discussed on a day-to-day basis, participants automatically develop a conscience.

- *Enactment principles*
  Transformation occurred when society implemented systems in the present of what they wanted/desired the future to be.

- *Free-choice principle*
  This principle underlined the fact that people and organizations thrived when they were free to choose their destiny and have a say in the nature and extent of their contribution. When people have a choice to pursue their interest and destiny, their involvement liberated both personal and organizational power.

8.3.3 Strategic outcome

The Directorate of Women in Mining should be the Government's source of advice on issues that are relevant and pertain to advancing the well-being of women in the mining sector. This

advancement should encompass women being in charge of their destiny by addressing, on a continuous basis, issues that affect them in the workplace. Women would use their strengths to maximize social and economic success.

The Directorate of Women Affairs' main responsibilities would be to:

- Provide suitable women nominees for appointment to the mining industry;
- Provide, on a continuous basis, policy advice on improving outcomes for women in the South African mining industry;
- Provide support services to the Minister of the DMR; and
- Manage South Africa's international obligations in relation to the status of women in mining.

8.4 A Strategy for the sustainable development and growth of the mining industry

The goal for the future of South Africa should be to create new businesses, rather than simply new jobs, in a way that was ecologically sustainable and that the country's resources were exploited to the benefit of all South Africans. The creation of new businesses and growth of the mining industry was the only way to address the high youth unemployment. The current trend was that the major mining houses had changed their employment model by subcontracting all their non-core activities to other companies. In addition, the government did not have the financial capacity to expand the civil service. However, the public works programs were a temporary solution to address the current high employment rate. There was an urgent need to address this situation since it was a time bomb waiting to explode and create civil unrest and economic disorder.

Going into the future, adherence to the principles of sustainable development was vital for the mining industry. Future sustainable growth had to be the foundation for mining operations. Mineral resources were finite and the lifespan dependent on the depletion rate. The demand for mineral commodities in the world had risen sharply with the economic rise of China and Asia-Pacific countries. As always, an increase in the demand for mineral commodities resulted in higher rates of extraction. South Africa stood to benefit from this demand.

8.4.1 Fundamental principles

The Sustainable Development and Growth of the mining industry strategy was evaluated against the following fundamental principles:

- Creation of Mining Institutes to educate young people how to start and run their own businesses;[144]
- Creation of a joint approach between all stakeholders to ensure the development and sustainability of mining communities by contributing to new business development, seed capital, education, and job skilling;
- Assurance that the natural environment would be restored as close as possible to the pre-mine state;
- Assurance of the development of portable skills of the workforce so that they would be able to sustain themselves post-mine closure;

8.4.2 Elaboration of principles

This strategy was underpinned by four principles explained below:-

- *International leading practice was fundamental to sustainability of the sector*
  While pursuing developmental initiatives adopt leading international and regional approaches to minimize mining environmental impacts.

- *National policy was fundamental to the growth of the sector*
  Development and implementation of a national action plan to ensure that profit making of mining corporations was not done at the expense of other interest stakeholders; in addition, an assurance of skills development and the portable skills.

[144] This idea has worked well in Brazil, under the leadership of President Lula da Silva, who was a former trade unionist saw and knew the suffering of the people on the ground. He established training institutions across the country. The initiative worked so well that in a period of 10 years, it resulted in the empowerment of over 24 million people who were uplifted from poverty to middle-class status and provided much needed employment opportunities.

- *Research and development was essential to the growth and sustainability of the sector*
  Research and development initiatives to counter the effects of mine closure and associated environmental degradation affecting the mining sector and the assurance that the effects of environmental degradation caused by mining were minimized.

- *Rehabilitation was important for sustainability*
  The establishment of a multi-stakeholder task team to look into the rehabilitation of derelict and ownerless mines to ensure effective environmental rehabilitation and health and safety of communities within proximity.

8.5 A strategy for employment equity in the mining sector

In South Africa, there is need to create a balanced economy: an outward economy that attracts substantial foreign exchange to pay for imports and an inward economy that best creates jobs to counteract the high unemployment rate. The South African mineral sector is one of the role-players that can dominate on the global stage.

South African mining had traditionally been labour intensive. In terms of the supply of labour and in terms of very broad skills levels, research showed that very little change has occurred over the past three decades in the skills composition of the sector. One could not ignore the fact that technological advancements had brought about changes in the skills required of people in the industry and that technology would continue to drive skills needs into the medium- and longer-term future. Overall, the replacement demand for labour exceeded new demands and it was clear that the sector needed to train new people to satisfy the replacement demand of the labour market in the event of high economic growth.

Figure 4 shows the interconnectivity of the strategy. All elements that inform the strategy inform the other.

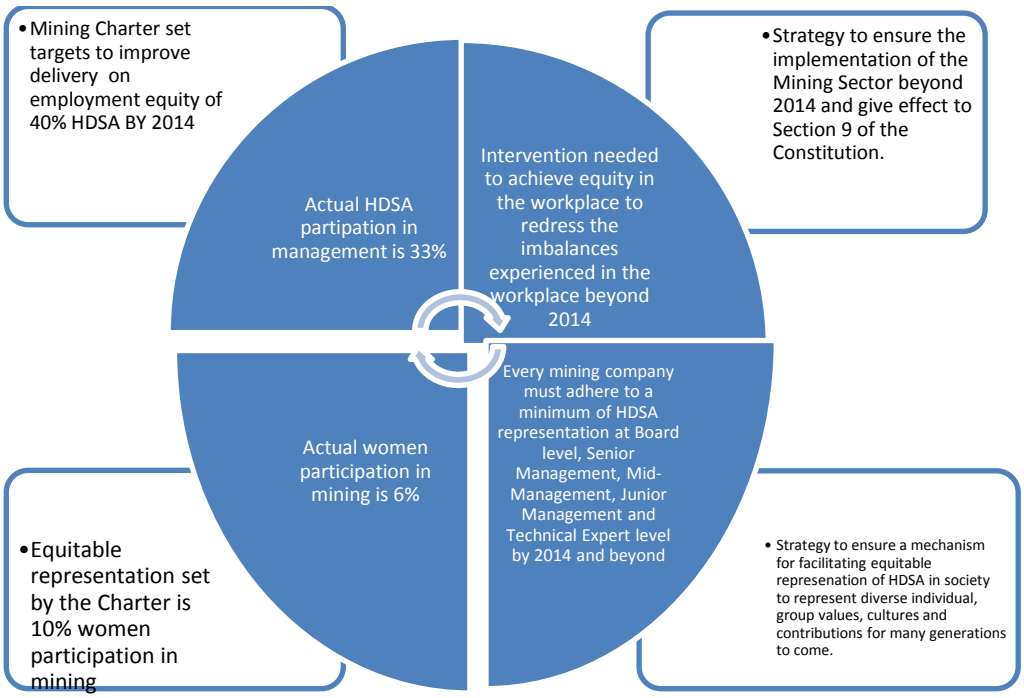


Figure 4: The inter-connectivity of the strategy

8.5.1 Fundamental principles

The employment equity in the mining sector strategy was evaluated against the following fundamental principles:

- Implementing an aggressive education and skills development plan;
- Addressing the gender disparity in terms of educational background to increase the executive talent pool which included very few women at that point in time;
- Being aware that the most significant challenges facing the transformation of the mining sector included the poor quality of secondary schooling, particularly in the areas of mathematics and physical science; the inability of the sector to attract high quality school leavers; the poor articulation of Further Education and Training programs (FET) with other qualifications. There was a need for the theoretical framing, methodological conceptualization and execution of the training needs of the mining sector; and

- Addressing the difficulties that many HDSA students face in accessing study financing; the difficulty that university of technology students' face in accessing the workplace- based training necessary for graduation; the low throughput rates for both artisans' learnerships and engineering qualifications; and the high dropout rates and low pass rates to attain competency certificates. Support should to be given to the development, broad dissemination and adoption of the best learning techniques.

8.5.2 Elaboration of principles

This strategy was underpinned by five principles explained below:-

- Continued MQA interventions to address challenges, which started from ABET level training in the workplace; formal collaboration with FET colleges; the development and delivery of foundational learning; the focus of artisan learnership on unemployed learners; the provision of bursaries for higher education qualifications; and the development of a career guide for the sector;
- Despite the interventions by the MQA, there were still major challenges and these were evidenced by the high dropout rates and low pass rates in attaining certificates of competency in various intervention programs that had been introduced to transform the sector;
- To support the transformation of the sector, the requirement for education and training needed to be reflected in all aspects of the sector. Five skills development priorities had been identified which represented the culmination of the sector analysis and consultation with stakeholders. These skills development priorities were intended to set the course for effective transformation of the sector post-2014;
- The first priority for the agenda was to support the objectives of the amended Mining Charter and focus specifically on providing support for addressing the Employment By 2014, equity requirement which required that a minimum of 40% of companies' employees at executive, senior management, core and critical skills, middle management and junior management levels should be HDSA; and
- The second priority was to facilitate and support the development and implementation of development programs of core skills aligned with the sector qualifications framework. This vital priority was essential for the effective transformation of the sector and funding should be made available over the planning period towards the accomplishment of this priority.

8.5.3 Strategic outcomes

The government has to ensure an appropriately trained new generation of South Africans in the field of science, mathematics and, specifically, mineral science. Programs under this priority include:

- Mathematics and Science at grade 10, 11 and 12 in rural mining community schools;
- One-year community service of university graduates to teach mathematics and science in all schools with special emphasis on rural mining community schools;
- Skills programs targeting the female children for specific needs such as mining engineering, geology, accountants, lawyers, occupational health and safety;
- Workplace coaches, education and training;
- Intermediate level (Further Education Training) core skills programs through learnerships and work experiences; and
- High (Higher Educational Training) level core skills programs through bursaries, work experiences and internships.

8.6 Strategy for beneficiation of minerals in the mining sector

Where commercial opportunities existed, beneficiation did take place in South Africa. About 30% of the country's exports were minerals driven, with gold and platinum alone accounting for about 20% of total exports.[145] The export earnings of the minerals' complex increased to a level of greater than 50% of the country's merchandise exports, with addition of mineral products like coal and stainless steel. The Minerals Policy White Paper defined beneficiation as the process of adding value from mining right through to the final fabrication of a consumer branded product. This definition highlights the fact that there were four stages of beneficiation: mining, refining, conversion; and manufacturing. The highlighting of the different stages of beneficiation was important to show that, in as much as beneficiation did take place in the mining and refining stage as mining companies found it commercially feasible. When it came to the conversion and manufacturing stage, mining companies found it difficult since they lacked the skills and competence to do so because the manufacture of a final product for sale was highly specialized. Most countries had maximised beneficiation successfully, for example India, China, Turkey and United Arab Emirates (Dubai). However,

[145] The country produced 15% of the world's catalytic convertors because of the initiative by government and industry by putting in place the Motor Industry Development Plan (MIDP) which focused on what they needed to do to make the manufacturing sector competitive in this particular area.

although some of them did not mine the product at all or mined a small percentage when compared to South Africa, they focused their skills set on the manufacturing sector.[146]

The government enacted a number of policy documents and legislations that had yet to successfully address the complex set of challenges that obstructed the implementation of a successful beneficiation strategy within the country.[147]

South Africa is well endowed with mineral resources and the value of the mineral wealth was estimated at US$2.5 trillion according to a survey done by the Citibank in May 2010[148]. This evaluation made the country the wealthiest mining jurisdiction.[149] What needed to be addressed in future was that a considerable amount of South Africa's mineral resources did not realize the country financial benefits as they were exported as raw ores or only partially processed. Even though there had been beneficiation interventions done to raw ores exported since the 1970s, more needed to be done.[150] Beneficiation and downstream processing of minerals was an important element in establishing international competitiveness as well as contributing to a positive balance of payments.[151]

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[146] This was so because one could basically access the products anywhere in the world, at roughly the same price. International comparison with regard to where the majority of production occurred where the majority of cutting took place for both diamonds and gold, the mining occurs in different countries and the action of manufacturing a final product for sale was generally done elsewhere in the world.

[147]South Africa was ranked 54th out 93 countries and provinces in the 2011/12 Fraser Institute Survey. This was despite the existence of lucrative opportunities for downstream processing and adding value to iron, carbon steel, stainless steel, aluminum. PGM's and gold. The following are the policy documents and legislations to address beneficiation in the country:

- The Mineral and Petroleum Resources Development Act No 28 of 2002;
- The Diamonds Amendment Act, No 29 of 2005;
- The Diamond Second Amendment Act, No 30 of 2005;
- The Precious Metals Act, No 37 of 2005;
- The Metals Sector Development Strategy, 2006;
- A Beneficiation Strategy for the mineral industry, 2011;
- The Industrial Policy Action Plan;
- The Revised Mining Charter 2010 and
- The New Growth Path; The Framework (2010)
- Motor Industry Development Plan

[148]Mining Review, *Mining and Taxes*, accessed 09/01/2013, available at http://www.miningreview.com/node/17795

[149]This evaluation by the global financial institution, Citibank, placed South Africa ahead of both Australia and Russia and makes it the single largest minerals treasure trove. This evaluation makes it imperative to ensure continued policy shift to make the country a mineral investment destination and thus improve the lives of the people of South Africa.

[150] A call has been made by the Government's industrialization policy for a paradigm shift to maximize long-term growth beneficiation projects, enhance value of exports, increase sources of consumption of beneficiated products and create opportunities for sustainable jobs.

[151] The growth rate in the manufacturing sector in the country had been slow and presently stands at 2.8% per annum.

8.6.1 Fundamental principles

The beneficiation strategy was evaluated against the following fundamental principles:

- Providing the right enabling environment;
- Identifying mining related capital goods, to take advantage of procurement undertaken by mining companies and facilitating higher levels of local content;
- Enacting regulatory provisions that could be incorporated into existing Acts to promote access to raw materials to assist in downstream projects;
- Ensuring co-operation between industry and government to leverage and enhance the National Development Strategy and Sector Skills Plans for required skills;
- Promoting local markets for the consumption of the value added mineral resources;
- Developing infrastructure such as rail, water, ports and electricity needs and ensuring that the existing infrastructure planning mechanisms and programs properly consider infrastructure requirements for mineral beneficiation;
- Reviewing existing and ensuring that existing future trade agreements adequately support the beneficiation intent and market access.

8.6.2 Elaboration of principles

This strategy was underpinned by following principles explained below:-

- Beneficiation of mineral resources was fundamental for economic growth;
- Beneficiation investments initiatives took advantage of the Comprehensive Strategic Partnerships with China;
- Beneficiation initiatives should be aligned to beneficiation R&D, both current and recurrent to the national ten-year plan for science and technology;
- Beneficiation initiatives were key to the utilization of the state's infrastructure (public good) as an effective instrument for the promotion of local beneficiation;
- Beneficiation initiatives are multi-sectorial requiring coordination of many government departments; and
- Beneficiation initiatives should address uncompetitive pricing of intermediate inputs such as export taxes.

8.6.3 Strategic outcomes

Figure 5 shows strategic outcomes of the beneficiation strategy.

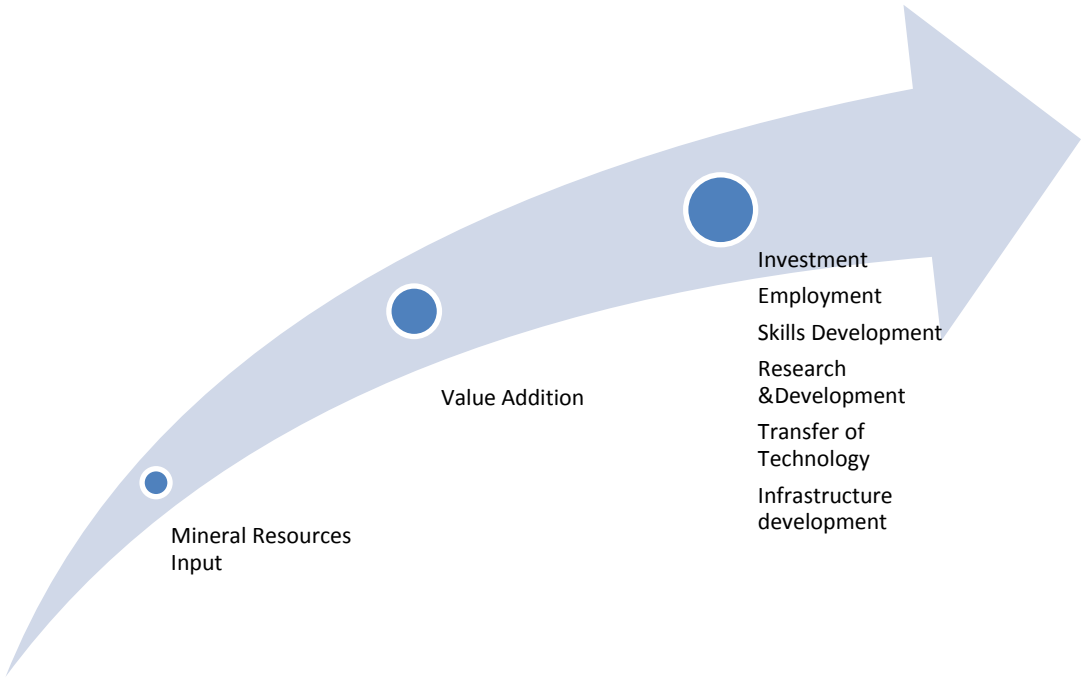


Figure 5: Strategic Outcomes

8.7 Strategy for ownership and joint venture

The South African mining industry was the foundation of economic development in the country. Access to the mining industry by HDSA was important and critical if the industry were to be relieved of political pressure. Attempts were been made to make the industry accessible to HDSA, for example an unbundling of mining companies with the sole objective to make it broad based. A good example was the unbundling by Anglo American of JCI with sole objective of transferring it to black ownership. The strategy failed because it was driven by expediency to lower the company's profile in view of the political change. In addition, it made common sense economically to do so at that time. Another reason for the failure was that the exercise was inappropriately handled as there was lack of consultation with main

beneficiaries (HDSAs). The lesson learned from this endeavour was that the ownership issue was sensitive one because of the historical basis of the industry and because such a unilateral decision was not acceptable.

At best, evidence indicated that the aggregated BEE ownership of the mining industry was below 9% and of this percentage the bulk was the hands of a handful HDSA beneficiaries. Broad-based empowerment had not been achieved by the year 2012. The inference was that since the advent of democracy in South Africa, racial patterns of ownership of mining assets had not yet changed. The broader transformation objectives of the Mining Charter were far from being achieved and intervention measures had to be taken to address the *status quo.*

8.7.1 Fundamental principles

The ownership and joint venture issue in the mining sector strategy was evaluated against the following fundamental principles:

- Promotion of pride in national identity to prevent the issue of fronting that remained a major threat of the broader transformation objectives of the Mining Charter;[152]
- Creation of local risk-oriented investors to support the sector in same way as the stock exchanges, as those in Toronto, Vancouver, Sydney and London, have enabled the developments of junior sectors in Canada, Australia, South America, Indonesia and West Africa;
- Direct participation in the establishment and operation of a wide range of productive enterprises and joint ventures with the private sector;[153]
- Availability of worthwhile mineral rights and readily accessible and usable geological information; and
- The promotion of juniors was fundamental as in recent years they had been responsible for the discovery of the largest mineral deposits, for example Voiseys Bay (nickel) and Lac de Gras (diamonds).

[152] South Africa should copy the Malaysian slogan 'Malaysian Boleh' meaning 'Malaysian Can' to instil a sense of a right to economic participation of HDSAs and prevent the issue of fronting. Ownership remains one of the central mechanisms for effecting meaningful integration of HDSAs into the mainstream economy. South Africans must get away from the mentality that the government has to do everything for them.

[153] Such ventures would address the allocation of shares to HDSAs in an established mining company as this did not result in the creation of employment opportunities or a single extra job

8.7.2 Elaboration of principles

This strategy was underpinned by following principles explained below:-

- Provision of a dynamically updated schedule of state-owned mineral rights available for exploitation;
- Establishment of a clearing house for investors to access where privately-held mineral rights were disposed and could be accessed for immediate exploitation;
- Provision of potential investors with easily accessible, geological, technical and financial information;
- Implementation of a more flexible mineral rights' regime and other legislation affecting mining and exploration such as landowners' rights and environmental protection;
- Availability of capital for HDSA investment in the minerals industry through joint ventures;
- Junior companies promotion of ownership and joint ventures as they were less averse to risk and prepared to work in countries that the major mining companies avoid; and
- The promotion of junior mining companies was key to the promotion of ownership as, in most instances, on making mineral discoveries; they sought out larger partners to provide capital and mining expertise and thus further promoted the sustainability of the industry.

8.8 A strategy for mine community development

Community development was an important component of mines operation and should not be seen or viewed as being a socially responsible or charitable initiative. Without community development, the result could be conflict and hostility between the mine and the community which could have a significant effect on the continued success of a mining operation. Examples of such conflicts are many, for example Bouganiville Copper (Papau New Guinea) and Freeports Grasberg Mine (Papau New Guinea). Communities need to be engaged and convinced that the benefits from the presence of mining operations far outweighed the costs associated with mining. Community development initiatives were core elements of mining operations.

On the 30th and 31st March 2012, the Parliamentary Portfolio Committee on Mineral Resources conducted public hearings on the state of the mining industry following the 2010 Mining Charter review process.[154] The reasons for this exercise was to determine how the Mining Charter, in both its original and revised forms, had impacted on the lives of people in the communities in which mining operations were conducted and to see whether any benefits had accrued since then. Submissions made by those mining communities that were present were mostly that there was lack of change in the conditions prevailing in the communities and that negative sentiments were expressed towards the mining industry. There had been an increase in service delivery protests across the country. Interestingly, this issue suggested deep-rooted dissatisfaction with the slow pace of service delivery by government. On the economic front, there was high unemployment rate in South Africa which stood at 24% in the last quarter of 2010. The level of poverty was also very high and this, coupled with the global economic crisis recently experienced, led to the shedding of many jobs which meant more pressure on the mining industry to contribute to the socio-economic development of communities.

8.8.1 Fundamental principles:

The Mine Community Development issue in the mining sector strategy was evaluated against the following fundamental principles:

- Replacement of the Social and Labour Plan (SLP) with Community Development Agreements (CDA) to ensure effective transfer of social and economic benefits to the community;[155]
- Implementation of the CDA and assurance that it addressed matters relevant to the community and provided for community participation in the planning,

[154] Parliamentary Portfolio Committee on Mineral Resources conducts public hearing , dated 11 April 2012, accessed 04/04/2012 <Http://www.parliament.gov.za/content/review%20of%20thMining%20charterpdf.

[155]The agreement- making process that led to CDA enabled impacted communities to articulate and have their development goals and aspirations addressed. 2. Through engagement and negotiation, communities were likely to acquire a better understanding and be informed of the financial and other constraints under which a mining company operated, which in turn facilitated a mutual understanding of expectations, 3 CDAs provided a mechanism for 'locking in' all parties to long-term commitments. The importance of this was that key personnel and organizational structures and even ownership arrangements will often change over the life of the project. 3. CDAs defined mutual obligations, thus building a sense of shared responsibility. Therefore, communities could potentially become partners in the project, thereby strengthening the project's 'social license to operate. 4. CDAs provided greater degree of certainty for all parties, Mining companies knew what was expected of them and communities, in turn, knew what their own obligations were and what to reasonably expect of the mining company and where involved, government. This reduced the risk of future confusion and uncertainty, and of shifting goal posts.

implementation, management and monitoring of projects as stipulated in the agreement;

- Assurance that the agreement would be reviewed every five years to take into consideration emerging issues and to address challenges;
- Alignment of projects to the provincial growth and development strategies as well as Integrated Development Plans (IDPS);

8.8.2 Elaboration of principles

This strategy was underpinned by the following principles explained below:-

- *For effective mine community development, there had to be a mindset shift from all stakeholders*

  Communities needed to realize that they were the masters of their destinies and that tey should view the mining companies as partners in helping them realize their developmental goals. Mining companies, on the other hand, should re-examine and reorganize, where necessary, their internal capacities and skills to meet the challenges that accompanied this partnership with the communities. To attain these goals, mining companies should ensure that the community development agencies and practitioners that they engaged with had the capabilities to be community development activists[156] and had the skills, which included facilitation skills, conflict management and social dialogue skills, to name but a few.

- *Effective mine community development had to conform to international leading practices*

  To ensure community development, there had to be the appreciation that something more comprehensive than just consultation was required. The need was not to re-invent the wheel in this instance but to look to the international arena for lessons.

- *Effective mine community development projects had to adopt approaches that were relevant for and rooted in traditional cultural practices of the communities*

[156] These were people who daily inspired young people and the mining community to value self-development as a solution to various challenges. They inspired community members to be engaged in community projects and structures for better service delivery and improvement of the living conditions of people, especially the disadvantaged. These were relevant to the mining industry as they engaged effectively with mining companies and communities by providing forums for addressing grievances, in addition to addressing issues relating to monitoring and compensation of land issues.

Communities should utilize long-established African communal practices. In the engagement of projects, they could engage the communal practice of doing things as a collective, for example the whole community going to plough one family's field and upon completion moving on the next field..[157]

8.9 A strategy for housing and living conditions

A report by the Bench Marks Foundation[158] based on five-year research among communities in the platinum belt highlighted the gaps between mining companies' promises and their practice on the ground about, among others promises, to improve housing and living conditions. The revised Charter in Item 2.7 requires the mining industry to convert or upgrade all hostels into family units by March 2015 and attain an occupancy rate of one person per room. The study found that the Marikana strike by Lonmin mine workers uncovered a number of factors linked to rising worker discontent in the South Africa mining industry. The study found that Lonmin, as a mine, had high levels of fatalities, very poor living conditions for workers and unfulfilled community demands for employment. The study also found "*proliferation of shacks and informal settlements, the rapid deterioration of formal infra-structure and housing in Marikana itself, and the fact that a section of the township constructed by Lonmin did not have electricity for more than a month during the time of our last visit. At the RDP Township we found broken down drainage systems spilling directly into the river at three different points*."[159]

Such a situation as described by the study could not be allowed to continue and showed the lack of compliance with the Mining Charter in 2012. In recent years, the platinum industry had prospered because of the demand of platinum for use in vehicle exhaust systems in the United States and European countries. The popularity of the metal in jewellery was another contributing factor of the immense profits being made by mining companies.[160] Lonmin was

[157] This example showed that impacted mining communities had the capability to achieve much when they worked together to articulate their development goals and aspiration.

[158]Policy Gap 1- *A review of the Corporate Social Responsibility Programs of the Platinum Industry in the North West Provinc*e: Published 2007 which was then followed by Policy Gap 6- *A review of Platinum Mining in the Bojonela District of the North West Province*: Published August 2012. The study found that the platinum industry had all failed to meet the standards of the Principle of Global Corporate Responsibility-Bench Marks for measuring business performance even though all the companies on the ground have corporate social responsibility programs in place.

[159]The Bench Marks Foundation, "Communities in the Platinum Minefields," 2012

[160] The price of platinum globally rose dramatically throughout the 1990s due to the commodity's demand in emerging markets that it was on par with gold as the country's leading mineral export. South Africa's platinum

said to be one of the largest producers of platinum in the world and the bulk of the produced tonnage came from Marikana. In 2011, Lonmin recorded revenues of $1.9 billion and, at the risk of mutilation and death as stated by the unions, underground workers at Marikana made only about R4000 a month.

The appalling living conditions as found by the study was a scathing indictment of an industry that continued to treat its workers in an inhumane manner and a state that had wonderful policies but was seemingly incapable of implementing them and taking the industry to task for failing to meet the targets set out in the Mining Charter. In addressing the issue of housing, mining companies resorted to providing workers with living out allowances. This allowance did not solve the problem as the unintended consequence was the proliferation of informal settlements.

8.9.1 Fundamental principles

The housing and living conditions of mine workers issue in the mining sector strategy was evaluated against the following fundamental principles:

- Ensuring that mining companies met decent standard of housing conditions for mine workers and future developments had to be coordinated with the structure of municipality, mining towns and settlements;
- Ensuring that mine workers had the choice in pursuing housing for themselves through the promotion of home ownership by the industry; and
- Adhering to Constitutional provisions and restoring the dignity of the workforce.[161]

8.9.2 Elaboration of principles

This strategy was underpinned by the following principles explained below:-

1. The mining industry should ensure a decent standard of housing for mine workers;

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industry was the largest in the world and 2011 reported total revenues of $13.3 billion, which was expected to increase by 15.8% over the next five years.

[161] The preamble to our Constitution records that the People of South Africa are committed to the attainment of social justice and improvements of the quality of life for everyone. The Constitution declares the founding values of our society to be "human dignity, the achievement of equality and the advancement of human rights and freedoms." The relevant Constitutional provisions at issue are Section 26 and Section 28(1) (c).These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and to health care, food and social security. There can be no doubt that human dignity, freedom and equality; the foundational values of our society are denied those who have no shelter.

2. The mining industry should develop social, physical and economic integrated housing developments within or outside the mining areas;
3. The mining industry should be responsive to housing demand;
4. The mining industry should ensure the involvement of employees in the housing administrative systems;
5. The mining industry should ensure security of tenure for mine employees;
6. The industry should promote best practices and compliance with minimum standards and norms in relation to the delivery and management of housing;
7. The industry should promote the use of financing schemes in a transparent and accountable manner; and
8. The mining industry had to ensure proper health care services for the mine workers and their families within and around the mining areas.

8.10 A strategy for procurement and enterprise development

In South Africa, local procurement formed an important part of the country's drive to promote BEE. The Mining Charter required that companies source a percentage of the goods, services and capital equipment from local companies and particularly from companies owned and/or managed by HDSAs in a bid to redressing the economic legacies of the apartheid.

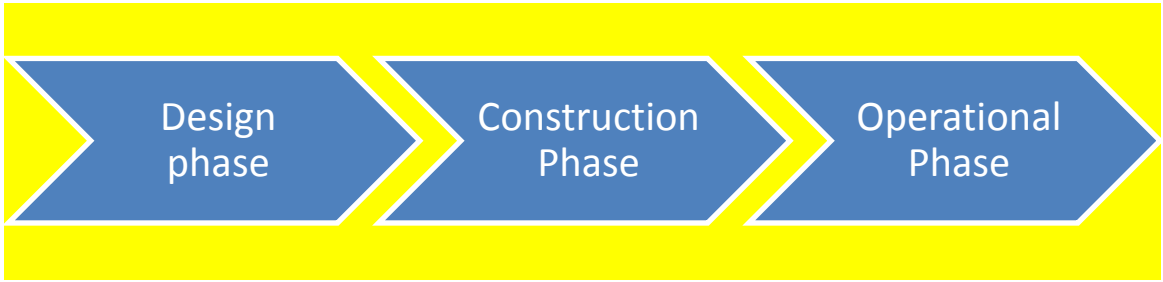


Figure 6: Life cycle of the mine

Figure 6 shows a mine's life cycle as it is important to understand this cycle when considering factors which influence procurement decisions in a mine development. The three key cycles of any mine are the Design, Construction and Operational Phases. Critical decisions within each of these phases would impact and influence procurement decisions which have a bearing throughout the cycle of the mine.

The design and construction phases usually were specialized fields and there were relatively few companies, if any, at mine community level with the expertise capable of winning a tender to do this. The operational phase procurement was informed by the design and construction phase. To operate a successful mining operation in a remote area, the welfare needs of most of the workforce had to be catered for, such as accommodation, catering, the supply of drinking water and food stuffs, and so forth. All these items would appear suitable for provision by local suppliers, but by the time a mine reached the operational phase, many of the systems, structures and suppliers had already been established by the main constructor at construction phase and the mine tended to favour suppliers they had worked with before and with whom they had a favourable working relationship. This meant that, even though such goods could be supplied locally and boosts the local community with revenue generation, the decisions had been made as to the preferred supplier at design and construction phases. Even though local supplies were not restricted from tendering to take over the various services and supply contracts on offer, the chances of obtaining contracts in the initial operational years of the mine were minimal.

8.10.1 Fundamental principles

The Procurement issue in the mining sector strategy was evaluated against the following fundamental principles:

- Decision for local procurement had to be made at the design stage of the mining company. Mining operations should develop their own local procurement strategies because if decisions rested with corporate offices, it was unlikely that local community procurement would be realized;
- Mining companies had to operate a pragmatic and systematic procurement process that undertook to engage local procurement wherever possible and practical. This engagement was needed as empirical evidence pointed[162] to the fact that of the bulk of the mining procurement budget spent in South Africa, the capital goods were often

[162]Hanlin C, *The drive to increase local procurement in the Mining Sector in Africa: Myth or reality*, MMCP Discussion Paper No 4, March 2011.
MMCP was a collaborative research and policy program between a number of research institutions and academic institutions, that is, Policy Research and International Services and Manufacturing (PRISM), Economics and CSSR, University of Cape Town and Open University.

acquired from foreign manufacturing companies, who had a local base in South Africa;

- Maximisation of local procurement where possible by actively encouraging procurement officers to engage with local suppliers and explore opportunities offered by local markets;
- Mining companies had to increase supplier development initiatives and further introduce simpler terms and conditions of payment that would accommodate the needs of small and medium enterprises;
- A real tangible commitment that filtered down from the level of policy development to actual practice. For this to occur, there had to be complete agreement and buy in at all levels of corporate and mine management; and
- Prescription of local contents of local goods and services which avoided HDSAs being simply middle men, but encouraged production and participation in these goods and services.

8.10.2 Elaboration of principles

This strategy was underpinned by the following principles explained below:-

- *Location of decision making was crucial to procurement and the benefit of local suppliers*

  If decision making rested with corporate offices, which were usually far from the mine operation, then it was highly unlikely that the local procurement objectives would be realized.

- *Knowledge of the local environment was crucial for local procurement to be realized.*

  Most procurement functions on a mine site were expatriate led and an understanding between the procurement decision makers at the mine sites The local markets and distribution networks had to be forged.

- *Procurement from the local community was based on successful integration of the investor and the community*

By their very nature, mines were situated in remote areas. Therefore, there were large groupings of expatriates living together in an environment they had little knowledge of and they were segregated from the local community. These factors translated into skepticism towards the abilities of local employees and anything supplied locally. In terms of procurements, this skepticism was against any services and products offered locally.

- *Preferential procurement policies were a catalyst for the development of local enterprises*

  As much as not all goods and services needed by the mining industry could be manufactured locally, the bulk of the goods could be produced locally and would boost enterprise development. Specification and encouragement of local content were advised.

- *Support for local production of imports*

  Government had to have explicit policies and programs to create capacity among HDSA to support local production of imported inputs.

8.11 A strategy for consultation, monitoring, evaluation and reporting

Monitoring and evaluation was the systematic and continuous collection of information about the progress of the mining project over time. Monitoring was useful and most important for identifying strengths and weaknesses in a project and for ensuring the provision of the responsible people for the various tasks with sufficient information to make the right decisions at the right time to improve its quality. On a continuous basis, information about the work, the impacts it had and about external environments needed to be collected and analysed. The results of all information gathered could be fed directly back into the planning process and effective changes can be made, thus ensuring that the work stays on course by checking that activities were implemented. Progress was measured toward effective delivery of objectives and problems could be identified and dealt with as they arose. Strengths could be built and changing circumstances could be dealt with. Figure 7 shows the program cycle and how assessment, monitoring, review and evaluation of work as parts of a continuous process.

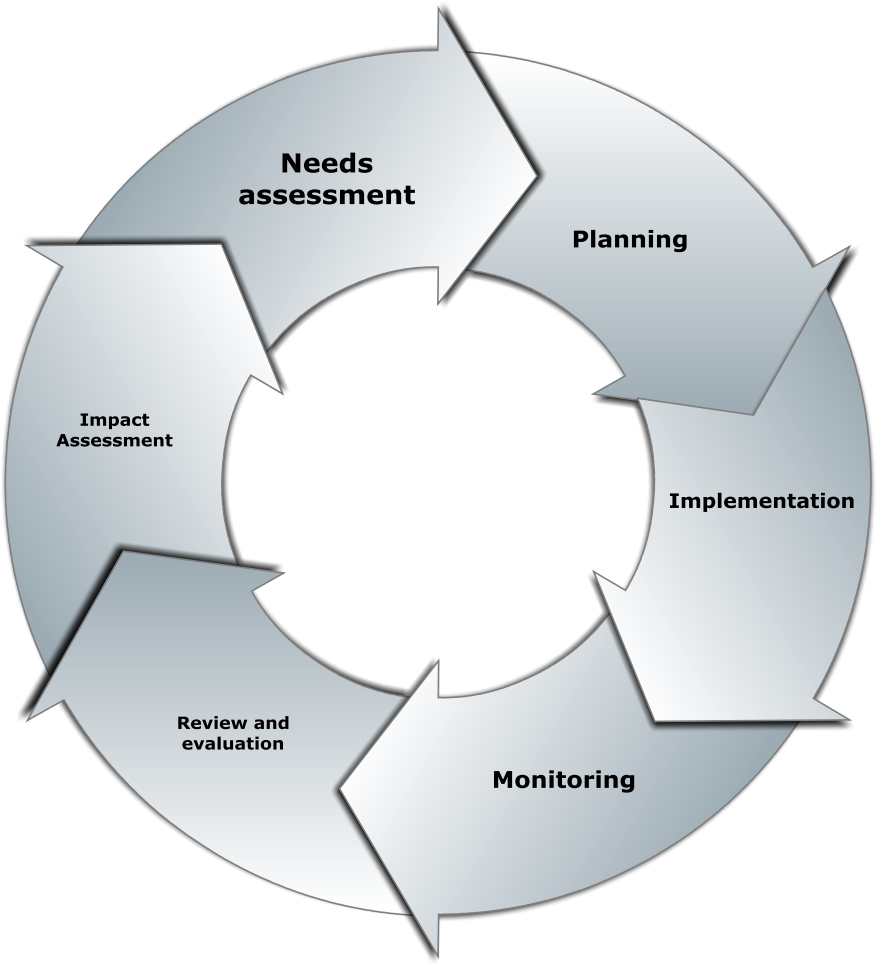


Figure 7: Program cycle

8.11.1 Fundamental principles

The consultation, monitoring, evaluation and reporting issue in the mining sector strategy was evaluated against the following fundamental principles:

- Mining Charter compliance was essential for effective transformation and there had to be a coordinated mechanism within all key stakeholders to effectively monitor and evaluate progress on an annual basis of the targets achieved;
- Clear indicators had to be set at the outset of the project that would show whether or not the objectives were being met and achieved;
- The Department of Mineral Resources should monitor and evaluate industry's obligations in order to ensure that all relevant conditions as laid down were incorporated and undertaken; and
- Non-compliance with the objectives of the strategies would render the entity to be in breach with the MPRDA and subjected to section 47 of the Act.

8.11.2 Elaboration of principles

This strategy was underpinned by the following principles explained below:-

- Quantitative and qualitative methods for collecting and analyzing information;
- Methods used had to be systematic: objective and without biasness; and
- A clear recognition of differences within and between groups and an avoidance of discrimination against major mining companies, juniors and small scale mining operations.

8.11.3 Non-compliance

Government should appoint an independent verification company to investigate the reasons why the company had not complied and recommend steps to ratify the position, failure of which government should render the mining company non-compliant with the provisions of the strategies as outlined in breach of the MPRDA and subject to the provisions of section 47 read with Section 98 and 99 of the MPRDA Act.

8.12 Conclusion

The central theme in the strategies to drive the transformation agenda forward in South Africa was political will, improved national complex[163] and a good system of education that would empower South Africans from elementary school to the working environment to transform the mining sector. In any transformation agenda, education was paramount for the empowerment of citizens, skills development and alleviation of past injustices.

For transformation to be authentic and just, it had to have a personal identity, in that an identifiable improvement in the lives of the targeted people was seen in social, economic and political areas. An educated people have had as their foundation a good education system. They are creative thinkers, who have a solution-based mind set from a young age. Critical thinking skills are essential to succeed in a competitive-based national and global arena. Education could provide the necessary skills and encourage ownership which could act as a catalyst for effecting the meaningful integration of HDSAs into effective participation in the economic arena. Ownership by HDSAs could also provide the operational leverage required to influence the effective implementation of the other elements of the Mining Charter.

The next chapter provides for the elements of strategy implementation. The implementation of the strategy was analysed according to a Strength, Weaknesses, Opportunities and Threats analysis. It was through the SWOT analysis that the strategies were tested for their robustness and sustainability. The strategies had to match policy with reality for the transformation of the mining industry to be achieved.

[163] The realisation was that all were afforded socio-economic rights as entrenched in the Constitution. The realisation of these rights was key in the advancement of race and gender equality and the evolution of a society in which men and women were equally able to achieve their full potential.

CHAPTER 9

STRATEGIES IMPLEMENTATION

9.1 Introduction

Chapter 8 dealt with the creative and analytical aspects of strategy formulation and this chapter aimed at undertaking the managerial priority of converting the strategy into operationally effective action. In terms of importance, implementing the strategic plan was as important as the strategy itself.

Implementation is the process that moves a strategic plan to actions to achieve desired ends. The process moves from addressing the w*hat* and *why* of activities to addressing the *who, where*, *when* and *how*. There has to be stability between the strategies and each organizational structure, reward structure and resources allocation and, most importantly, political will to ensure success. For a strategy to be effective and its objective to be realized, it must gain a commitment of the organization's resources and also be embodied in organizational activities.

The approach taken in developing an implementation plan for the strategies involved taking into consideration the lessons learned over the years, particularly in terms of the objectives of the 1994 Mining Charter and its subsequent amendments in 2009. The strategies' objectives and lessons had been benchmarked against international best practice. The strategies were aligned and inspiration was drawn from the Africa Mining Vision (AMV) and its Action Plan. The strategies went beyond the AMV having taken into consideration that the Charter had been given more leverage and legislated non-compliance by the mining industry when compared to the AMV which set out intents and purposes. The major stakeholders of the mining sector would have to, in turn, endorse the implementation plan and thus provide greater legitimacy and ownership. The successful implementation of the strategies could not be the preserve of government alone. The stakeholders and their roles were briefly described in Chapter 8.

This chapter aims to show how the strategies were to be implemented. This discussion is the translation of chosen strategy into action to achieve strategic goals and objectives. The

successful implementation of these strategies depended on the committed coordination of all stakeholders and the attainment of measurable results.

The implementation plan of the strategies was modelled on the SADC program logic model, which, turn, had been used by the United Nations Economic for Africa[164]. It was linked between inputs and resources, which were then invested into activities or actions that produced results, which would eventually lead to changes in the sector. These changes were referred to as outcomes and impact. The outcomes led to the achievements of objectives. The basic program logic is illustrated in Figure 8 below.



Figure 8: Program logic for the strategies implementation plan

[164]Harmonisation of mining policies, standards and regulatory framework in Southern Africa

Objectives- a summary of what the implementation plan desired to achieve under each strategy.

Strategic actions- the major tasks or activities required to ensure the implementation of the objectives.

Indicators of achievement- the measures to define the extent of which strategic actions had been met and implemented.

Timeframe- the implementation of the strategy had to be allocated a time frame for consistent monitoring and evaluation.

Outcomes- expected changes in the mining sector as a result of implementing the activities as recommended in the Implementation Plan.

The program logic for the strategies implementation plan as outlined in Figure 8 above laid the groundwork for a 360° feedback process in clarifying and translating the vision and strategy/ies, that would lead to communication and linking, to planning and target setting and ultimately to strategic feedback and learning. It was a process followed to keep the strategies aligned and to control strategy implementation. The successful implementation of strategies depended on consensus being achieved both within and outside the organisation. Failure to take into consideration external stakeholders, such as environmental groups and the communities, could have a major negative impact and seriously jeopardise strategy implementation efforts.

The effectiveness of the strategies was assessed by applying and carrying out the classic SWOT analysis (an assessment of internal environment with regard to strengths and weaknesses as well as external environment concerning opportunities and threats).

The action plan had been conceived as a rolling plan in terms of time frame, whether short term or long term. Short term was defined as a period between 0 to 10 years and long term as a period between 10 to 20 years. The success of the action plan as envisaged in the implementation plan of the strategies depended on the levels and quality of partnerships that emerged. On each of the strategies, a number of key role players, based on their areas of activities were identified. As a result, different types and levels of resources were identified

as being needed to leverage the plan by all the stakeholders as implementation plans could not be the sole reserve of government.

9.2 The elements of the strategies

The elements of the strategies were ordered in terms of priority of preference by the researcher as indicated below. The reason was that as soon as one touched on the subject of transformation of the mining sector, the focus invariably fell on only two elements: ownership and management control. While BEE's main aim was to increase the number of HDSAs who managed and controlled the country's economy in order to redress past injustices, the ownership and management objectives did not exclusively meet the holistic objectives of transformation of the mining sector.

These elements were:

- Human resources development;
- Advancement of women in the mining industry;
- Sustainable development and growth of the mining industry;
- Employment equity in the mining sector;
- Beneficiation of minerals in the mining sector;
- Ownership and joint venture;
- Mine community development;
- Housing and living conditions;
- Procurement and enterprise development; and
- Consultation, monitoring, evaluation and reporting.

9.3 An implementation plan for the strategy for human resources development

The purpose of this strategy was to ensure effective transformation into the future of the mining industry as education was a key driver for any transformation agenda. Figure 9 is a SWOT analysis of human resources development.

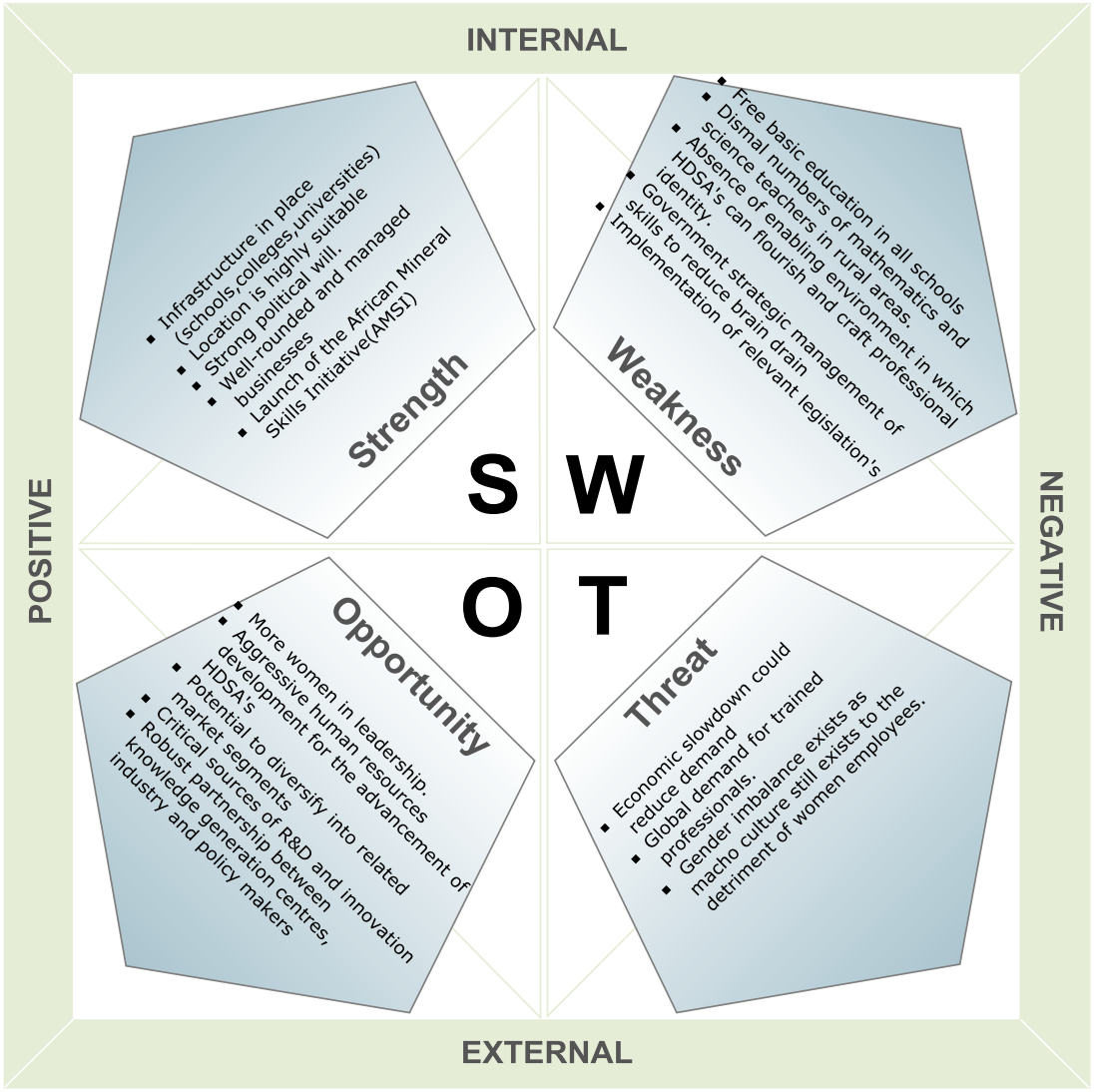


Figure 9: SWOT analysis of human resources development strategy

It is evident from the SWOT analysis in Figure 9 that good strategic planning was an interactive process, requiring the reassessment of internal and external scan information and then adjusting goals accordingly. The figure represents a visual strategic implementation; the result is a clear, concise and a workable blueprint to be followed in pursuit of the strategy implementation. The launch of the African Mineral Skills Initiative (AMSI) is a useful supplement to tackling the skills shortages of skilled workers. The AMSI is supported by Africa's leading major mining companies. The weaknesses and threats show that the country has to benchmark itself against international best practises to be competitive. The weaknesses and threats can be addressed through regional economic arrangements. For this to occur,

South Africa cannot continue to have stringent policies towards recruitment of qualified persons and needs to implement an institutional framework that encourages the free movement of people with required skills that could be utilised in the sector. The private sector has a business interest in human resources development and should, therefore, play an important role in leveraging the contribution made by government in terms of addressing the weaknesses and threats. Table 14 shows an Action Plan for the Human Resources strategy.

Table 14: Action plan for human resources strategy

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Enhanced Human Resources and Institutional capacities	• Mandatory and free basic education in all schools • Increased focus on the girl child with interest in the Sciences • Strengthening of HDSAs nationalistic spirit through education • Increased teaching of mathematics and science in rural school by qualified teachers • Strengthening of continuing professional development • Compulsory national service of science and engineering graduates to teach in schools	LT LT LT LT LT LT	• Increased HDSA students numbers graduating in mineral-related qualifications • Increased educated, trained and corrected gender imbalance in the mining sector • Improved national inferiority complex to enhance the numbers • Increased scarcity skills development • Improved productivity of employees in the place of work • Increased development of HDSAs employees	Government Industry Tertiary Institutes

9.4 An implementation plan of the strategy for the advancement of women in the mining industry

The purpose of this strategy was to point out that effective transformation could not be implemented if a section of the population did not fully and actively participate into the economic mainstream .A SWOT analysis is shown in Figure 10:

Strategy for the advancement of women

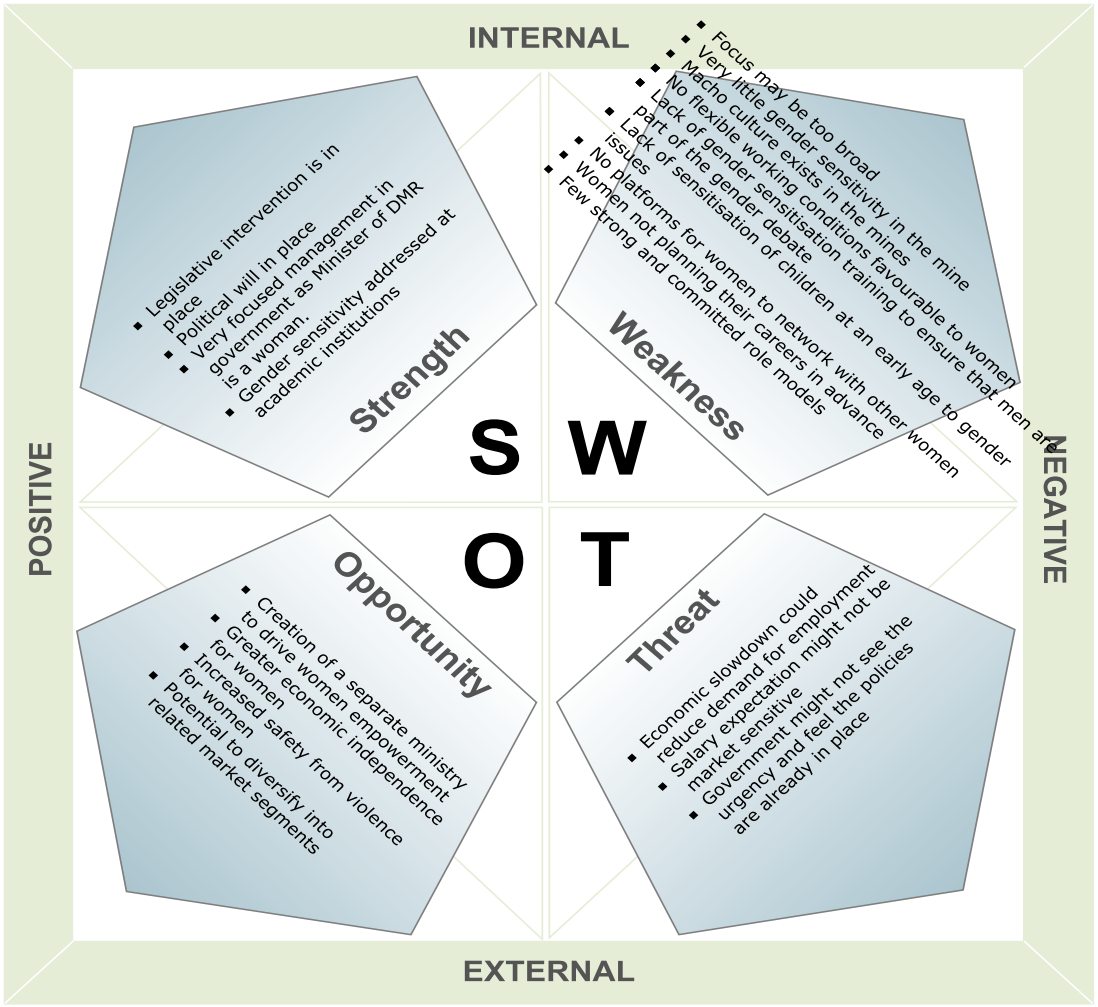


Figure 10: SWOT Analysis of the strategy for the advancement of women in the mining industry

The creation of gender equity in South Africa had to be effectively addressed if the country was to achieve economic performance that contributed to a better life for all and thus create sustainable jobs for all South Africans. The total number of women in South Africa was reported in 2011 as 50.40% according to a World Bank report, published in 2012. This percentage accounted for slightly more than half of the population of South Africa.

Since legislative intervention had not achieved the desired results, the creation of a new ministry for the sole advancement of women, was needed as the government's principal advisor on achieving better outcomes for women in the mining industry as they were often deemed as only being responsible for the children and the disabled. Economic liberation

would not be realised if a section of the population was not involved. It would be to the detriment of country if the government felt that the current legislative and institutional framework were sufficient and did not need to be addressed. Table 15 shows an action plan to address the need for the advancement of women in the sector.

Table 15: Action plan for strategy for the advancement of women in the mining industry

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Corrected gender balance in the mining sector at board level downwards	• Creation of a new Ministry of Women Affaires • Promotion of gender diversity and promote women to position of leadership • Addressing the working conditions of women in the mining industry • Empowerment of women in all spheres of society	ST LT ST LT	• Increasing suitable women nominees for appointment to the mining industry • Increasing female directors that manage, own and control mining companies • Improved monitoring of the status of women to fulfill the country's international obligations[165] • Increasing flow of portions of economic benefits toward women	Government Industry

9.5 An implementation plan of the strategy for sustainable development and growth of the mining industry

The purpose of this strategy was to ensure that there was collaboration between all relevant stakeholders to promote sustainable development practises. Figure 11 is a SWOT analysis for sustainable development. A SWOT analysis is shown in Figure 11:

[165]South Africa has ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), a bill of rights for women. CEDAW sets out legally binding principles and standards for realising women's rights and is thus often referred to as the Women's Convention.
Under the 1993 Declaration on the Elimination of Violence Against Women, States have an international obligation to eliminate violence against women. Violence is derived from social attitudes that belittle women and girls and set them apart from rights to attain economic liberation. Violence to women is tolerated through indifference, ignorance and fear of speaking out. It is prevalent where communities do not address structural patterns of discrimination and do not implement policies and laws in an effort to empower women.

Strategy for sustainable development and growth of the mining industry

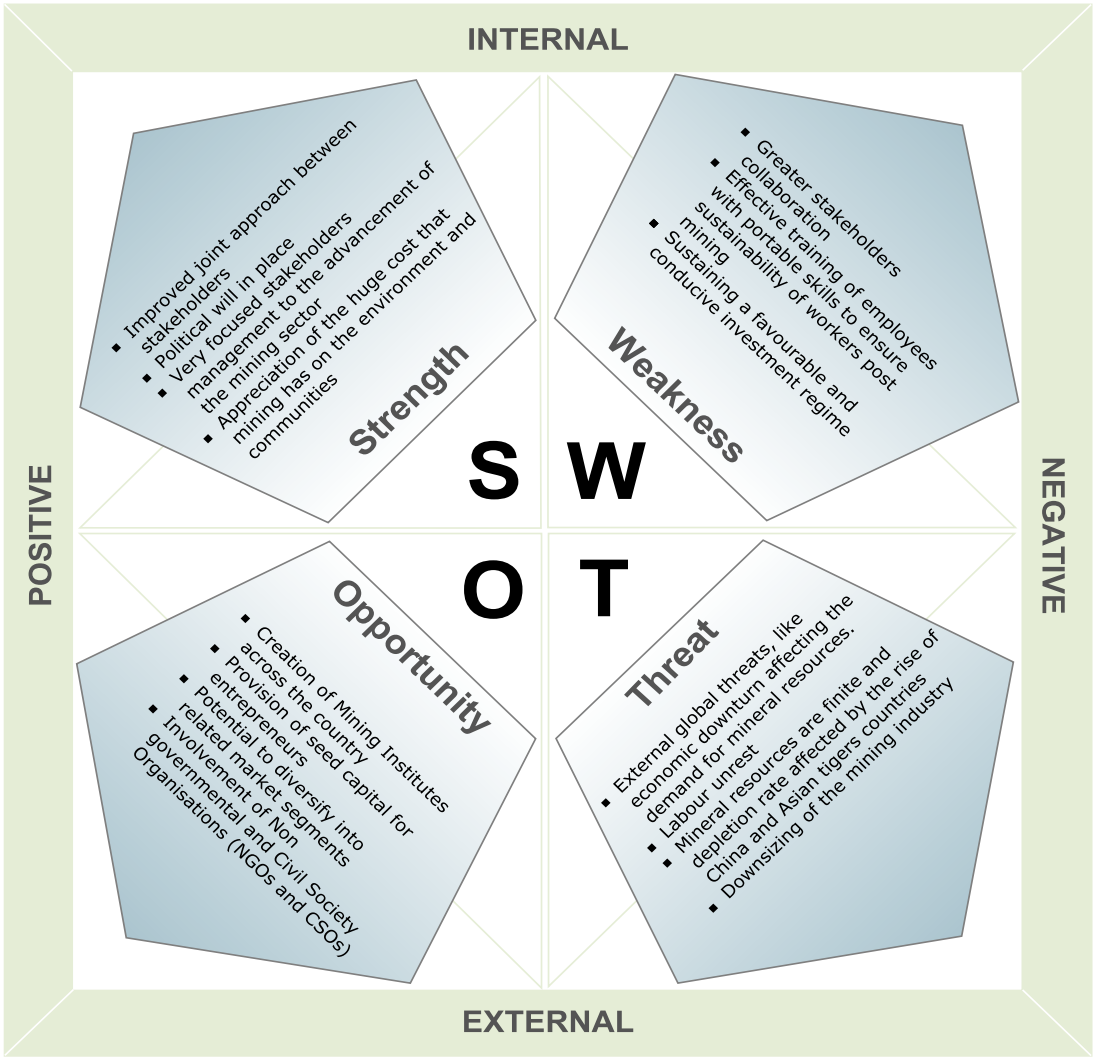


Figure 11: SWOT analysis of strategy for the sustainable development and growth of the mining industry

The greatest threat in this SWOT analysis was that because of labour unrest as recently seen in the mining industry, the industry was being forced to negotiate outside the recognised bargaining council, resulting in the ripple effect of downsizing. The adverse effect would be an affirmation of the 2011 census of the country's chronic unemployment problem. The country could not afford to have the figures worsen by the downsizing of the mining sector.

For this strategy to be effective there had to be the involvement of Non-governmental Organisations and Civil Society Organisations (NGOs and CSOs) as they occupied an important position in society. These organisations were important as they had comprehensive

knowledge of community issues and concern that impacted on the society directly. NGOs and CSOs also served as important avenues for service delivery to communities. They served as an interface between the major stakeholders, that is, government, industry, communities and donors in the promotion of sustainable development practices, thereby ensuring the equitable delivery of benefits of development. Table 16 shows an action plan for this strategy.

Table 16: Action plan for strategy for the sustainable development and growth of the mining industry

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Creation of new businesses, rather than new jobs A well-governed mining sector that is inclusive of environmental concerns and appreciated by all stakeholders Strong transparent and participatory governance processes at all levels	• Creation of Mining Institutions to educate young people to start and run their own businesses • Creation of a joint approach between stakeholders towards development • Creation of sources of capital for HDSAs' participation in new ventures	LT ST ST	• Increased numbers of new businesses and people attending capacity building workshops • Increased degree of interaction between all stakeholders • Increased number of companies HDSAs controlled and owned by HDSAs	Government Industry

9.6 An implementation plan for the strategy for employment equity in the mining sector

The purpose of this strategy was to ensure the availability of mining skills and compare these to projected demand as well as the sector's ability for skills development and attainment of employment equity. A SWOT analysis is shown in Figure 12:

A strategy for employment equity in the mining sector

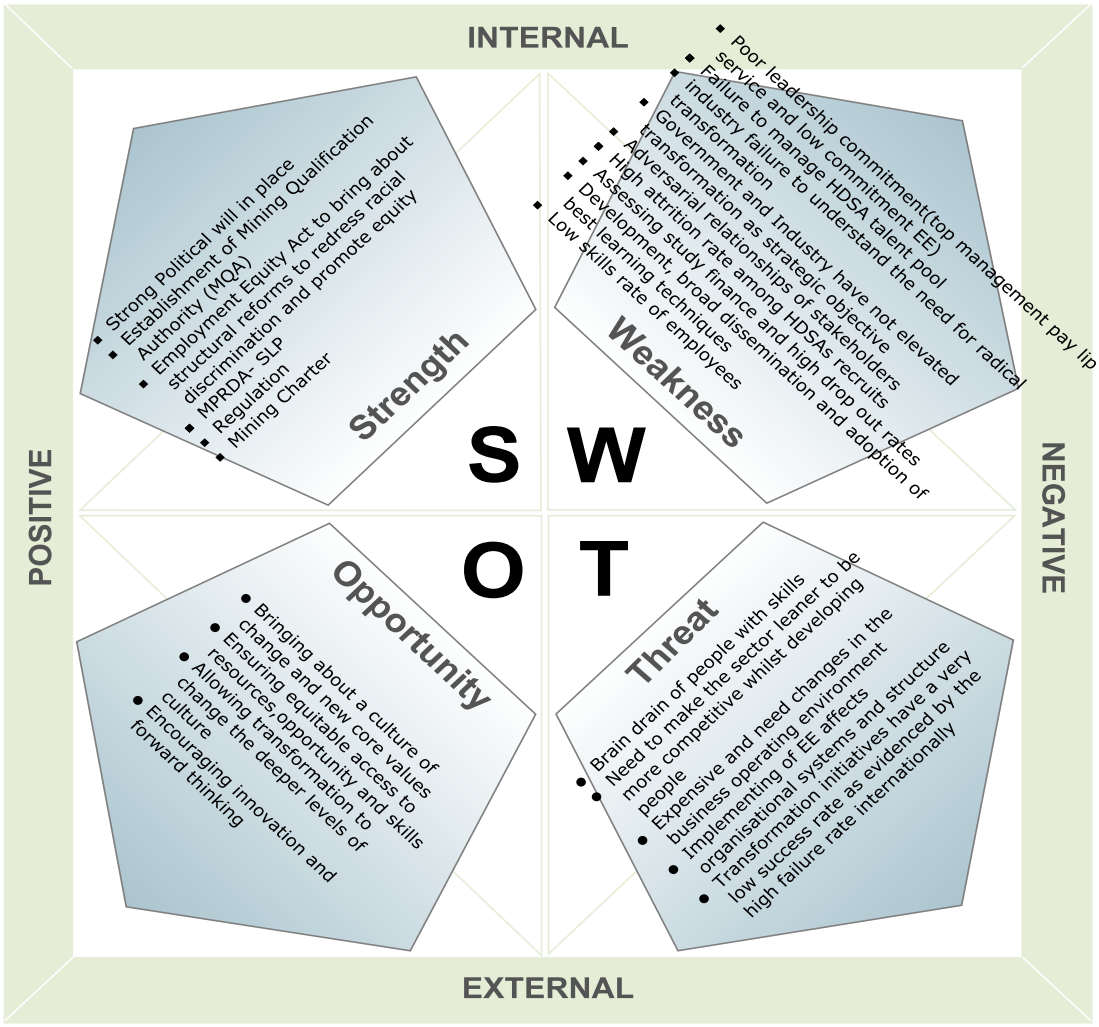


Figure 12: SWOT analysis of strategy for employment equity in the mining sector

This SWOT analysis pointed out that it was imperative for the strategy to succeed and that government had to ensure there was a constant output of appropriately trained new generation South Africans to feed into the mining sector to make it sustainable. Table 17 shows the action plan for this strategy.

Table 17: Action plan for strategy for employment equity in the mining sector

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Appropriately trained new generation of South Africans Pragmatic Employment Equity Plans by employees	• Planning and focusing people's minds on the strategic objectives of the Charter • Deploying qualified people to mining companies to change structure, roles and competencies • Supporting the organisations' systems and controls by implementing performance measures and technology • Providing support for addressing Charter requirement for employment equity • Community service of graduates to teach Math's and science • Skills programs targeting the girl child • Strengthening of continuing professional development	LT	• Operational and organisational change framework of mining companies accompanied by cultural change and aligned with the objectives of the Charter • Success levels of all interventions by the MQA in ensuring well-managed mine ventures • Success cases of development and implementation of core skills development programs • Addressing of skills gap to achieve the minimum 40% of HDSAs in executive and critical skills level • Letting go of past practices such as imbalance in equal opportunity for HDSAs • Increased numbers of women employees involved in the mining sector • Increased employment possibilities and motivation and inclusion by management in the change process and the accompanied financial incentives	Government Industry

9.7 An implementation plan for the strategy for beneficiation of minerals in the mining sector.

The purpose of this strategy was to ensure that the country's mineral endowment, which was its comparative advantage, was further translated into a national competitive advantage. This strategy would be aligned to a national industrialisation program which would enhance the quality and quantity of exports, ensure the promotion of decent employment and the diversification of the economy. A SWOT analysis is shown in Figure 13:

Strategy for beneficiation of minerals in the mining sector

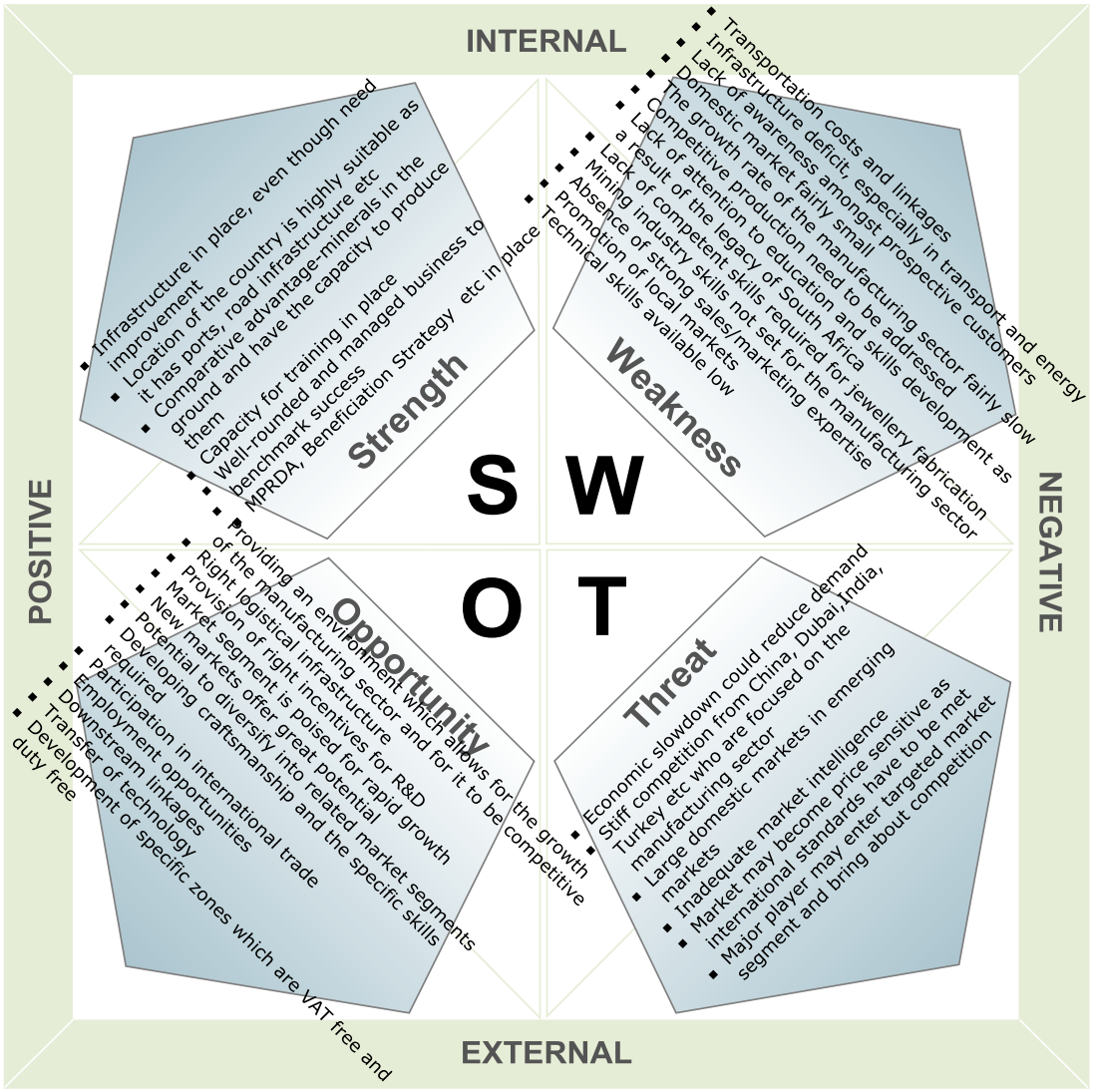


Figure 13: SWOT analysis of strategy for beneficiation of minerals in the mining sector

From this analysis, it was deduced that beneficiation was important as it would catalyse and compel the sector to contribute to the broad-based growth and development through downstream linkages into mineral beneficiation and manufacturing. There would be an immense contribution to the economy if minerals were beneficiated instead of being exported in their raw form. There was a direct and indirect relationship as a result of beneficiation. Beneficiation of mineral resources would not only translate into higher value product but would also be useful for employment creation among other benefits.

A favourable regulatory environment would be crucial because additional control measures would have adverse effects in the diamond industry as highlighted by amendments that came

into effect in 2005. These control measures resulted in a total collapse of the country's diamond manufacturing and the subsequent migration of diamond cutting to Botswana. Government should review and ensure that future trade agreements were aligned with and supported the beneficiation strategy. For beneficiation to be successful in the country, the manufacturing sector should be accelerated to provide a quantum leap on the productivity side which would go a long way in assisting the country to make inroads into beneficiation. Table 18 shows an action plan for this strategy.

Table 18: Action plan for strategy for beneficiation of minerals in the mining sector

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
A knowledge driven, diversified, globally competitive mining sector that is a key component of an industrialising South African economy Manufacturing sector to be accelerated on the productivity side	• Injection of capital for major beneficiation projects • Investment in the manufacturing sector • Human resources development to equip with the right type of skills • Development of policy instruments and laws that will encourage R&D and HRD • Development of specific zones which are VAT free and duty free • Ensuring transportation linkages and specific infrastructure needs over the next 20 years (energy, water and communication capacity) • Linking clear industrial strategies by addressing export taxes on selected mineral product • Promote strategies to	LT LT LT ST LT LT ST LT	• Beneficiation investment initiatives taking advantage of the Comprehensive Strategic Partnerships with China • Growth of the manufacturing sector • Existence of Human Resources with the requisite skills • Increased incentives in place for R&D • Alignment of production plans with national programs • Improved infrastructure to conduct business • Development and support technologies that are competitive • Increased beneficiation initiatives • Increased FDI flows into the country	Government & Industry

	develop R&D in the mining sector to encourage beneficiation initiatives • Ensure that trade agreements support market access and FDI	LT		

9.8 An implementation plan for the strategy for ownership and joint venture.

The purpose of this strategy was to ensure that access of the mining sector by HDSAs was achieved to alleviate the political pressure brought to bear on the mining industry. A SWOT analysis is shown in figure 14:

Strategy for ownership and joint venture

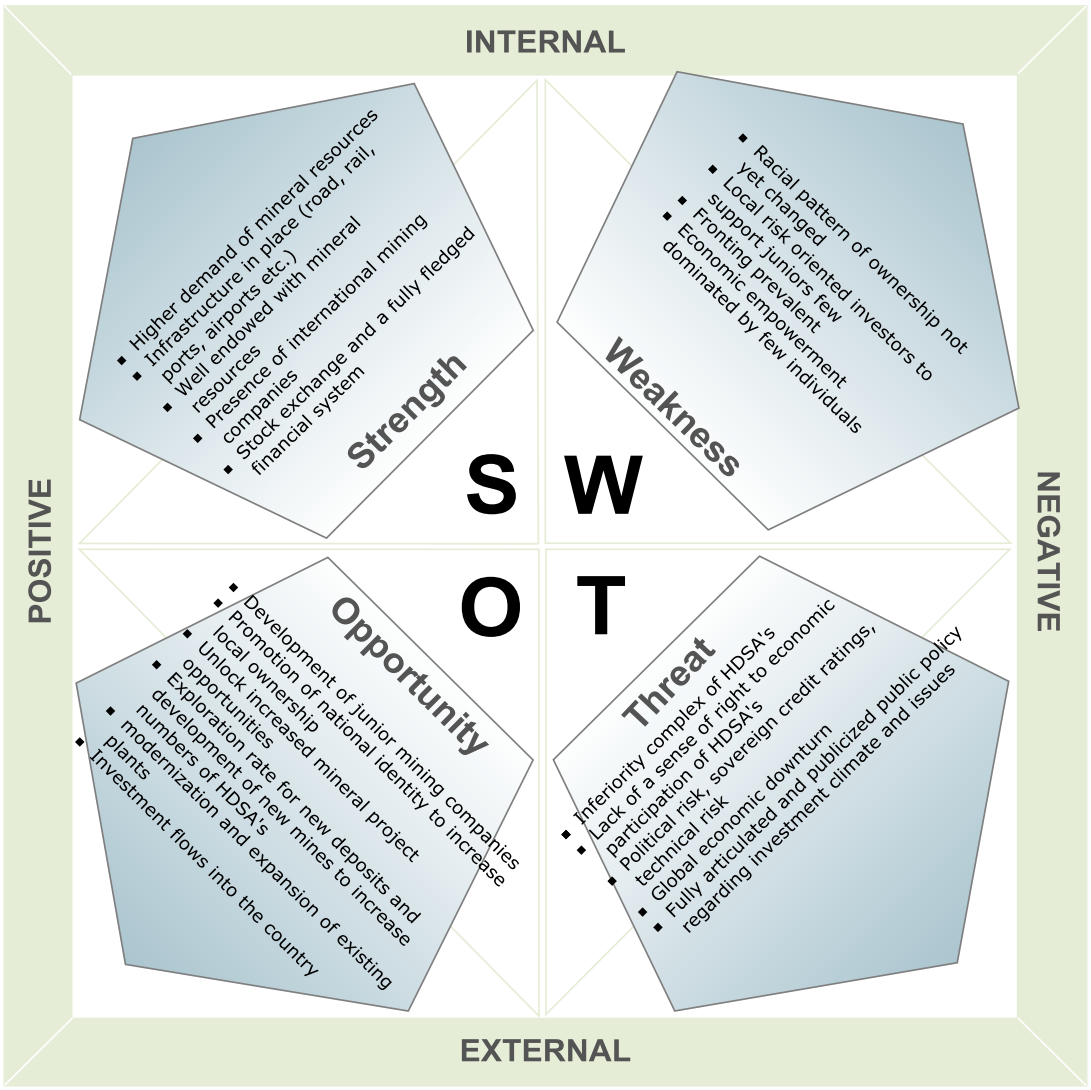


Figure 14: SWOT analysis of strategy for ownership and joint venture.

From this analysis, the issue of ownership was deemed an extremely sensitive one in light of the historical situation of the industry that was with the segregated few. The opportunities in mining were immense due to the high demand for mineral commodities. Table 19 shows the action plan for this strategy.

Table 19: Action plan for strategy for ownership and joint venture

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Enhanced mineral based investment and diversification	• Creation of local risk finance to enable the development of the junior mining sector • Establishment of a productive mining enterprises and Joint Ventures • Constant dialogue with all relevant stakeholders • Investment in grassroots exploration and availability of projects for joint ventures • Creation of FDI opportunities	LT	• Increased numbers of junior mining companies • Percentage increase in local and HDSAs' ownership • Number of mining projects opportunities • Numbers of new mines by HDSAs • Increased numbers of modernisation and expansion of existing plants and improvement in investment flows and growth	Government Industry

9.9 An implementation plan for the strategy mine community development.

The purpose of this strategy was to ensure that community development initiatives were a core element of mining operations and were not viewed as a socially responsible and charitable initiative. Transformation also included change on a fundamental level in the magnitude and quality of the mining sector's overall contribution to the economy of South Africa, through backward and forward linkages, community development and environmental sustainability. A SWOT analysis is shown in figure 15.

Strategy for mine community development

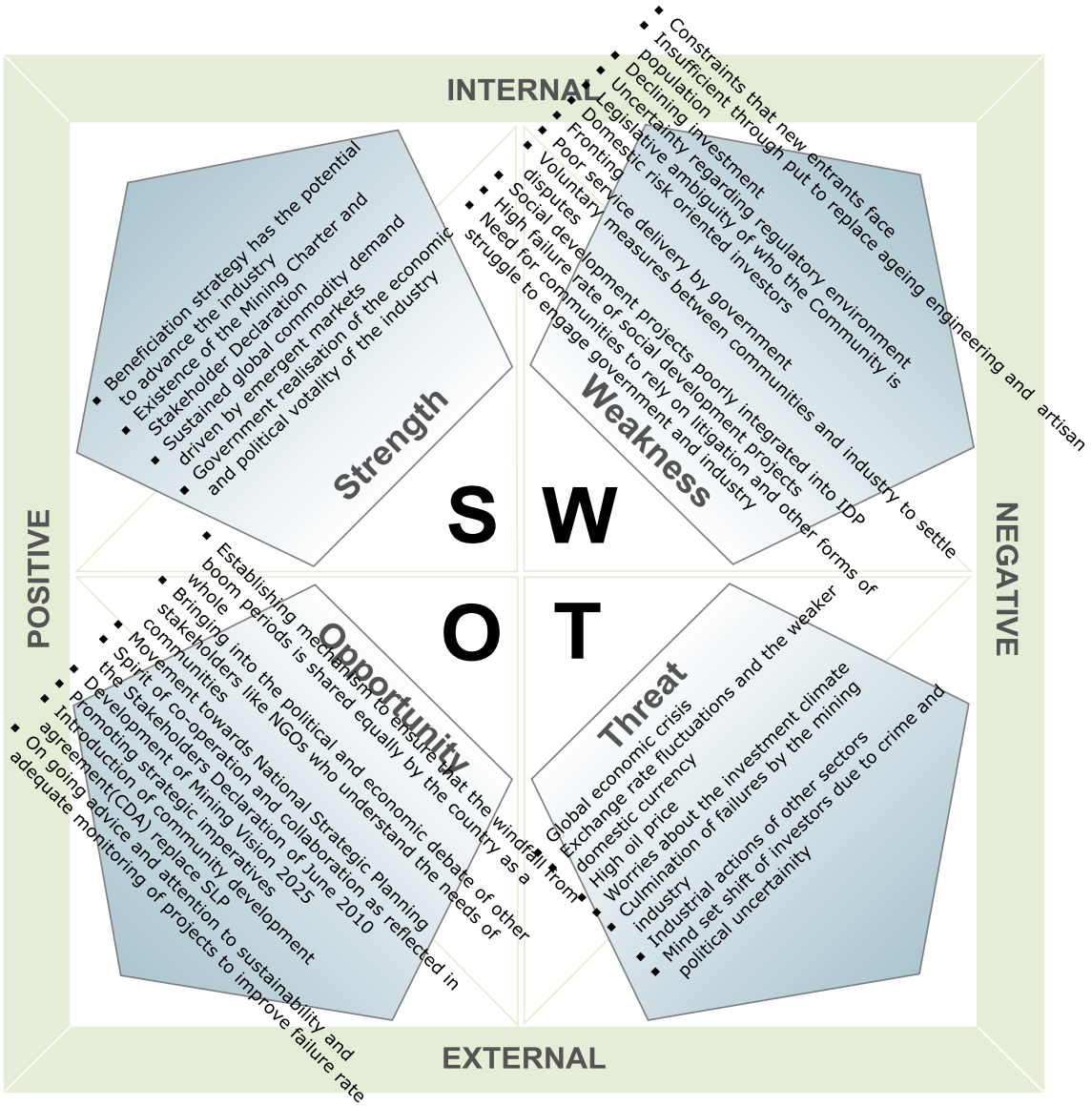


Figure 15: A SWOT Analysis of strategy for Mine Community Development

The above analysis reveals that government and industry need to be more proactive to prevent another crisis like Marikana (which was triggered by the unsatisfactory living conditions of miners in Rustenburg) ever happening again. Table 20 shows an action plan for this strategy.

Table 20: Action plan for strategy for mine community development

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Mining sector that is socially responsible and appreciated by the community	• Developing the manufacturing sector using windfall resources from boom periods • Establishing share ownership schemes • Strengthening frameworks that govern environmental and social impact, and management • Implementing guidelines and benefits agreement with communities where mining operations occur • Building effective capacities of communities • Replacing ageing engineering with technology • Training artisans to replace the ageing population	LT	• Amount of funds from windfall resources used to develop manufacturing • Number of established share ownership schemes • Restoration of the environment to as near pre-mining condition as possible. • Existence of community development agreement(CDA) • Members of the communities experiencing improved nationalistic complex • Existence of young artisans to address skills gap in industry	Government Industry NGOs

9.10 An implementation plan for the strategy housing and living conditions.

The purpose of this strategy was to ensure that the living conditions for mine workers and unfulfilled community demands for employment were effectively addressed. The SWOT analysis is shown on figure 16.

Strategy housing and living conditions

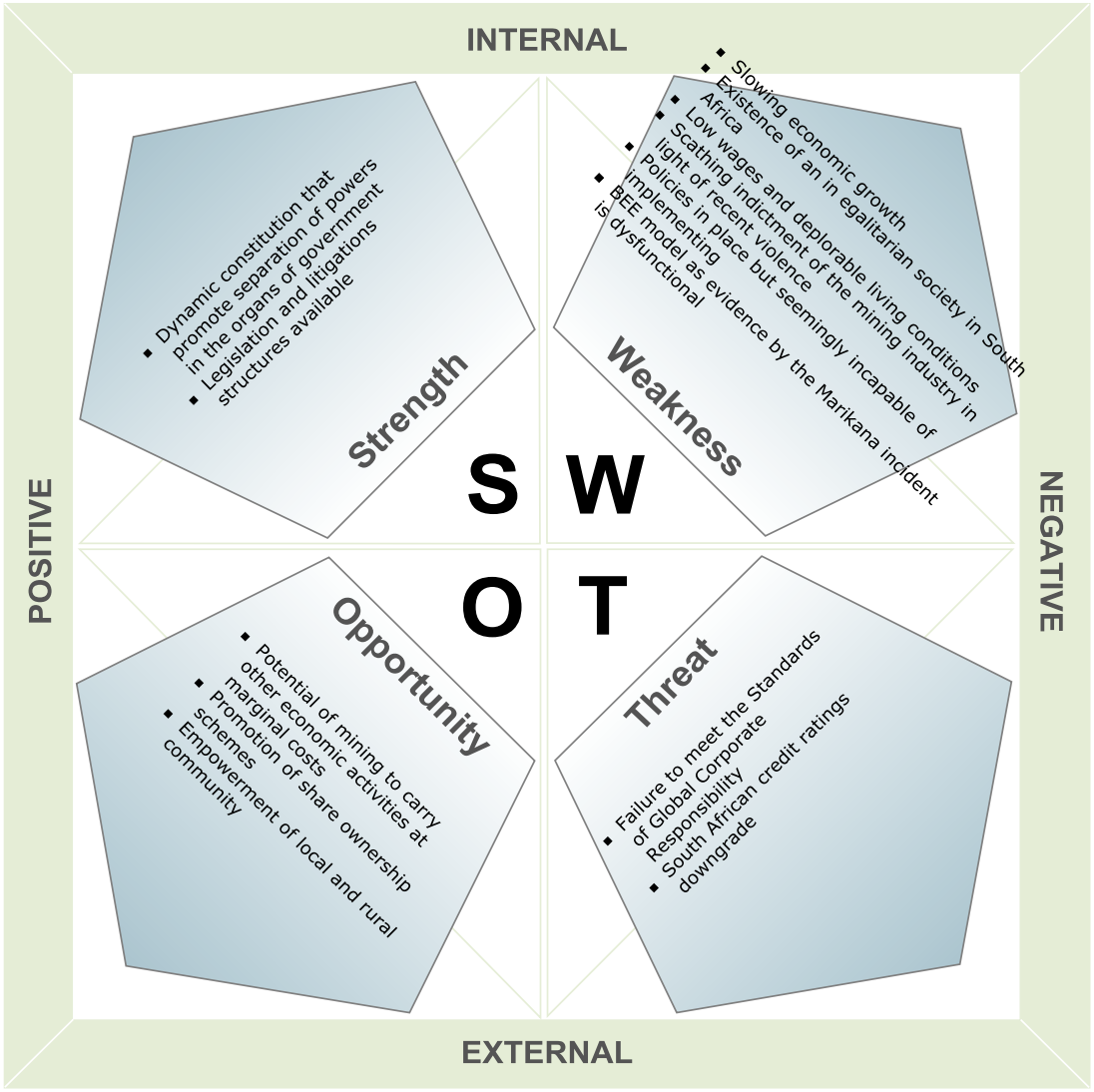


Figure 16: A SWOT analysis for the strategy housing and living conditions.

Table 21: Action plan for the strategy housing and living conditions

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Improved housing and living conditions	• Upgrade all hostels into family units by March 2015 and attain an occupancy rate of one person per room • Address the poor living conditions and unfulfilled demands for employment • Address the rapid deterioration of formal infra-structure and housing • Strengthen mining industry's compliance with Charter • Monitor implementation of ensuring the promotion of home ownership • Develop a sustainable health and safety environment • Build capacities of communities	ST ST ST ST ST ST ST	• Annual benchmarks or targets for companies for achievement of upgrades • Reduction by a large margin of the proliferation of informal settlements • Effectiveness of financial schemes in a transparent and accountable manner • Improved achievement of the Charters annual targets • Substantial number of employees who have achieved home ownership • Effectiveness of community engagements with all stakeholders • More community members able to implement the use of best practices and compliance with minimum standards and norms in relation to the delivery and management of housing	Government Industry NGO's Municipality Banks Financial Institutions

9.11 An implementation plan for the strategy for procurement and enterprise development.

The purpose of this strategy was to ensure that local procurement formed an important part of South Africa's drive to promote BEE.A SWOT analysis is shown in figure 17.

Strategy for procurement and enterprise development

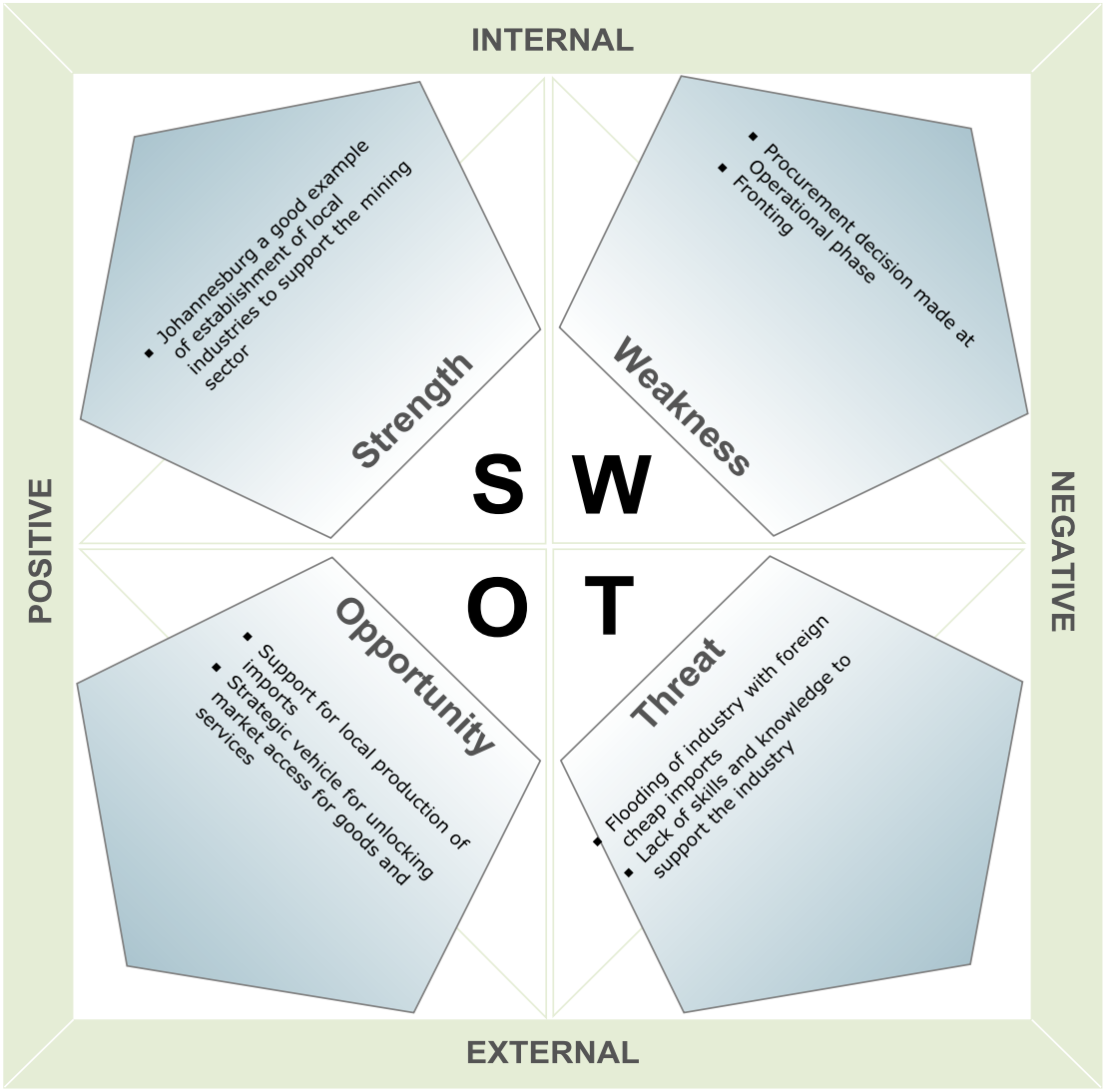


Figure 17: A SWOT analysis for the strategy for procurement and enterprise development.

From this analysis, it was apparent that procurement done in the proper way had the advantage of boosting the economy and, therefore, effective policies and programs had to be implemented to create capacity among HDSA to support local production of imports and other services. This strategy would avoid the creation of ghost towns. Table 22 shows the action plan for this strategy.

Table 22: Action plan for the strategy for procurement and enterprise development

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Local procurement industries that will contribute to the GDP of the country e.g., produce cities like Johannesburg	• Develop niche technological competencies that will support procurement initiatives • Develop local procurement strategies • Strengthen pragmatic and systematic procurement processes to maximise local procurement • Promote local manufacturing or local content of supplies	LT LT LT LT	• Improved investment flows into mining and communities projects • Increased levels of locally produced goods needed by the mining industry • Level of increased employment opportunities • Increased levels of local content of supplies	Government Industry NGO's Municipality Banks Financial Institutions

9.12 An implementation plan for consultation, monitoring, evaluation and reporting.

It was important to consult, monitor, evaluate and report the implementation of the strategies and to ensure that their intended outcomes were all effectively delivered. A framework was needed to integrate results from several sources and to ensure effective delivery. The framework had to be results-oriented and have measurable indicators of expected outcomes. There had to be institutional arrangements for the implementation of the strategies to undertake the following activities:

- Provide technical support for the implementation of the strategies;
- Develop an information and advocacy dissemination campaign, that would take the form of websites and discussions forums to enable stakeholders' engagement; and
- Undertake consultation, monitoring, evaluation and reporting activities to provide corrective action and intervention.

The purpose of this strategy was to ensure that consultation, monitoring, evaluation and reporting of the impact of the strategy by assessing that impact, taking into consideration

short-term and long-term implications of interventions and evaluations as to whether there had been a change as per the desired objectives. A SWOT analysis is shown in figure 18.

Consultation, monitoring, evaluation and reporting

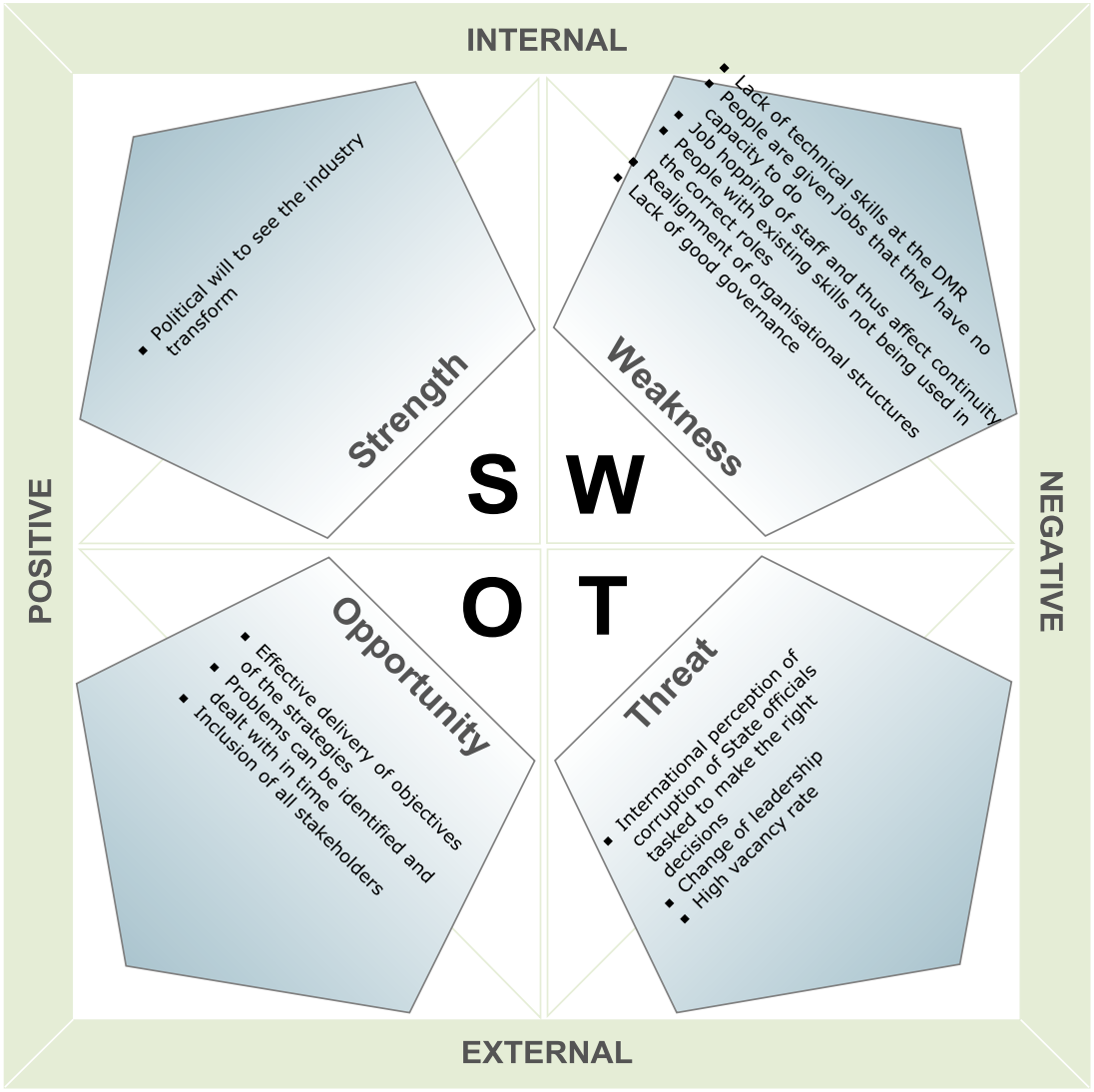


Figure 18: A SWOT analysis for the strategy for consultation, monitoring, evaluation and reporting.

Table 23 shows the action plan for this strategy.

Table 23: Action plan for consultation, monitoring, evaluation and reporting

Expected Outcomes	Activities	Time Frame	Monitoring Indicators	Responsible Bodies
Enhanced achievements of the elements of the transformations agenda	• Systematic and continuous collecting and analysing of information about progress over time	ST	• Identifying strengths and weaknesses of the strategy and providing the right skilled people to make the right decisions	Government Industry
	• Coordinated assessment mechanisms with all key stakeholders of the wider impact, considering the short-term and long-term implications of interventions and evaluation should there be a change	ST	• Utilisation of a range of criteria to measure progress	
	• Setting of clear indicators at the outset of the strategy and provision for the work with sufficient information to make the right decisions	ST	• Improved quantitative and qualitative methods for collecting and analysing information	
	• Proactive role and monitoring and evaluation of the DMR to ensure that all relevant conditions, as laid down, are incorporated and undertaken	ST	• Annual targets and performance disseminated to stakeholders	
	• Ensuring that the work stays on course, measuring progress towards objectives, identifying problems as they occur and strengths that can be built on	LT	• Adapting to changing circumstances and achievements of desired goals	
	• Appropriate decisions taken about the direction the work should take	LT	• Recognising failures and successes and taking corrective measures to ensure the attainment of objectives	

9.13 Success factors

Recommended steps in the implementation of the strategy were:

- Ensuring that the right people were on board, with required competencies and skills;
- Disbursing adequate resources to the strategy's essential activities;
- Ensuring that the strategies were aligned with incentive policies and legislations for effective implementation;
- Implementing programs for constant improvement;
- Linking reward structure of accomplishment of results to the people tasked with implementation of the strategy and also developing some creative positive and negative consequence for achieving or not achieving the strategy; and
- Making use of people with the know-how to implement (strategic leadership).

Coupled with the steps mentioned above, it was apparent that the scope of managerial activities associated with strategy implementation could not be divorced with the entire management process. Therefore, the entire management process was geared according to the needs of the strategy. The following factors were important in strategy implementation:

9.13.1 Institutionalization of strategy

The fundamental basis for a strategy to be effective was the setting up of effective institutions. The failure or success of a strategy did not depend on how well designed it was or whether its objectives were clearly stipulated. The successful implementation of strategy required that the strategy's drafter acted as its promoter and defender. There had to be a buy in from stakeholders, so that all concerned believed that it was their strategy, rather than one imposed on them. Such a buy in from all concerned created a commitment that was essential for ensuring the implementation of the strategy successful. A well-resourced structure at the DMR to drive the Charter was appropriate in this regard.

9.13.2 Setting up proper organisational climate

For the strategy to be implemented effectively, it needed a conducive organizational climate. The conducive organizational climate referred to the fact that there had to be co-operation, commitment and dedication of individuals within the organisations to drive the implementation of the strategies. It was fundamental to have the people and, in particular, trained people with competencies and requisite skills to support the plan. The first stage of implementing the strategy was to set up plans and to ensure the necessary skills were multi-sectorial.

9.13.3 Developing appropriate operating plans

In the implementation agenda, the settings of action plans were crucial. The plans should reflect desired strategic results. It was important that every manager understood the objectives of the strategy to enable him or her to review the program's recommendations of staff members and line subordinates to ensure that they were consistent with the requirements of the strategy. Appropriate committees to review major programs should be appointed to lend an aura of formality to the program decisions and to influence the implementation of the strategy.

Successful collaboration between institutions that impacted on the development of mineral resources was important. The committees should comprise all the relevant stakeholders, which included the following: DMR, Industry as represented by the Chamber, industry as represented by SAMDA, NGOs, communities, and other relevant government department, for example, Department of Water Affairs, Department of Trade and Industry, Department of Transport,, Department of Home Affairs, Department of Human Settlement, Department of Labour, Department of National Treasury, Department of Education, Department of Energy, Department of Public Works, Department of Rural Development and Land Affairs and Department of Women Affairs. Figure 19 shows the reporting process.

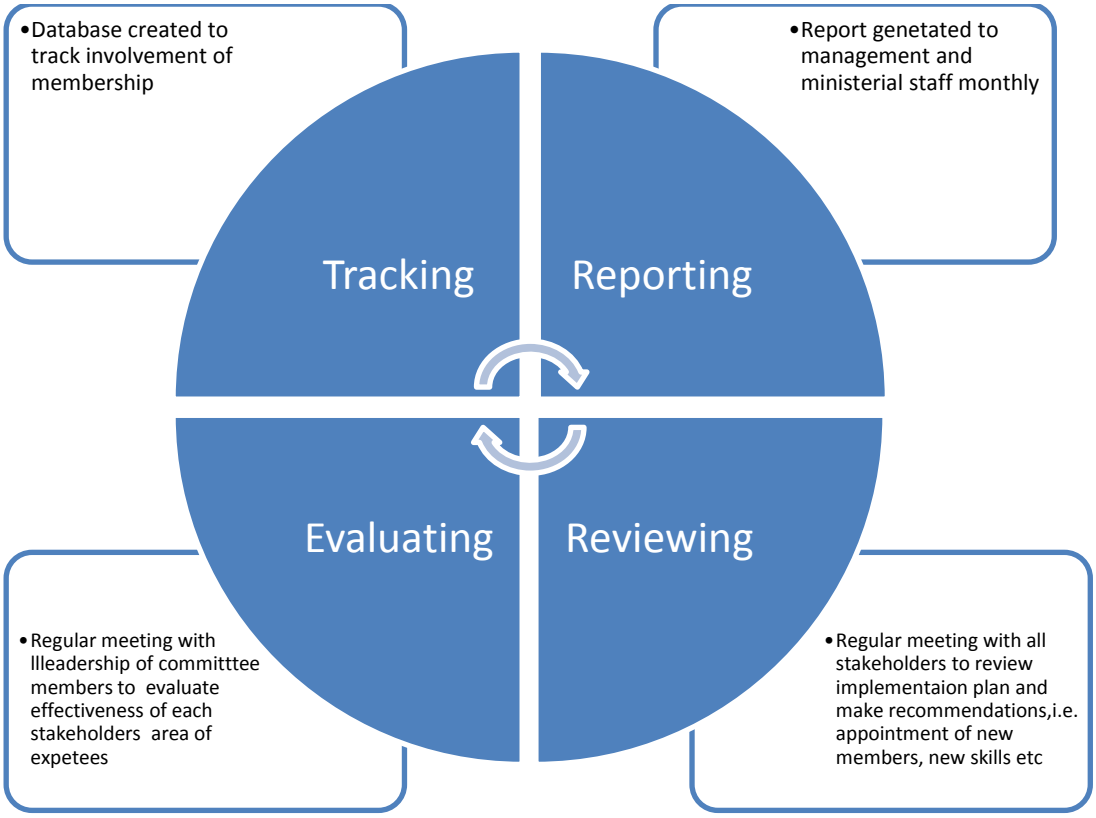


Figure 19: Stakeholders involvement reporting process

9.13.4 Periodic review of strategy

The successful implementation of the strategies rested on the periodic review of the strategies to ascertain whether they remained relevant because even the most carefully developed strategies might cease to be suitable due to unforeseen circumstances at the implementation stage. For example, if events changed, knowledge would become clearer or appear that the environment would not be as originally thought. It was for these reasons that the strategies should be reviewed from time to time. The frequency for such review would not be universal, but major strategies should be reviewed at least once a year.

9.14 Impediments to strategy implementation

Each strategy should have an implementation plan or initiatives. Before the drivers and instruments that assist in implementation of strategy are introduced, it is worthwhile to identify some of the barriers organizations often experience during implementation. These are explained in the diagram depicted below as Figure 20.

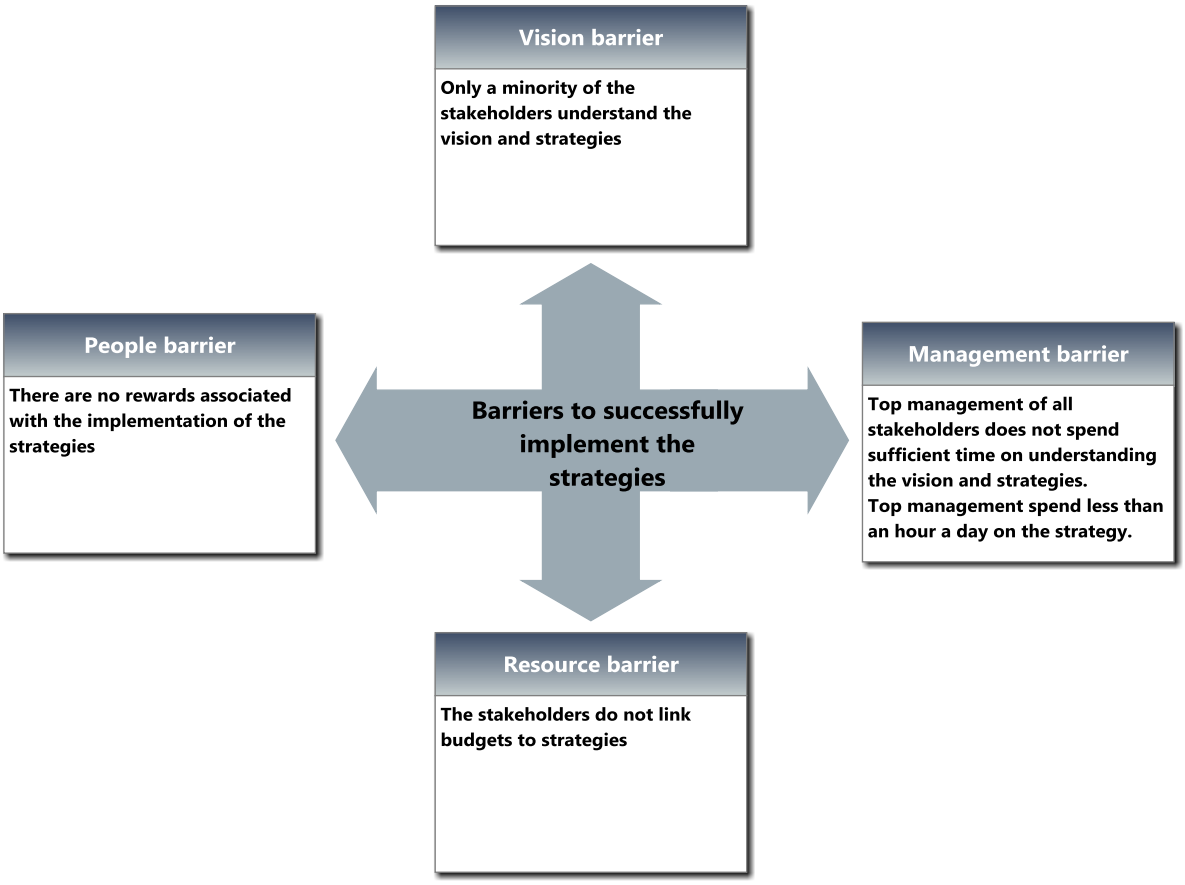


Figure 20: Barriers to successful strategy implementation

It was important to note that the above figure was relevant to all parties involved in the strategies, as they were interconnected in the formulation and implementation of the strategies. Even though government through the interconnectivity of the parties was the main driver in terms of delivery, the role of the other parties was critical for the effectiveness of the strategies.

9.14.1 The specific actions needed to be taken to deal with the barriers were the following:

Vision barrier- It was important that all the stakeholders understood the vision and strategies. Stakeholders understanding of the barriers should be from top management down to support staff for effective implementation.

People barrier- Employees of all stakeholders who had a responsibility regarding the implementation of the strategy should be skilled and remunerated accordingly for all work done. Financial remuneration acted as an incentive for people to work harder and go beyond the call of duty to ensure effective delivery of work allocated to them. It was, therefore imperative that all stakeholders had a budget for this aspect.

Management barrier- It was imperative that top management spent time understanding the vision and strategies. Management should, from time to time, have meetings, workshops and go on retreats to keep up to date with the strategies.

Resource barrier- All the stakeholders should link budget resources to strategies. It was impossible to implement a strategy without budget allocated for that goal.

In summary, successful transformation of the mining sector post-2014, at the end of life of the current Mining Charter, both in its original and revised version, was crucial for the country in order to maintain its ability to be globally competitive. This implementation would enable the growth of the mining sector and the economy. South Africa needed renewed commitment by both the public and private sector to continuously grow the skills of its employees in order to achieve meaning employment and create lasting impact on the economy.

A critical success factor for the transformation agenda for the mining sector beyond 2014 was skills development which had to be prioritised. It was imperative to enforce the strategies and the implementation of the strategies for the mining sector beyond 2014. South Africa had to recognise that, without continued investment in skills development, all sectors of the economy would be impacted and it was of paramount importance for the mining sector. This recommendation was also aligned with National Development Plan (NPC) Vision 2030 document which recommended that the key to sustainable employment and economic growth in South Africa was through education and skills development.

South Africa had to establish the correct basics at the foundation level in order to see the fruition of Vision 2030. If the country did not entrench the basics at grassroots level for to education and human resources development, the problems would have a domino effect through the system and skills development would be compromised. The direct impact on the economy was that the correct education structure and skills development programs not only empowered individuals to develop to their full potential, but also reduced social inequalities.

The importance of education could not be overemphasized, as the lack of even basic education, further added to a lack of economic growth and joblessness. These factors proved the importance of education and skills development is for economic growth.

A recommendation was made for the strategies for the mining sector beyond 2014 to align with the National Development Plan, Vision 2030. The plan was designed to bring about fundamental change by 2030 in all sectors of the economy, including the mining sector. Consequently, the timeframe for the strategies for the mining sector, as recommended, should be fifteen (15) years, starting from 2015 and ending in 2030.

The South Africa envisaged by 2030 should be just, fair, equitable and prosperous. Of paramount importance, it would be a country that each and every citizen could proudly call home. It was up to all the stakeholders of the mining sector to play a role in directing the future.

9.15 Conclusion

The mining industry stakeholders, individually and collectively, owned the implementation plans of the strategies and had to ensure that the plans were carried out; even though the government carried the main burden of ensuring that the strategies were implemented. Government should continue to hold stakeholders accountable for their acts by administering laws for the good, safety and well-being of society.

The SWOT analysis of the various strategies indicated that the transformation agenda of the mining sector had many challenges and a long-term view was needed to realise the vision of a just and equitable mining sector. Each of the strategies would be important and would contribute to the overall cause of transformation of the mining sector. Table 24 is a summary of the proposals.

Table 24 Summary table of the implementation plan

Plan Elements	Expected Outcomes	Summary of activities	Monitoring Indicators	Responsible Parties	Time frame
Human Resources Development	Enhanced human resources and institutional capacities	-Skills development and training	Increased educated, skilled HDSA's employees	Government Industry Tertiary Institutions	LT
Advancement of women in the mining industry	Corrected gender balance at board level downwards	Promotions of gender diversity in the mining sector	Increased suitably qualified women to work in the sector	Government Industry	ST
Sustainable development	A well-governed mining sector	Creation of sources of capital for HDSAs participation in new ventures	Increased numbers of new business ventures run by HDSAs	Government Industry	ST
Employment Equity in the mining sector	Skills development	Increased HDSAs in leadership	Achievement of the targets of the Charter in executive and critical skills level	Government Industry	ST
Beneficiation of minerals in the mining sector	Competitive mining sector	Injection of capital by stakeholders for major beneficiation projects	Growth of the manufacturing sector	Government Industry	LT
Ownership and Joint Venture	Enhanced mineral-based investment and diversification	Creation of local risk finance to enable HDSAs to establish mining ventures	Increased number of new ventures totally owned by HDSAs	Government Industry	LT
Mine Community Development	Socially responsible mining sector	Development of the manufacturing sector	Existence of manufacturing sector and decreasing of skills gap	Government Industry NGOs	LT
Housing and living conditions	Improved housing and living conditions	Upgrade all hostels into family units and eradicate informal settlements	Decent housing and living conditions for all mine employees	Government Industry NGOs Municipalities Financial	ST

				Institutions	
Procurement and enterprise development	Local procurement	Development of niche technologies to support procurement initiatives	Procurement levels of local content supplies	Government Industry NGOs Municipalities Financial Institutions	LT
Consultation, monitoring, evaluation and reporting	Enhanced achievement of all elements of transformation agenda	Improved quantitative and qualitative methods of collecting and analysing data	Annual targets and performance disseminated to all stakeholders	Government Industry	ST

While the plan might be found to be incomplete and imperfect, it would go a long way to explicate firm proposals to solve the mining sector's problems and deepen social and economic engagements of all the stakeholders of the mining sector in building a sustainable mining sector into the future.

The next chapter concludes this study by providing a general summary and conclusions of the research.

CHAPTER 10

SUMMARY AND CONCLUSION

10.1 Summary and conclusion of the research

The main aim of the research was to explore the progress made in fulfilling the objectives of the Charter and to investigate whether the Charter, as an organ of transformation, had fulfilled its mandate and if not, to recommend strategies beyond 2014 when the lifespan of the Charter expired. It further recommended what the future Charter should look like. For the historically disadvantaged South Africans, the affirmative action, as advanced by the Charter, meant progress to a better life, a chance to reap the benefits of the country's mineral resources.

For any transformation initiative to be successfully implemented in addressing historical imbalances, it was imperative to have a clear understanding of the following issues:

- Historical background of the multi-racial society;
- The roots of economic inequality;
- Political dynamics of an interracial society; and
- The political leadership and political will pertaining to affirmative action.

The following issues were to be achieved:

- National unity equity and balance among the social and ethnic groups of the nation participating in the economic development of the country; and
- The sharing of the benefits.

The purpose of this research was to investigate the initiatives taken to transform the mining sector, which, in this case, were based on the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) and the Mining Charter of 2004 and its subsequent revised version of 2010 and to verify whether the objectives of the Charter, as an agent of transformation of the sector, had been achieved. This research aimed to determine an action plan beyond the life of the Charter.

The strategy of transformation was focused on the tiers of ownership, management, human resources development, skills development, employment equity, procurement, migrant labour and rural development. The intention was to make it more representative of the demographics of South Africa and to ensure a new era of socially responsible mining operations. Targets were set in relation to the nine elements of the Charter and a timeframe of five years was set from 2004 for review. The stakeholders also agreed to determine at the five-year review, what further steps, if any, had to be implemented to achieve the set targets. The stakeholders met in 2009 and made an assessment of the successes and challenges experienced from the inception date. The result of the five-year review culminated in the revision of the Mining Charter, namely the Amendment of the Broad Based Socio-Economic Empowerment Charter for the South African Mining Industry of 2010.

The Mining Charter was, to all intents and purposes, fairly flexible and its subsequent review afforded the stakeholders scope for innovative and independent approaches to drive the transformation agenda of the industry further. Far less flexible was the adjunct to the Charter, the Scorecard. The Scorecard provided a framework to measure the transformation process of the Charter. It measured the actual implementation of the Charter and had core elements of the Charter. It required the mining companies to tick off each box which provided an excuse to companies for their failure to meet the targets as set out in the Charter. They claimed there was insufficient clarity and direction. Measurement of true transformation of the mining industry could only be achieved through strong partnerships between the stakeholders.

10.2 Recommendations of the research

The conceptual challenge that faced the mining sector was to understand what had to be done to speed up the transformation agenda as set out by the objectives of the Mining Charter. The research had explored the progress made and problems experienced in achieving the objectives of the Charter and its accompanying targets. The specific summaries of the most important findings were in relation to the provisions of the Charter and the comparative analyses of the transformation of other countries selected for the purpose of this research.

What was apparent in these case studies was that the legacy of discrimination and attitude to race was difficult, if not impossible, to overcome or fully transcend when racial orders were being reconstructed. What was also evident from the case studies was that effective transformation policies had to provide strong incentives and good monitoring to ensure the

desired outcome was obtained. The common dominator for an effective implementation of a transformation agenda was education and skills development.

Implementation of an effective affirmative action plan was a process and not an event which required long-term plans for its impact to be felt in a country. The Mining Charter had a lifespan of 10 years, and from the experience of the selected countries this period was too short for effective transformation to take place to address historical imbalances.

The shortcoming of the original and revised Mining Charter as an empowerment measure in their current form was an over-emphasis on the elements of ownership, thus overshadowing the importance of the other elements. This shortcoming led to the interpretation and promotion of narrow BEE that resulted in few beneficiaries.

The Mining Charter, in conjunction with the Stakeholders Declaration, the Beneficiation Strategy, other policy documents and actions, had the potential to take the mining industry to the next level in terms of transformation and economic growth, but more had to be done to channel them into a coherent sector strategy. In this process, there was clearly a need to acknowledge that a logical process was essential to facilitate a genuine social transformation and economic growth of the mining sector in order to launch it into a new dispensation, taking into consideration new events as they arose in the sector.

It was recognized that there had been successes achieved through the Mining Charter, that is, the awareness of the need for ABET education, the awareness of the need for transformation and social investment by mining companies, the recognized need to facilitate the entry of women into the industry, the sporadic black-owned mines, the employee-share ownership plans (ESOPs), that had, in some instances, spread some level of benefit to HDSAs.. In as much as these successes were acknowledged, there were still challenges and failures that existed, in achieving the objectives of the Charter.

Significantly, that the elements of the Charter could be achieved as the vision of the stakeholders could not be argued regarding the transformation of the sector. Ten years have passed since the stakeholders began implementing the Charter and they are familiar with the issues. Therefore, fundamental change was not necessary. It was proper to build on the familiar knowledge and approach. What was needed was refinement. Recommendations for the future Charter should resemble that identified in the annexure. The proposed Charter has

two parts: one for industry and the other for government as both parties have dual responsibility to ensure effective implementation.

The Charter should be extended beyond the current term of 2014, but with a number of modifications to be more encompassing. The researcher recommended strategies going forward to ensure effective transformation. Second, the contribution of mining to society has to be made public through various forms so that the affected stakeholders were cognizant of transformation effects. It had to be remembered that calls for nationalization have not died away. They still surfaced from time to time from various stakeholders because of perceived unfulfilled expectations. Calls for nationalization had a detrimental impact on attracting foreign direct investment. In other words, if not managed positively, it would result in resentment, have an adverse effect on the economy and lead to political and social unrest.

10.3 Areas for further research

The Minerals and Petroleum Resources Development Act and the Mining Charter's transformation agenda were geared towards large scale mines. No consideration had been given to the Charter's implications with regard to junior and small-scale sub-sectors. Recommendation for further study would be to investigate the effect of the Mining Charter's on smaller operations.

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