MINING'S CONTESTED FUTURE:
EMPLOYEE AND COMMUNITY PARTICIPATION IN SOUTH AFRICA'S MINING CHARTERS

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Declaration

I declare that this research report is my own unaided work. This research report is being submitted for the master's degree in Labour Policy and Globalisation at the University of Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other university.

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Signed on this 21st day of October 2019

Abstract

This research report examines a multi-stakeholder attempt by the Department of Mineral Resources (DMR) to introduce a range of institutional structures to ensure meaningful participation in the transformation of the mining industry. The majority of South Africans were systematically marginalised and thus prevented from meaningful participation and ownership in the mining sector through colonial rule and the exclusionary policies of apartheid. To redress these historical inequalities, the DMR developed the Minerals and Petroleum Resources Development Act (28 of 2002) (MPRDA) and the Broad-Based Black Economic Empowerment Charter for the South African Mining and Minerals Industry ("Mining Charter") as a regulatory instrument in 2004. To increase employee participation and development of the mining community, the Act introduced compulsory future forums and social and labour plans to complement the objectives of the Mining Charter. The latter was developed with specific measurable targets in mind to effect transformation of the industry.

The Department of Mineral Resources and Energy[1] (DMRE) conducted a comprehensive assessment of the progress of transformation in the mining industry in 2009 and measured it against the objectives and agreed targets contained in the Mining Charter (Department of Mineral Resources, 2004). The identified shortcomings resulted in the publication of a revised charter in 2010. A further assessment, conducted in 2015, identified shortcomings in the implementation of the various elements of the revised charter. Against this backdrop, the DMR initiated a process to review the Charter with the intention to further strengthen the Mining Charter as a tool for effecting meaningful broad-based transformation of the mining and minerals industry. The initial review process, which commenced in 2016, was a failure in terms of social partner participation and subsequently, a second (and more inclusive) review process was enacted in 2018.

This report investigates the process of constructing the Mining Charter (Mining Charter III, 2018) and assesses the extent to which meaningful participation (decision-making and financial terms) has been introduced in the mining sector by means of the revised Charter.

[1] At the time of the negotiations, the department was called the Department of Mineral Resources (DMR) – which was changed to the Department of Mineral Resources and Energy (DMRE) in June 2019. DMR and DMRE will be used interchangeably depending on the context.

Past attempts at the institutional transfer of the German co-determination system in South Africa failed because they did not account for South Africa's distinct industrial relations traditions and the socio-economic context. The researcher demonstrates how the clause providing for employee and community representation on company boards was removed from the final Charter and why the innovative attempt to include the "community" in charter consultations failed to gain support.

On the positive side, the failed employee share ownership plans (ESOPs) will be replaced with an employee ownership and shareholding scheme provided for in the new charter, where mining employees will receive 5% carried interest shares, at no cost to the employee. This report also discusses the social partners' responses to the abovementioned provision. Mine communities will furthermore become the beneficiaries of 5% carried interest shares or enjoy the equity equivalent thereof. Furthermore, a trust is to be established to strengthen social and labour plans with community and company representatives that will jointly identify and implement projects. This means that mining communities will receive a formal avenue to influence decision-making about development projects.

Despite the attempt to increase ownership and meaningful participation through the new Charter, the challenges of transformation in the South African mining sector go well beyond traditional notions of employee participation and community development. There is also the migrant labour system, a legacy of discriminatory laws that disrupted communities and family life, but also created the dynamic of "us" and "them" between host communities and communities from labour-sending areas. The research report also focuses on the types of complexities adding to the mining industry's contested future.

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Abbreviations and Acronyms

AMCU	Association of Mineworkers and Construction Union
BBBEE	Broad-Based Black Economic Empowerment
COGTA	Cooperative Governance and Traditional Affairs
DMR	Department of Mineral Resources
DMRE	Department of Mineral Resources and Energy
DTI	Department of Trade and Industry
ESOPs	Employee Share Ownership Plans
EIA	Environmental Impact Assessment
HDSA	Historically Disadvantaged South Africans
IDPs	Integrated Development Plans
LRA	Labour Relations Act
MARTISA	South Africa Mining and Rural Transformation in Southern Africa
MPRDA	Mineral and Petroleum Resources Development Act
MC I	Mining Charter I
MC II	Mining Charter II
MC III	Mining Charter III
NEDLAC	National Economic Development and Labour Council
NUM	National Union of Mineworkers
PMC	Public Mining Company
SAIIA	The South African Institute of International Affairs
SANCO	South African National Civic Organisation
SAMDA	South African Mining Development Association
SLP	Social and Labour Plan
SWF	Sovereign Wealth Fund
SWOP	Society Work and Development Institute
TBVC	Transkei, Bophuthatswana, Venda and Ciskei
UASA	United Association of South Africa

1. CHAPTER ONE

1.1 Introduction

The so-called original sin of land expropriation originated from the mining sector resulting in mine employees and mining communities being exploited and disempowered by means of discriminatory law, regulations and practices. The intent of this study is to determine how present mining regulations, especially the mining charter, achieves its objectives to empower and increase the participation and ownership of mine employees and mining communities in the mining industry to restore the damage of past regulations.

1.2 Main research questions

- In what way did MC III, as a transformation and empowerment instrument, address the legacies of the past, the present shortcomings, and the future of the mining industry?
- In what way did MC III increase employee and community ownership and shareholding in mining companies?
- How inclusive was the charter consultation process and what issues will contribute to mining's contested future?

1.3 Objective of the research

The objective of the research is to establish the rationale and dynamics behind the Mining Charter and to determine its influence on meaningful employee and community participation in the mining sector. The aim is therefore to determine in what way and to what extent empowerment provisions, contained in the Charter and related regulations, translate to the empowerment and tangible benefits to employees and communities as well as what the different views of the social partners are.

1.4 The significance of the research

The objective of the Mining Charter is to transform the industry in a meaningful way as a redress for the negative impact mining had on black employees and mining communities. Since the reviewed Mining Charter was gazetted on 27 September 2018, this research report will be one of the first master's degree studies focusing on MC III. As a unionist, I was also a participant in the Charter negotiations, and I can share inside information relating to the negotiations.

Furthermore, compared to research conducted on Broad-Based Black Economic Empowerment (BBBEE), not much academic research has been conducted on the Mining Charter specifically, despite its huge significance. In addition, an analysis of employee participation in decision-making at the workplace focuses on the provisions in the Mineral and Petroleum Resources Development Act (MPRDA) regarding the functioning of the compulsory future forums, whereas studies on employee participation primarily centre on the functioning of workplace forums as provided for in the Labour Relations Act (66 of 1995) (LRA).

Through interviews conducted with representatives of all the social partners, this study highlights some of the potential conflict areas regarding ownership, decision-making and community development that will have an impact on the effective implementation of MC III and the way it may contribute to mining's contested future.

1.5 Research methodology and data collection

1.5.1 Data collection

Qualitative research - with the content of the Mining Charter as the focus point - was used to determine the level of influence mining employees and communities have on decision-making and the financial benefit they derive from ownership in the mining sector.

1.5.2 Ethnography

As the general secretary of the trade union Solidarity, I represented the union on the Transformation Task Team that served as the MC III negotiation forum. The negotiations commenced on 17 March 2018 and we concluded the process by mid-September 2018. The social partners that were involved were the other mining trade unions, namely the National Union of Mineworkers (NUM), Association of Mineworkers and Construction Union (AMCU) and the United Association of South Africa (UASA); government representatives from the Department of Mineral Resources (DMR); and the mining companies represented by the Mineral Council South Africa (previously Chamber of Mines) and South African Mining Development Association (SAMDA).

Due to my involvement, I was able to observe the dynamics and power play between social partners, which enabled me to provide more information on certain clauses contained in the Charter and it also enabled me to observe the dynamics between "class" and "race". Section

6.2.3 specifically deals with the “race” versus “class” debate to determine who the beneficiaries of the employee ownership scheme would be and how “class” won. Another incident worth mentioning took place when halfway through the negotiation process, one of AMCU’s negotiators, a white woman, launched a scathing attack on the three black negotiators who represented the Minerals Council by accusing them of not being serious about transformation. In response, the three black council representatives defended the predominantly white profile of top management of mining houses – the white AMCU negotiator clearly represented the proletariat (who happened to be mainly black), while the three black Council’s negotiators represented the bourgeoisie (who happened to be mainly white).

1.5.3 Semi-structured interviews

My involvement in the Charter negotiations and in the mining sector gave me access to all the social partners who had an interest in the Mining Charter. Out of the 26 respondents who participated, I conducted 18 face-to-face interviews and used mainly open-ended questions and a few closed questions. Five respondents preferred to submit written responses to the questionnaire I used for the face-to-face interviews. Three focus group sessions were held with shop stewards from Solidarity, the NUM and UASA.

The group of 26 respondents comprised of:

Senior DMR officials	-	2
Union leaders	-	4
Mining executive	-	1
Senior mining managers	-	4
Tribal chiefs	-	2
Community leaders	-	3
Minerals Council Board member	-	1
Minerals Council senior manager	-	1
Legal experts	-	2
BEE expert	-	1
Mining youth leader	-	1
Mining journalist	-	1
Union focus groups	-	3

1.5.4 Challenges pertaining to the scheduling of the interviews

Other than the first interview I conducted in August 2018, I conducted the rest of the interviews from January 2019 until early April 2019.

Although I managed to secure interviews with all the social partners, I could unfortunately not secure an interview with the chief negotiator who represented the Minerals Council at the Charter negotiations. It was seemingly due to my criticism expressed to the Council during the negotiation process. I publicly accused the Council's negotiating team of "bad faith bargaining" when they changed their position after an agreement was reached on the percentage carried interest linked to an ESOP and community share ownership model to be allocated to employees and communities (see section 6.2.1 for more detail). The Council is always sensitive to any form of criticism and unfortunately it led to not securing an interview. This did not create a gap in the research, because I was able to report on my observations during the negotiations and I was also able to obtain the Council's views from various media statements and media interviews. I nevertheless managed to secure an interview with a board member and a senior manager of the Council. I also interviewed a senior executive of Sibanye-Stillwater as well as managed to secure four interviews with senior managers from two leading mining houses. Due to the sensitivities between the social partners, two senior employer participants requested for the interviews to be conducted anonymously. I also interviewed the mining law expert, Peter Leon, who mainly represents and advises mining houses on mining law and mining regulations. Therefore, in the end, I was able to obtain a comprehensive response from the business side.

The biggest challenge was to secure interviews with community leaders and tribal chiefs. I used the snowballing technique to secure interviews with community leaders. Mining journalist Ed Stoddard secured contact with David Pheto, a community activist of the Moruleng area. I requested senior managers, responsible for community affairs at Sibanye-Stillwater and AngloGold Ashanti, to assist me with securing interviews with tribal chiefs from labour-sending areas in the Eastern Cape. Unfortunately, both companies had so much red tape to wade through and protocol to adhere to that it made it very difficult to succeed. I could at least establish with my interaction with the two companies that the Lusikisiki area in the Eastern Cape would be the best place to visit for research purposes. On the other hand, Fred Arendse, the Chief Executive Officer (CEO) of the junior mining company Siyakhula Sonke Empowerment Corporation (SSC) arranged a meeting for me with Prince Zwelithini

Dlamini from the Lomshiyo Traditional Community and with John Ngomane, a regional leader of the South African National Civic Organisation (SANCO) from the Barberton area.

During the interview I had with Prince Dlamini, I explained the difficulties I experienced to secure interviews with his counterparts in the Eastern Cape. He advised me to merely go onto the Cooperative Governance and Traditional Affairs (COGTA) website to obtain contact details of all recognised traditional leaders, which I did. I phoned six chiefs and three chiefs requested me to phone back later after I explained the reason for the interviews, but none of them answered their phones during the second round of calls. The other three chiefs I phoned indicated that they were not comfortable to be interviewed and I sensed that their discomfort to be interviewed in English somewhat played a role. Since the photographs of the traditional leaders were displayed on the website, I decided to phone the chief who looked the youngest and who might be more approachable. By doing so, I managed to get in contact with Chief Nkosi Phatisiwe Artwell Mjoji, Chief of the Malangeni Administrative Area at Lusikisiki. The Chief immediately agreed to the interview and he was also surprised that a unionist from Solidarity, who mainly represents white skilled workers, was interested in interviewing a tribal chief. He also arranged interviews with two other chiefs from the same area and with Zukile Mhlekwa, the community representative serving on the COGTA structures responsible for community services in the Ingqusa Hill Local Municipality.

On 7 March 2019 I took the 11-hour drive by car from Johannesburg to the Eastern Cape for the four interviews scheduled for Friday 8 March 2019 at a guest house in Lusikisiki. 8 March became a very challenging, but nonetheless interesting day in my fieldwork. The first interview was scheduled for 10:00 and when the Chief had not arrived by 11:00, I asked the receptionist at the guest house if it would be appropriate for me to phone the Chief and enquire about his whereabouts. I was strongly advised not to phone the Chief and I received an explanation on the local customs which I had to understand; the Chief would arrive sometime during the day. However, by 12:00 his driver arrived and informed me the Chief was not feeling well and that he might see me on Monday 11 March. Another chief also cancelled on the same day without providing a reason. In the meantime, Chief Mjoji informed me that he had to go to East London for a meeting with President Cyril Ramaphosa and a few selected traditional leaders from the Eastern Cape. He suggested that I stayed in Lusikisiki for the weekend and that we could have the interview upon his return. Luckily, Mhlekwa arrived on time for his interview, which turned out to be a very insightful interview. I contacted Chief Mjoji after the interview to enquire whether it would be possible for me to interview him that same evening in East London at about 19:30, giving me enough time for the six-hour drive from Lusikisiki to East London. He agreed but informed me that I first had to go to his village to greet his wife and observe the AngloGold Ashanti Agricultural Community Project under his supervision and that I also had to sign his visitor's book. Mhlekwa accompanied me on the 90-minute round trip to Mjoji's village. Before we left, I enquired about the customs on visiting a tribal village and was informed that it would be appropriate to hand out sweet treats to the children of the village, which I bought on the way there. The detour turned out to be very valuable and I was able to familiarise myself with the poor infrastructure and living conditions of the families of migrant workers in that specific labour-sending area. I was also able to familiarise myself with the various community development projects initiated by mining houses. I asked Chief Mjoji's wife for some advice and guidance on the situation with the two chiefs who cancelled their interviews. She informed me that she knew they would cancel and that I should not bother to reschedule. After a gruelling six-hour drive through road works and in pouring rain, I eventually arrived just before 21:00 that evening at the hotel in East London where the Chief was staying – fortunately, it was an interview worth all the effort.

My third challenge was to schedule interviews with the leaders and focus groups of especially AMCU and the NUM during a time that AMCU members were on strike at Sibanye-Stillwater. After numerous written requests addressed to Joseph Matunjwa, the President of AMCU, I was eventually able to secure an interview with Gift Antonio, AMCU's chief negotiator at the Charter negotiations. I was unfortunately not able to secure an interview with an AMCU focus group, due to the animosity at mine level between AMCU and the other mining unions since we did not join AMCU in their strike action. As a result of the strike, I also had to reschedule the interview with the NUM Focus group three times, due to incidents relating to the AMCU strike that required the NUM shop steward's attention. The other interviews were much easier to arrange, since I had established relationships with various role players involved in the mining sector. It was also an advantage to be able to interview Adv. Sandile Nogxina and Pieter Alberts of the Department of Mineral Resources and Energy (DMRE) who acted as advisors to the DMR's MC III drafting team. I nevertheless faced another challenge during most of the interviews and that was to restrain myself not to engage in debates and arguments with participants who had different views and opinions on certain aspects.

1.5.5 Theoretical and documentary analysis

The second research methodology was the theoretical analysis of different literature sources. A primary source review process included an analysis of mining legislation and regulations, court rulings as well as previous Mining Charters. A secondary document review process included academic literature, company reports, industry agreements, government-commissioned research, public hearing submissions, newspaper articles, business and mining magazines, online searches, press releases and NGO reports. I also made use of unpublished material I obtained during the Charter negotiations.

1.6 Structure of the research report

The research report consists of nine chapters. Chapter 1 deals with the background, the rationale behind the research and the research methodology. I then focus on the mining sector's history of exploitation to provide the necessary context and background to the purpose of the Mining Charter in Chapter 2. In Chapter 3, I deal with the origin of the Mining Charter and elements and shortcomings of MC I (2004) and II (2010). In Chapter 4, theoretical concepts and grounding of the aspects relating to the core elements of my fieldwork and themes extracted from the Mining Charter on the plurality of ownership and employee and community participation in decision-making are discussed. The latter aspects include matters relating to workplace forums, future forums and co-determination. Chapter 5 focuses on four failures linked to MC III, which include the failed attempt to meaningful participation of communities in the Charter drafting process and various failed attempts to strengthen employee and community participation in decision-making. Chapters 6 to 8 discuss the successes of the Charter relating to employee and community ownership and financial benefits, the strengthening of social and labour plans and the joint community/company trust to be established to oversee community development projects. In the final chapter (Chapter 9), I summarise the key findings, link the literature and theory with developments regarding the Charter and offer recommendations to improve the Charter in terms of employee and community ownership and their participation in decision-making.

2. CHAPTER TWO: A HISTORICAL OVERVIEW OF THE MARGINALISATION OF BLACK MINE WORKERS AND COMMUNITIES IN THE SA MINING SECTOR

2.1 The history of mining and its impact on ownership

2.1.1 Introduction

South Africa discovered coal in the early 1860s, diamonds in 1866, gold in 1886 and platinum in 1924. Since the time of these discoveries and over the next few decades, the industry consolidated eight mining houses, namely: Union Corporation (formed in 1886), Goldfields (1887), De Beers Consolidated Mines (1888), Johannesburg Consolidated Investment Company (or JCI) (1889), Rand Mines (1893), General Mining and Finance Corporation or Genmin (1895), Anglo American (1917) and Anglo Transvaal Consolidated Investment Company (or Anglovaal) (1943). By 1960, Anglo American was by far the largest South African mining house and it had significant shareholding in nearly all the other mining groups[2] (Gqubule, 2018:123-124).

It was the discovery of gold and diamonds in the late nineteenth century that transformed South Africa's agrarian economy into one based on the extraction of natural resources. It also entrenched racial divisions in the workplace, creating three distinct labour markets: one for whites, another for coloureds and Indians and a third for Africans. White workers became a privileged stratum mainly organised into craft unions that used techniques of entry restriction, apprenticeship and the closed-shop concept to protect their monopoly of control. African workers, by contrast, mainly entered wage labour on a weak and unorganised basis, mainly as unskilled migrant labourers. This division of labour was institutionalised by the Industrial Conciliation Act of 1924[3] (Berger, Pries & Wannöffel, 2019:538).

2.1.2 The exploitation of black mine workers after the discovery of diamonds

The first diamond in South Africa was discovered in late 1866 by a young boy named Erasmus Jacobs on his father's farm, De Kalk, located on the fringe of the Cape Colony near Hope Town. The stone was subsequently christened the "Eureka Diamond" (Davenport, 2013).

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[2] Wernher Beit & Co structured around the Corner House Group was also an influential mining house before the rise of Anglo American.

[3] The Act included Coloureds and Indians, and although Black African unions were not illegal in terms of the Act, they were without rights and toothless.

Nearly three years later in early 1869 a Griqua shepherd, named Swartboy, picked up an 83-carat fine white diamond on the banks of the Vaal River. Swartboy sold the diamond to Schalk van Niekerk for a fortune of 500 sheep, 10 oxen and a horse. This diamond was christened "The Star of South Africa". It was the discovery of the "Star" by a black shepherd that set South Africa pulsing with diamond fever, which proved to be the catalyst for the country's first diamond rush. The pioneers of this rush were the Boers who trekked to the Vaal River with their wives, children and black labourers for diggings (Davenport, 2013).

The Boers adopted an almost heartless approach to the search for diamonds and while they sat at the sorting table, the labourers were toiling hard under the broiling sun. Close on the heels of the Boers came the colonials from the British colonies of the Cape and Natal. Among the first of the colonial Cape-born prospectors to make his way to the Vaal was Joseph Benjamin Robinson who became one of the most formidable mining magnates. Once settled, he organised a party of local tribesman to surface search for diamonds and within in six weeks they had found 30 diamonds for him valued at approximately £10 000 (Davenport, 2013).

Prior to this discovery of diamonds, ownership of the land where the diggings took place had not been questioned or even been contested by any community. The local governments of the Cape Colony, the Orange Free State and Transvaal regarded that area as wasteland inhabited by the Griquas and indigenous nomadic groups. The battle for ownership changed once reports of diamond discoveries filtered through to authorities and the rush for fortune seeking commenced with the result that each mining camp was compelled to elect a governing committee to regulate living and working there. This approach became known as "Diggers Democracy" and it acknowledged the right of every man and woman, including those of colour, to work and own a claim (Davenport, 2013).

The next historical event was the discovery of a diamond on a Free State farm, Koffiefontein, away from the Vaal River in the "dry country" in July 1870. The grand rush to the dry diggings commenced and led to squabbling over the ownership of the dry land among the governments of the Orange Free State, Cape Colony and the Griqua chiefs. The government of the Free State made the first move and started implementing regulations that stipulated that every (white) person was only entitled to work two claims of 30 square feet each; the Free State Government had forbidden black diggers to own and work diamond claims. Additional labour was sourced by colonists who went inland and shepherded batches of black men to the diggings. The diamond diggings from the very beginning of the rush became vitally dependent on unskilled black labour. Such unskilled workers laboured from sunrise to sunset, 14 hours in the summer and 10 hours in the winter (Davenport, 2013).

By the mid-1880s, the three largest and most powerful mining companies, namely De Beers, the French and Kimberley Central commenced with the practice of engaging only recruited migrant labourers. These labourers had to accept wages of only half that were previously paid, because the three companies exercised an effective monopoly and black migrants had little choice but to agree to the employment terms. Strike action was also not an option, since black workers were forbidden to organise, while most of the trade unionists, all of them white, used strike action to improve the position of white workers (Davenport, 2013).

In 1889, De Beers introduced several changes to the structure of the underground workforce as underground mining replaced open quarrying, which was more dangerous and expensive and required maximum alertness and a precise placement of skills. Consequently, the company deemed it appropriate that black manual labourers should be supervised by the more skilled European miners (Davenport, 2013).

2.1.3 The discovery of gold and the formalisation of exploitation

More than any other factor, the exploitation of gold and subsequent legislative changes shaped the course of South Africa's socio-political and economic history (Davenport, 2013). Webster (1981:9) concurs and his argument of 1981 is still relevant today, namely that "the position of Black labour within the South African economy was characterised by the institutionalisation of migrant labour[4], low wages and lack of worker organisation mirrored in the development of labour patterns in the gold mining industry since its inception in 1886".

According to Webster (1981) and Davenport (2013), profits in the gold mining sector was largely dependent on low production cost and the task for mine owners has always been to create and contain a vast supply of cheap African labour. Webster adds that the legislative power of the state and the creation of monopolistic recruiting organisations assisted with the control of labour supply. The central laws in the process of forced proletarianisation were in the first instance the "pass laws", which controlled labour on the mine by restricting the movement of black mineworkers. The latter was introduced under direct pressure of the

[4] Typically, men were contracted to work in the mines around core mining areas while leaving their families behind in the 'homelands'.

Chamber of Mines, which was founded in 1887. Secondly, the Glen Grey Act was promulgated, which introduced a labour tax and in the words of the mine owner Cecil Rhodes "removed natives from that life of sloth laziness and also made them to contribute to the prosperity of the state". In the third instance, the Native Land Act of 1913 was introduced. This legislation froze African land ownership to a mere 13% of the total area and forced Africans into overcrowded reserves, suppressing the emerging African peasantry and simultaneously creating a pool of cheap labour.

By the 1890s, a powerful and well-organised mining capitalist class had emerged with the ownership of both diamond and gold mines in the hands of a few capitalists. The centralisation of control was further consolidated by the Chamber of Mines and two African labour recruiting agencies. The "maximum average" wage system was introduced and as a result, there was no need for individual mines to improve conditions of employment or wages resulting in lower wages whenever the profitability of mines needed to increase. What followed was the introduction of the "wage colour bar" to distinguish the wages of black workers from white workers, but also to ensure that no mining company pays wages above the maximum wage rate (Webster, 1981:11-12).

The benefits for mining companies with the establishment of the migrant labour system were firstly, the existence of reserves where Africans allegedly had an alternative source of income to substitute their mine wages and mine owners used that as justification for subsistence wages. Secondly, migration prevented effective class mobilisation and the quasi-military institution of the compound, which was often structured in such a way that it led to inter-ethnic strife (Webster, 1981:12). This specific system of housing was first introduced in 1885 by the Kimberley Central with the argument that closed compounds were necessary to prevent diamond theft, drunkenness and absenteeism among black mine labourers. The introduction of the compound system had fundamental implications for the racial and sexual division of labour in South Africa (Davenport, 2013).

2.1.4 The Freedom Charter and legislative changes

Adv. Sandile Nogxina (2018), former Director General (DG) of the Department of Mineral Resources (DMR), and now special advisor to Gwede Mantashe, Minister of Mineral Resources and Energy, stated "what was very interesting when we drafted the South African

Constitution, later the MPRDA and the Mining Charter, was that we included elements of the Freedom Charter to confirm that the mineral wealth of this country belongs to all".

With the objective of restoring the imbalance, the Freedom Charter that was adopted on 26 June 1955 states:

> The People Shall Share in the Country's Wealth! The national wealth of our country, the heritage of South Africans, shall be restored to the people...The mineral wealth beneath the soil, the Banks and monopoly industry shall be transferred to the ownership of the people as a whole.

As Nogxina (2018) facilitated the drafting of the MPRDA and the first Mining Charter, he further summarises the historical context of the Charter as follows:

> The mining industry was the industry that caused, what is normally refers to the first sin, which was land appropriation. It is therefore imperative that when you are analysing the changes that are currently taking place within the mining industry, you go and look at the history of the mining industry and its contribution to socio-economic inequalities that still exist in the South African society. This constellation of workers between the rural areas and the mines was the function of the mining evolution in South Africa. The historical acquisition of property rights was an injustice, because it was contaminated by colonialism and further by apartheid. It was for that reason that Section 25 of the South African Constitution calls for the protection of this historically acquired rights, and the injustices that accompanied that, after the state interfered with those rights.

In sharp contrast and in response to the new set of legislation and regulations introduced during the democratic transition, former Anglo-American Platinum Chairman Leslie Boyd, who retired in 2001, held the following view:

> A pro-labour bias carried the grave risk of sacrificing the need for business efficiency on the altar of affirmative action and globalization called for greater labour flexibility in the name of competitiveness, not less. Also, the continued move away from the migrant-hostel system added to labour cost pressures since workers now faced living expenses previously provided for with exacting frugality through hostels (Bowman, 2016:19).

3. CHAPTER THREE: THE REGULATORY PATH TO AND PURPOSE OF THE MINING CHARTER AND SHORTCOMINGS OF MINING CHARTER I AND II

3.1 The origin of the Mining Charter

3.1.1 Minerals Act, 1991 and the White Paper on a Minerals and Mining Policy for SA, 1998

Alberts (2019b), Head of Legal Services at the Department of Mineral Resources and Energy (DMRE), explains that when the democratically elected government came into power in 1994, the mining industry was still governed by the Minerals Act (50 of 1991). In terms of the Act, the mineral right holder was the owner of the land – Section 1(ix)(a) and (xxiv) – and the rights of mining communities and the empowerment of mining employees were not mentioned.

Community affairs were governed by the Rural Areas Act (House of Representatives), 1987 and the Natives Land Act, 1913. The acquisition of mineral rights by the governments of the Transkei, Bophuthatswana, Venda and Ciskei (TBVC) states and the self-governing territories was governed by the South African Development and Trust Act, 1936, which provided for the vesting of these rights in the SA Development Trust (SADT) on behalf of blacks (White Paper on Minerals and Mining, 1998). Government also held mineral rights in trusts for specific tribes and communities, including those mineral rights which vested in the Lebowa Minerals Trust under the Lebowa Minerals Trust Act, 1987, and the Ngonyama Trust under the Kwa-Zulu Ngonyama Trust Act, 1994 (Alberts, 2019c).

In order to review the apartheid mining legislation, an intensive consultation process commenced in September 1995 between representatives from both the executive and legislative branches of government as well as organised business and labour that resulted in the publication of the "White Paper: A Minerals and Mining Policy for South Africa" on 23 September 1998 (Alberts, 2019b).

For the first time, a South African mining regulation (albeit a draft) referred to ownership and meaningful participation of mining employees and communities[5] in the South African

[5] Although "communities" were not defined in the White Paper, it made a distinction between "local communities", "mining communities", "affected communities" and "rural communities".

mining sector. The White Paper provided for the following matters to be addressed or taken into consideration in a revised mining legislation:

Ownership and ESOPs

- The state should take a constructive intervention role in altering the patterns of ownership in the industry and promoting black ownership at all levels.
- Government should encourage real worker participation in the management of all mines.
- The development of ESOPs for mining employees needed to provide for genuine participation in the managing of operations that should be of a sustained value and be tailored for low-income workers.
- ESOPs should be a practical vehicle to promote a broader spread of ownership and participation in the industry.

Employee and community participation in decision-making and workplace forums

- The stakeholders and affected communities should be involved in discussing all the issues surrounding mineral development and should participate in the decision-making process.
- A new form of corporate governance is required that would create conditions for effective employee participation through a system of co-determination.
- The Department of Labour would be responsible for facilitating smooth industrial relations and, especially, for facilitating the establishment of workplace forums in the mining sector.

Communities and social plans

- The adoption of a social plan[6] approach was recommended to deal with structural job losses.
- Government should facilitate the involvement of affected communities (including municipalities) in any process intended to deal with the consequences of mine downscaling and closure.

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[6]The proposed Social Plan originated from an agreement concluded at the Presidential Job Summit in 1999 at the National Economic Development and Labour Council (NEDLAC). The aim of the plan was to avoid job losses and employment decline where possible. In cases where job losses on a big scale were unavoidable, it would actively manage retrenchments and ameliorate their effects on individuals and local communities (Parliament Portfolio Committee Report, 1999).

- Communities should be consulted regarding mineral development and should enjoy lasting benefits from such developments.

3.2 The MPRDA and the Mining Charters

The promulgation of the Minerals and Petroleum Resources Development Act (MPRDA) (28 of 2002), which came into force on 1 May 2004, was a product of the White Paper (1998).

The MPRDA operationalised the vision of the state in mineral resources development and an important feature of the MPRDA was that it had vested minerals in the custody of the state in trust for the people of South Africa. A few months after the promulgation of the MPRDA, the first Mining Charter was gazetted in accordance with Section 100(2)(a) of the MPRDA and came into force on 13 August 2004 (Madolo, 2014:26).

The said Section 100(2)(a) of the MPRDA (28 of 2002) that gave effect to the Mining Charter, 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.

3.3 The purpose of the Mining Charter in strengthening meaningful transformation: a social partner perspective

Regarding the purpose of and the rationale behind the mining charter, the various social partners expressed the following views:

3.3.1 Government perspective

I received responses from Alberts (2019a) and Nogxina (2018). Alberts stated that the MPRDA gave effect to the constitutional imperative to advance the redressing of past imbalances and to create a non-racial or a de-racialised mining industry. In order to give effect to the latter, Alberts added that:

> there had to be a regulatory instrument, and that was why the MPRDA specifically empowered the mining Minister, together with the industry and stakeholders, to develop

> the Mining Charter. Without the Charter as a guiding instrument, it would have been difficult to achieve the transformation objectives envisaged by the MPRDA and the Constitution of the Republic South Africa.

According to Alberts (2019a), the Charter has a regulatory weakness in that it is subordinate legislation and it does not have the same legal authority as the MPRDA (28 of 2002) as primary legislation. The consequences for non-compliance to the Charter would, therefore, be less severe.

As a specialist in mining regulation, Nogxina (2018) gave the following explanation:

> The first mining charter was adopted in 2004 at the time when we were talking about the fourth generation-imposed Washington-consensus mining laws that were characterized by a shift away from state ownership, towards people ownership. The post-Washington-consensus mining laws, in other words the current mining laws, were characterized by the notion of social capital that became so important, where communities asserting their rights to national patrimony who wanted to get involve in the regulatory environment. And the most important thing that characterizes this, in addition to social capital, was the stakeholder participation in the regulation of the mining industry and not being a passive recipient of regulations, or merely complying. I take issue with the mining industry when they say that our regulatory system was not in line with other regulatory systems in the world, and the answer was simple, it was because the rest of the world had not just come out of apartheid, and that's the difference.
>
> Therefore, workers and communities were not only asserting their democratic rights to participate in decision-making, they were also asserting their economic right to own. Hence, this Charter had taken on board both of those elements that were saying that we didn't only want to give you free carried interest shares, we also wanted workers and the communities to be owners, or shareholders.

In a keynote address to a colloquium hosted by the University of South Africa, held on 7 June 2019, Minerals Resources and Energy Minister Gwede Mantashe[7], affirmed the abovementioned position and said that the Mining Charter should not be viewed in isolation, but rather be seen in the context of the socio-economic transformation of South Africa. Mantashe added: “Let me locate the Mining Charter within the context of transformation. It’s not in isolation. It’s part of the broader South African transformation agenda. Broad transformation was required because of South Africa’s history”. According to Mantashe, the

[7] Gwede Mantashe was the General Secretary of the NUM from March 1998 until May 2006.

black majority had been excluded from any meaningful role in the economy, other than as providers of labour for centuries. They had suffered from racial discrimination and oppression, resulting in exclusion, exploitation and the concomitant suffering. There had been systematic and all-round deprivation of black South Africans. The consequences of these abuses still endured. “Unless we open the wound and wash it, it’s not going to heal” (Campbell, 2019b).

3.3.2 Company perspective

For the junior miners[8], the principle of “transformation” was a key objective of the Charter and Fred Arendse (2019), the Chief Operations Officer (COO) of Siyakhula Sonke Empowerment Corporation (SSC) felt that the Mining Charter was serving as a blueprint to guide and prioritise transformation in the industry by redressing historical inequalities. Phemi Kgomongwe (2019), founder and CEO of the Youth in Mining Foundation[9] added that the Mining Charter was created to be a measuring stick to establish how transformative the industry was and to measure how it translated to the transformation of the social landscape as an ongoing process.

The big mining houses also agreed with “transformation” being the key purpose of the Mining Charter, but they added the principle of being “meaningful” to it. The senior mining executive (2019) of Sibanye-Stillwater (who wished to remain anonymous) was of the opinion that:

> The Mining Charter had been set up to drive transformation within the mining sector and to correct the historical wrongs. The ongoing purpose of the Charter was therefore the realisation of Government’s objective of redressing historical and socio-economic inequalities, and to ensure ‘meaningful participation’ of black persons in the mining industry.

Attie Benson (2019), a Human Resources Manager, also from Sibanye-Stillwater, agreed with his senior colleague and emphasised that “the objective of the Charter was indeed the meaningful transformation of the mining industry with the aim to open up the industry to participation by all stakeholders, and by putting the management of the mining sector, in the hands of all stakeholders”.

[8] Mid-tier mining producers

[9] The foundation seeks to be a reservoir of information for young people engaged and interested in the mining industry.

3.3.3 Union perspective

Paul Mardon (2019), Deputy General Secretary at Solidarity who was also involved in the Mining Charter III negotiations, displayed an understanding of the complex history of the country by writing that "the purpose of the Mining Charter was to redress historic inequalities due to apartheid, hence the Charter was focusing on black persons' access to ownership and empowerment within the mining industry in South Africa". Mardon added that "the Charter was the instrument that would assist with levelling the playing fields so that all persons regardless of race, could compete on equal terms and contribute to the growth of mining industry".

Ngoako Matcha (2019), the Head of Transformation at the NUM who represented the NUM at the Mining Charter negotiations, used the same analogy of "playing fields" and argued:

> without the Mining Charter, the mining industry would not move forward, and mining houses would continue as if everything was fine. But, if you have legislation that says, if you don't do this, then we'll have to punish you, then, that was how you level the playing fields.

For Gift Antonio (2019), the Human Resources Manager of AMCU, who represented the union at the Mining Charter negotiations, the Charter was also a transformative and empowerment tool, but he added that with MC III "the role of mine communities became more prominent".

Ed Stoddard (2019), an independent mining journalist, also referred to "communities" as a key beneficiary of the Mining Charter and stated that "the Ramaphosa administration's approach seemed more in line with the original intentions of the Charter not only to raise black participation in the industry, but also to uplift communities impacted by mining".

3.3.4 Community perspective

Unlike Antonio and Stoddard who recognised the importance of the Charter from both an employee and community perspective, for the community leaders the purpose of the Charter was all about the interests of the communities they serve. Zukile Mhlekwa (2019), the community representative serving on the Cooperative Governance and Traditional Affairs (COGTA) structures responsible for community services in the Ingqusa Hill Local Municipality in the Eastern Cape, was of the view that the role of the Mining Charter was to assist government to identify transformation problems in relation to community development. He iterated that government was using the Charter to hold mining companies accountable for the benefits to which mining communities were entitled. Likewise, Phatisiwe Artwell Mjoji (2019), Chief of the Malangeni Administrative Area at Lusikisiki in the Eastern Cape, added that the objective of the Mining Charter "had everything to do with ensuring that the mining bosses and the black elite were not the only beneficiaries of mining, but that communities also received their fair share of benefits".

3.3.5 Expert perspective

Referring to a broader purpose of the Mining Charter, the Partner (2019) at the law firm Fasken (who wished to remain anonymous), believed that for mining houses the Charter became their link to a "license to operate", because the DMR combined the mechanism for licensing and the granting of mining rights with its BBBEE drive as provided for in the Charter.

Focusing more on the racial element, Duma Gqubule (2019), founding Director at the Centre for Economic Development and Transformation, explained that "when the ANC came to Government in 1994, there was a deep-seated ambition, or objective to de-racialise ownership of the economy, or to de-racialise the so-called commanding heights of the economy and the Mining Charter became the instrument to achieve the latter".

Despite his earlier views on the purpose of the Charter, Mardon (2019) strongly disagreed with Gqubule when he argued that the rationale behind the change in ownership as provided for in MC III was as follows:

> The perpetual application of the ownership requirements denoted an underlying purpose, not to level the playing field as much as to ensure significant, if not eventually, total black control over mines and mining assets. This element created the impression that the rationale behind the Charter was an achievement of a political objective, rather than the improvement of the industry and the lives of people of South Africa.

Mineral Resources Minister Gwede Mantashe was however quoted by Rebecca Campbell on 7 June 2019 in *Mining Weekly* that the Mining Charter he observed was "part of the broader South African transformation agenda. The Mining Charter was but one tool that was drafted to guide us in the transformation of this society". Mantashe emphasised "transformation was not about replacing white faces with black faces, but about real economic empowerment" (Campbell, 2019a).

3.4 Mining Charters I and II and its provisions relating to employee and community financial participation and participation in decision-making

Although the focus of this research report is on MC III, for further context I will briefly summarise the provisions in Mining Charters I and II regarding employee and community participation in decision-making and their financial participation in the mining sector.

The following are key elements relating to employee and community ownership and participation reflected in the two Charters:

3.4.1 Mining Charter I (MC 1)

Employee participation and empowerment of HDSAs

MC I stipulates the beneficiaries of the transformation and empowerment elements contained in the Charter as **Historically Disadvantaged South Africans (HDSA**) and defined as "any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa Act (200 of 1993) came into operation".

Clause 4.7 of MC I regarding "Ownership and Joint Ventures" states the following:

> Government and industry recognise that one of the means of effecting the entry of HDSAs into the mining industry and of allowing HDSAs to benefit from the exploitation of mining and mineral resources is by encouraging greater ownership of mining industry assets by HDSAs. Ownership and participation by HDSAs can be divided into active or passive involvement as follows:
>
> **Active involvement**
>
> - Collective investment, through employee share ownership plans (ESOPs) and mining dedicated unit trusts.
> - The majority:
>   - ownership of these would need to be HDSA based. Such empowerment vehicles would allow the HDSA participants to vote collectively.
>
> **Passive involvement**
>
> - Greater than 0% and up to 100% ownership with no involvement in management, particularly broad-based ownership like ESOPs.

Important to note that with the promulgation of the MPRDA and the publishing of MC 1 in 2004, it was the first time that the principle of employee ownership by means of an ESOP was introduced into the mining sector.

Community participation

The MPRDA stipulates that "**community**" means:

> a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community.

Clause 4.4 of MC I deals with "Mine Community and Rural Development" and reads as follows:

> 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.

3.4.2 Mining Charter II (MC II)

Ownership and empowerment of HDSAs

MC II defined "meaningful economic participation" to include BEE transactions concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, workers (including ESOPs) and communities.

Regarding the definition of Broad-Based Socio-Economic Empowerment (BBSEE), it was defined as a socio-economic strategy, plan, principle, approach or act, which is aimed at transforming the mining industry to assist in, provide for, initiate, facilitate or benefit from:

- ownership participation in existing or future mining, prospecting, exploration;
    - and beneficiation operations;
- effective ownership, which meant the meaningful participation of HDSAs in ownership that include voting rights, economic interest and management control of mining entities; and

- integrated socio-economic development for mine workers, host communities, major labour-sending areas.

Community development

MC II made provision for a “social fund” that referred to a trust fund that provides financing for investments targeted at meeting the needs of poor and vulnerable communities as informed by commitments made by companies in terms of their social and labour plans.

A new clause referring to “Mine Community Development” (clause 2.6) was added to MC II and it reads as follows:

> Mine communities form an integral part of mining development and there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate. Stakeholders must adhere to the following:
>
> - consistent with international best practices in terms of rules of engagement and guidelines, mining companies must invest in ethnographic community consultative and collaborative processes prior to the implementation/development of mining projects; and
> - mining companies must conduct an assessment to determine the developmental needs in collaboration with mining communities and identify projects within the needs analysis for their contribution to community development in line with Integrated Development Plans (lDPs), the cost of which should be proportionate to the size of investment.

The above clauses and definitions contained in MC I and II created the impression of an effort of increasing mining employee and community participation in ownership and decision-making, but when analysing the two Charters and by studying the assessments done by the DMR, it did not translate to any form of meaningful participation. Chapters 5 to 8 of this report confirms that some of the clauses referred to above, were also inserted in MC III, but with measurable outcomes making it more meaningful.

3.5 Shortcomings of MC I and MC II and the need for a revised charter

Alberts (2019a) from the DMRE held the following view regarding the shortcomings of the first two mining charters:

> History tells a story. Mining Charter I was the first charter and it stands to reason that there would have been some imperfections. Mining Charter II tried to rectify those imperfections and caused more legal uncertainty than one would have expected. So, although the parties had good intentions in agreeing on certain terms, the drafting was a bit inadequate or there was not a meeting of the minds on some of the terms that was not adequately defined. For instance, the principle of "ownership" and the fact that the stakeholders never agreed to a common understanding of what ownership entailed.

The favouring of BEE entrepreneurs through MC I and II

Antonio (2019) from Amcu and Matcha (2019) from the NUM, both looking at BEE from a mineworker's perspective, regarded BEE as a failure due to its unequal distribution of benefits in terms of ownership and shareholding. Ngoako stated that since its inception, BEE has been structured in the wrong way and BEE entrepreneurs has always had a larger stake and enjoyed more financial benefits compared to workers and the community. Antonio added that "empowerment was not taking place from the bottom, but it was focusing on black elites who were already rich, whilst workers and communities always received the smallest portion, though they form the biggest population that needed to be empowered".

Although, purely from a community perspective, Prince Zwelithini Dlamini (2019) from the Lomshiyo Traditional Community near Barberton, shared a similar view as the unions when he sarcastically stated that "BEE had been highly successful but for the rich individuals, that included President Cyril Ramaphosa and Patrice Motsepe who benefitted as a small group of individuals who became billionaires out of mining". For Dlamini, it proved that the BEE model as provided for in the mining charters created very rich black monopolies, without empowering communities. He added: "I see these rich individuals as great opportunists, and not great businesspeople."

Maxwell Bolani (2019), the local economic development manager of AngloGold Ashanti, reasoned that the lack of empowerment of communities came as a result of the BEE weighting and its application under the previous charters that favoured the empowerment of individual BEE partners. Viewing it from a different perspective, the senior mining executive from Sibanye-Stillwater (2019) admitted that companies tend to choose a BEE partner who is politically connected, resulting in the BEE entrepreneurs benefiting, whereas communities and workers did not benefit as much as them. He added however that "the intended empowerment objectives of BEE for mineworkers and mining communities have been negatively impacted due to a shrinking industry caused by a lack of investor confidence, rising costs and drop in commodity prices".

4. CHAPTER FOUR: GENERAL THEORY ON THE PLURALITY OF EMPLOYEE OWNERSHIP AND PARTICIPATION IN DECISION-MAKING

4.1 Introduction

As reflected in Chapters 1 and 2, due to mining's history of exploitation and marginalisation, black mining employees and communities were deprived from the right to ownership and meaningful participation in the mining industry. In this chapter, Part 1 deals with the general theory regarding employee ownership and financial participation through ESOPs, to analyse the plurality of ownership and decision-making. In Part 2, the focus is on participation in decision-making, with a specific focus on workplace-related forums.

4.2 Part One – Ownership and financial participation

4.2.1 Employee ownership - a general perspective

According to Rosen and Dulworth (1987:211) "advocates of employee ownership see it as a means to broaden the ownership of wealth, improve labour-management relations, stimulate productivity, and to make work more satisfying. They also argue that broadened ownership is a useful or even necessary component of the employee participation system".

Combining employee ownership with high levels of employee participation yields the most positive outcomes. Employee ownership also challenges traditional management attitudes towards employees and, at the very least, it creates an expectation of achieving a genuine balance in the interests of the company and employees (Michie, Oughton & Yvonne, 2002).

It is especially the existence of the plurality of ownership that is relevant for the redress of ownership in South Africa's mining industry. Michie, Blasi and Borzaga (2017:3) support the argument for a plurality that demands a greater degree of diversity of ownership forms which can be private, state-owned or co-operative and mutual. This is needed to make the productive system more resilient and it would also be a way of tackling the otherwise relentless spiral of ever greater inequality.

Therefore, Michie *et al.* (2017) support the proposal made by the UK Ownership Commission that was established in 2010 by Cabinet Minister Tessa Jowell MP to review the state of ownership in the UK and globally, which set out pillars of good ownership. The two most relevant recommendations that can be linked to the South African context would be:

- the establishment of *corporate pluralism* where a plurality of ownership provides more opportunity to align the form of ownership with the appropriate business model, promotes more resilience to shocks within individual sectors and across the wider economy, allows savers and investors more avenues through which to save and invest, and gives consumers greater choice; and
- the more *engaged* owners and employees are with the business, the more likely it is to succeed, because employee engagement and participation enhances organisational performance.

In terms of the Ownership Commission Report (2012:69), there are three main formats of employee ownership:

- Direct ownership where employees own individual shares in their company
- Indirect ownership where shares are held collectively on employees' behalf, such as in a trust
- Hybrid models, a combination of direct and indirect ownership

It is especially the ownership of productive assets that has profound implications for other aspects of social life, such as the degree of wealth and income inequality, the quality of working life and the functioning of democracy. The private ownership of productive resources – the factories, mines, railways and so forth – placed great economic power in the hands of the new class of owners, which in turn tended to bestow upon them political power and social influence. The resulting inequality of income, harsh working conditions and economic instability – where economic downturns left the unemployed with no means to support themselves – led to various alternative visions for a non-capitalist society where it was crucial for wealth and power to be more evenly distributed through an alternative to private ownership of the "means of production" (Michie *et al.*, 2017).

The need for "worker-ownership" can, according to Woodworth (1981:196), be classified into two principal themes. Type 1 methods include direct ownership like pension and stock owner trusts and Type II alternatives consist of producer cooperatives ranging from small business ventures to factories collectively managed and owned by employees and/or the community. Woodworth explains that most of these methodologies aim that employees should obtain additional rewards, but what was needed to better cement performance with reward, was not simply a bonus, but vested ownership in the business.

Table 4.1: Woodworth's table of patterns of worker ownership

Critical issues	Type I	Type II
Analysis of contemporary society	• System is fundamentally sound • People want to expand their piece of the pie	• System is basically oppressive • People are politically and economically disenfranchised
Theory of change	• Gradualistic • Equilibrium model of social progress	• Revolutionary • Conflict model of social progress
Causation of problems	• Lack of participation in society • Inertia • Trappings of political system	• Collectives • Worker-owned cooperatives • Community/worker forms of joint ownership
Mechanism for changing ownership	• ESOPs • Profit sharing of stocks • Pension funds • Direct purchase ownership	• Collectives • Worker-owned cooperatives • Community/worker forms of joint ownership
Values underlying ownership approach	• Profitability • Efficiency • Employee incentives and satisfaction	• Collaboration • Self-determination • Economic stability
Concept of ownership	• Degree of ownership may be partial or full • Ownership is an opportunity; a benefit for interested parties	• Degree of ownership is total • Ownership is a right of every member
Objectives or goals	• Retention of jobs • Heighten employee morale	• Economic survival • Reform of existing economic structure • Human fulfilment
Underlying politics	• Low to moderate degree of participation	• Full participation and sharing of power

Critical issues	Type I	Type II
	• Voting of stock according to shares possessed	• Trusts • Decisions based on consensus • One member, one vote
View of economics	• Neo-capitalistic • Broader distribution of wealth	• Anti-capitalistic • Transform the meaning of wealth
Organisational functioning	• Top-down structures • Worth of the individual	• Human scale systems • Ideology of collaboration • Power parity

(Woodworth, 1981:197).

Since the plurality of ownership is important in the South African context in order to create a variety of empowerment opportunities, Woodworth's (1981:199-200) model explains that under Type II forms of ownership, power is a basic goal to maximise the amount of worker's genuine participation and power. He also describes it "as a significant form of economic democracy where there is full participation and sharing of power and decisions are taken based on consensus, or 'one member, one vote' when required".

In further applying Woodworth's model to South Africa's situation, of importance is the Type I mechanism of offering direct ownership by means of ESOPs and membership to a pension fund; a model of social progress that broadens the distribution of wealth. The Type II mechanism is then important in the manner that it provides for various forms of worker and community ownership and for the latter to be obtained through revolutionary means due to the oppressive nature of the system.

In a related study Meyers (2011:114-15) came to the same conclusion that democratic employee ownership *can* create working-class empowerment, but it requires formal and non-hierarchical organisational structures supported by organisational narratives that recognise the legitimate and intersecting importance of both race/ethnicity and gender with class in the workplace. The study by Meyers (2011) also reveals that social inequalities are increased or minimised by the degree to which control is organised vertically or horizontally and the findings further illuminate the effect of *formal rules and procedures* on the direction of power.

According to Pitegoff (2004:241), worker-ownership is a central component to economic development benefiting the wider community. Community economic development adds an element of accountability to and participation by a wider array of constituents, including those ordinarily excluded from the political arena or from financial benefits of development. It suggests a social entrepreneurship, tapping market forces for other goals, namely: creating stable quality jobs; fostering opportunity for education and personal advancement; establishing grounded and credible institutions with wider influence; and driving change in distressed regions and economic sectors. Pitegoff (2004) then argued that "the most relevant justification for worker ownership is the role it can play in community economic development. Rather than an end or just another way of doing business, worker ownership can be a vital element of broader job creation, community organisation or a community revitalisation strategy".

Since South African mineworkers are either part of the host community or a community from a labour-sending area, as emphasised later in Chapters 7 and 8, the increase in ownership for mining employees will indeed result in the empowerment of their community. The Type II ownership referred to by Woodworth and especially how the worker/community forms of ownership can be linked will then be dealt with in Chapters 6 and 8, whereby MC III makes provision for a 5% carry interest awarded to employees and communities separately, with no cost to these beneficiaries. With direct and indirect decision-making opportunities to accompany it, all are aligned with Woodworth's model.

4.2.2 Employee Share Ownership Plan (ESOP)

ESOPs - a general perspective

Profit sharing is intended to make employees identify with their company and have an added incentive to perform and strive towards its success. The idea is to persuade employees to work harder for some, but not all of the profits; to moderate conflict between management and labour; and to pose profit-related pay and ESOPs as alternatives to trade unionism and industrial conflict. In the longer term, it should be the alternative to the social ownership of the means of production (Fine, 2002:180).

According to the ESOP Centre in the United Kingdom (2018), employee ownership can either be direct or indirect. In a direct employee share ownership plan, employees hold shares or have the option to purchase shares in their company at discounted and tax-efficient rates.

In an indirect employee share ownership scheme a company is owned (in full or in part) by a trust on behalf of its employees.

The purpose of an ESOP is also to enable employees to participate in the ownership of their company without having to invest their own money, thus extending ownership to even the lowest paid employees (Tischir & Hofmire, 2017). A company establishes an ESOP by setting up a trust fund to buy its own stock or contributes new or treasury issues of its stock. Stock held in the trust is placed in accounts for individual employees based on either relative compensation or some formula more favourable to lower-paid employees. Employees acquire a gradually increasing right to the amounts in their accounts as they accumulate seniority, a process known as vesting (Rosen & Dulworth, 1987:212).

Diale (2016:iii-iv) explains further that an ESOP is an empowerment tool that can be adapted and designed to achieve the goals of companies, employees and governments. "Internationally the application of ESOPs have taken various architectures highly dependent on individual company and country circumstances." Diale adds that ESOPs have instilled a culture of ownership amongst employees and says that "ESOPs generally provide a stable and dynamic working environment, when administered effectively and cannot be implemented in isolation, but they require a combination of factors to make them successful". According to Diale (2016: 72-75), these ESOP factors include: a model that enables meaningful economic participation; instilling an ownership culture; driving the business principles; share price performance; financial incentives; aligned goals; productivity gains; an engaged and responsive workforce; and regulatory compliance.

ESOPs from a South African perspective

Tischir and Hofmire (2017) indicate that ESOPs give employees ownership or a stake in the employing company, but also attempt to make remuneration packages more attractive. Importantly, from a South African perspective, Mthombeni (1996:46), referred to by Bischoff and Mazibuko (2003:33) agrees and indicates that an important advantage is that ESOPs provide benefits to employees without them needing cash in hand to participate or join a scheme.

Bischoff and Mazibuko (2003:32) also found that if employees have a positive perception of their company's ESOP (i.e. the value and financial benefit for them) they were more likely to be committed to their company and organisational commitment had been shown to lead to a host of benefits for the firm in terms of employee retention, motivation and loyalty.

Fine (2002:179-180), who assessed the significance of ESOPs in South Africa, came to the conclusion that workers are offered ESOPs to comfort them, and an extra twist is added by the simultaneous goal of empowering which would inevitably be an elite within black business. Fine further argues that ESOPs are simply a different form to pay wages, obscuring the fundamental conflict between capital and labour by misleading the latter to believe it has a stake in a firm or the economy, other than just being a wage labourer. Therefore, it appears that ESOPs supplement wages with the added element listed as a profit share. Fine’s overall finding was that an ESOP has become a management strategy not to only incorporate workers, but also to gain tax and other financial advantages useful in take-over battles.

The South African Institute of International Affairs (SAIIA) reached a more positive conclusion in its analysis (SAIIA, 2016), indicating that at the core of ESOPs is the idea that workers ought to own a stake in the company for which they work. By allotting a stake to staff, ESOPs allow employees to share in the company’s growth by deriving benefits flowing from (share) capital appreciation. This should encourage improved productivity as workers seek to maximise returns on their equity investment. According to the SAIIA, the most successful example to date is the Kumba Iron Ore Envision ESOP that transferred approximately 3% of Kumba’s equity to more than 6000 non-management employees in 2006. Five years later, on the back of increased production and high share prices, the ESOP yielded R2,6 billion to its beneficiaries, who each received more than R500 000 in pre-tax dividend pay-outs. In another instance, more than 9600 below-management employees of Exxaro each received dividends of R135 000 at the end of the five-year vesting period in 2011.

Franz Stehring, the divisional manager of mineral resources at the United Association of South Africa (UASA) who was interviewed on 17 January 2019, acknowledged the success of Kumba’s Envision, but he described Envision as a once-off success that coincided with good timing of the market and similar pay-outs were never again enjoyed by employees. Stehring felt that “the Anglo-American Coal ESOP model was also successful, because workers were allocated a certain number of shares after three years, and the employees could do with the shares whatever they wanted, and it didn't cost the employees anything”. Antonio (2019) felt that the Phalaborwa Mining Company (PMC) ESOP model was also a good example, where workers and the community were given a 10% share allocation each and black entrepreneurs were given 6% – which was futuristic thinking, according to Antonio. Furthermore, it was an “evergreen scheme” that meant for as long as an employee was part of the workforce, he or she could enjoy the dividends.

Unfortunately, the successes of the likes of Kumba contradict a more discouraging pattern of underperforming ESOPs. If ESOPs are to be pursued as a viable model of worker-empowerment, the schemes will need to ensure a sustainable and less risky means of generating monetary benefits for workers. To this end, the incorporation of a profit-sharing component into the ESOPs structure could provide another source of additional income for eligible beneficiaries. It could also be deployed as an instrument of redistribution (SAIIA, 2016). Diale (2017:92) is of the view that there is a general financial underperformance of ESOPs and feels that current ESOPs have therefore failed to imbue an ownership culture within their employees. An employee’s ability and opportunity to participate in the decision-making processes contribute to the success of an ESOP.

As ESOPs in its current format are clearly underperforming, Pitegoff (2004:250) argues that an ESOP, as a form of deferred compensation, also has little to do with the goals and enhancement of community development and present serious limitations as engine for social change.

A more detailed analysis of the role and future of ESOPs in the South African mining industry is provided in Chapter 6.

4.3 Part 2 – Participation in decision-making

This part of the theoretical analysis focuses on various forms of employee participation in decision-making at the workplace; a right that especially black mining employees were deprived of for more than a century.

4.3.1 Different forms of employee participation in decision-making

Nilsen (2019:258), referring to the work of Gorz (1967), distinguishes between “subordinate” and “autonomous” power of labour. In the case of “subordinate power,” he refers to the association or participation of workers in an economic policy that urges them to share responsibility on the level of results and execution, while at the same time forbids them to become involved in the decisions and the criteria according to which this policy had been decreed. By “autonomous power” he means the ability of workers to challenge the very premise of managerial prerogative.

By adding a more suitable alternative to the power relationship, Kohler (1986:499) regards a growing societal regard of adversarial-based relationships as obstructive and wasteful as well as a renewed interest in some circles in developing means with which to increase “democracy” in the workplace, have contributed to the revival of interest in employee-participation. Much of this attention has been directed at the creation of an atmosphere of labour-management cooperation. This condition is meant to be achieved using a variety of structures intended to enhance employee involvement in workplace decision-making. These integrative schemes of industrial relations are known by several names, including quality of work life, employee involvement, participative management or more broadly, worker participation. To add to the latter, according to a report submitted to the International Labour Organisation (ILO) by Trebilcock and Muneto (2011) on various forms of worker participation, out of the seven forms identified, the following forms of participation are relevant to the South African mining industry:

- Direct participation is where workers may participate in decision-making either directly or indirectly through their representatives – i.e. trade unions or elected employee representatives.
- Employee representation on supervisory boards (co-determination) and employee shareholding
- Health and safety committees and representatives: A specialised form of workers’ participation is seen in the development of health and safety committees and health and safety representatives.
- Works Councils: The term *works councils* describes arrangements for the representation of employees, usually at plant level, although they also exist at higher levels.

With regard to the works councils, Botha (2015:1815) mentions that in European countries such as Austria, Belgium and the Netherlands employee participation mainly takes place in the form of the German model of works councils. The German model is regarded as the “first and most highly developed” model of worker participation. A “dual channel” representation system exists: first, employees are active on supervisory boards and second, trade unions play an active role in the context, not only of works councils, but also in collective bargaining. The German form of works councils or so-called co-determination makes it possible to develop and to adhere to policies that are likely to expand or at least to protect jobs, even if shareholder value may be compromised.

When it comes to employee participation in decision-making, the German model of co-determination has mostly been a point of reference for researchers in this field.

4.3.2 German model of co-determination and the co-determination debate in South Africa

Referring to the study of Rogers and Streeck (1995), Webster and Macun (1998:66) indicate that workplace representation involves formal mechanisms of management-worker interaction that seek to institutionalise rights of collective worker participation, including rights to information and consultation on the organisation of production and, in some cases, formal co-determination in decision-making. Co-determination as a form of decision-making differs from consultation, which involves obligations on the part of management to inform workers before taking a decision, to wait for a response or counterproposal and to take any response or counterproposal into consideration when deciding the issue.

The German model of co-determination incorporates workers' representatives in the traditional company board structure, but it does not necessarily imply participation in the active management of the company (Trebilcock & Muneto, 2011:2). In practice, it means that public companies have two boards – a management board and a supervisory board. The management board is responsible for day-to-day company operations and consists of executive board members, while the supervisory board, which oversees the management board, is non-executive in nature. While the number of employee representatives on the board is dependent on the size of the company's workforce and the type of company, at maximum employee representation can constitute half of the membership on the supervisory board (German Trade Union Confederation, 2018).

Whilst the classic German model of co-determination only provides for employee representation on a board, Adler (1998) explained that by bringing in a community dimension where communities can join employees and senior executives in decision-making processes, a new form of co-determination is created, namely "social-co-determination". Adler was of the view that social co-determination provided for a higher form of pluralism, since it goes beyond traditional shop floor-based co-determination to include constituencies other than labour and capital in processes integrating production and related business decisions. It therefore called for wider societal interest and in the South African mining context, it would include mining communities.

Debates on co-determination in South Africa from an employee perspective

To avoid a second Marikana incident, mining law expert, Peter Leon, proposes that South Africa should adopt the two-tiered German board system. Leon explains:

> that it was something South Africa should seriously look at, given the environment in which the country found itself in the wake of the Marikana tragedy. It could give employees an important voice in directing the operations of companies and might help in attuning businesses to their broader social responsibilities (Creamer, 2012).

For the abovementioned model's application in the mining sector, Satgar (2009:5) proposes that at a large conglomerate like Anglo American Corporation, an autonomous self-management workplace forum can be agreed to, which could exist alongside the board and have competencies like information disclosure, consultation, joint decision-making and autonomous self-management. In terms of the agenda there could be - at least in the short term - co-determination on investment decisions, production planning, work reorganisation and technology use, but autonomous self-management on affirmative action policy and training as well as health and safety issues. The challenge of this variation of autonomous self-management is the struggle to achieve a full and complete self-management agenda that eventually transcends the co-determination competency.

According to Webster *et al.* (2018:553, 612), however, German co-determination does not take sufficiently into account the specific social and economic context of South Africa's distinct industrial relations system. Instead of following the path of institutionalised co-determination, the labour movement opts for engagement with employers based on a union agenda and union independence in order to transform and democratise the workplace. At the centre of this strategy is the shop steward as the instrument for worker participation at plant level. Webster adds that "although we found a surprising degree of cooperation with management among many shop stewards, the attempt to transfer the German system of co-determination in the LRA through Chapter 5's focus on workplace forums, had failed".

In the research conducted amongst NUMSA shop stewards at the Volkswagen plant in Uitenhage, Webster *et al.* (2018:553) found that some shop stewards argued that co-determination, as it was in practice in Germany, was not an appropriate industrial relations system in South Africa and those members argued that they did not believe in co-determination, because it was opposed to their ideological school of thought. They added: “We do not need co-determination because if a mistake was made by management it should remain management’s mistake alone; it should not be a mistake of the union and management.”

NUMSA’s general secretary, Irvin Jim, concurred that “the union was not in partnership with employers; thus, workers could not co-determine decisions with management. A workplace belongs to the employer, not workers” (Bischoff *et al.*, 2018:15-16).

4.3.3 Employee participation in decision-making in South Africa as provided for in the LRA and MPRDA

Workplace forums in terms of the LRA

In a study focusing on worker and employer participation in works councils, as provided for in the previous Labour Relations Act (28 of 1956) during the 1980s and 1990s, Bischoff *et al.* (2018:2-3) established that instead of works councils, management began introducing forms of “employee involvement” (rather than genuine participation), such as briefing groups, communication schemes, quality circles, “green areas” and suggestion schemes. Almost all these structures were limited to the immediate working environment and concentrated on increasing productivity. Pateman (1970), referred to by Bischoff (2018), names this form of participation *pseudo-participation*, which apply techniques to persuade employees to accept decisions that have already been made by management with the result that in fact, no participation in decision-making takes place.

According to Webster and Macun (1998), European style co-determination has later been introduced into South Africa’s labour legislation through the introduction of workplace forums in Chapter 5 of the new Labour Relations Act (LRA). Botha (2015:1812-1813) explains that “collective bargaining, by its nature, is adversarial”. This characteristic of collective bargaining has been counteracted by the legislator instituting workplace forums as a complement to the collective bargaining system: it grants workers participatory decision-making power and a voice and deals with production issues at a workplace level. The system of workplace forums draws upon the model of the German works council system and has been enacted to “introduce a form of participatory workplace governance” and to create a system of participatory decision-making in addition to, or alongside, (adversarial) collective bargaining.

Theoretically, the workplace forum is an industrial relations institution intended to promote worker participation in workplace decision-making. With the South African workplace long dominated by managerial prerogative, providing workplace forums with such powers or competencies as provided for in the LRA enabled a fundamental inroad into managerial decision-making. Joint decision-making, or co-determination, fundamentally breaks with unilateralism and hierarchical decision-making in the workplace in that it allows workers to prevent management from deciding on an issue unless the consent of the workplace forum has been obtained. In general, for worker power in South Africa, this amounts to an advance beyond legally sanctioned collective bargaining or "soft" consultation regarding retrenchments to a legal duty to co-manage. It essentially requires the employer to present proposals to the workplace forum before implementation, with a view to reaching consensus (Satgar, 2009:43-44).

Webster *et al.* (2019:540-541) add that the LRA provided for workplace forums to be established by the Commission for Conciliation, Mediation and Arbitration (CCMA) on application from a representative union. Wood and Mahabir (2001) explains that since only trade unions can trigger them, it was designed to reassure unions that forums would not be used like works councils under apartheid to replace unions. Instead, they would serve to compel employers to cooperate by providing workers with statutory rights of joint decision-making in the workplace as well as to facilitate a shift at workplace level from adversarial collective bargaining to co-determination and participation. They were designed to perform functions that collective bargaining could not easily achieve, but the purpose was not to undermine collective bargaining, but to supplement it.

Despite its theoretical value, unions did not embrace this form of co-determination. Webster and Macun (1998), referring to the *Mail and Guardian* (1997), argue that the core of the unions' caution lay in the concern that new forms of workplace representation would undermine established union structures. Given the adversarial nature of workplace industrial relations, suspicion of any form of involvement and taking responsibility for decisions persisted amongst employees and unionists. On the other hand, managements' uncertainty, especially regarding these statutory forums, arose from their fear that the proposed forums would substantially curtail their prerogative to make unilateral decisions. These reservations were bolstered by employer arguments that the German model of co-determination was exhausted and that the labour market was too rigid and inflexible.

Researchers at the Sociology of Work Unit (SWOP) (currently known as the Society, Work and Development Institute, SWOP) conducted a survey in 1997-1999 of the applications received by the CCMA for the establishment of workplace forums. The researchers repeated the exercise in 2014. In addition to what has been already mentioned above, they discovered that the trade unions lost interest in the workplace forums or took the then COSATU position of opposing the workplace forums; thus, it was not established. COSATU stated in the September Commission Report of 1997:

> While it is significant that this legislation institutionalizes workers' rights to workplace democracy, workplace forums as outlined in the legislation hold many dangers for unions (and employers). We strongly support the argument that workplace forums should be union-based, rather than independently elected (Webster *et al.*, 2019:7-10).

Future Forums in terms of the MPRDA

In the study by Bischoff *et al.* (2018:16) regarding multi-union participation in workplace forums/future forums, the researchers express the following view:

> Our ethnographic account of worker participation at plant level suggested that workers felt disempowered and unable to significantly shape decision-making. The recent increase in strikes both in duration and violence in South Africa has led to a growing number of commentators suggesting that the concept of the workplace forum needed to be revisited. The loss of majority status by the NUM in the platinum belt may signal a broader trend towards multi-unionism in the workplace. This opened up an opportunity for a discussion on how a multi-union participatory structure could be established in the workplace where unions could make common demands and interact with management. What is clear from our findings is the need for the current low trust dynamic between management and workers to be systematically addressed.

Workplace forums, as provided for in the LRA, can be established on a voluntary basis and in any economic sector in South Africa. The promulgation of the MPRDA in 2004 made the establishment of future forums, a forum based on the broad outlines of a workplace forum, compulsory at all mining operations.

According to the "Guideline for the Response of a Social and Labour Plan"[10] for the mining sector published in October 2010, future forums should consist of management, employees and/or trade union representatives. The functions of future forums include:

- the promotion of ongoing discussions between employee representatives and employers about the future of the mine;
- to look ahead and to identify problems, challenges and possible solutions with regard to productivity and employment;
- to develop turnaround and redeployment strategies to help reduce job losses and to improve business sustainability; and
- to implement strategies agreed upon by both employer and employee parties.

A report by the Centre for Applied Legal Studies (CALS) (2016:10) further states that future forums were designed to anticipate a crisis and plan for more constructive alternatives to retrenchment and was a vital component of the system given that mines operate for a finite period and the political, social, economic and environmental impacts of mine closure were significant. The provisions required companies to develop measures to ensure the diversification of skills and economic sectors in order to minimise the negative impacts of mine closure. It also required future forums to anticipate and address the economic and social impacts of closure.

Mardon (2019) added that the purpose of the future forum was also to streamline the process for retrenchments and to ensure that all reasonable steps have been taken to prevent retrenchments. Mardon added that the MPRDA regulation, which governs future forums, stipulated that the forum was to act as an early warning system where in terms of Section 52 of the MPRDA, holders of mining rights must consult with, amongst others, trade unions if the prevailing economic conditions could cause the profit to revenue ratio of the relevant mines to be less than six per cent on average for a continuous period of 12 months or if any mining operation was to be scaled down or to cease with the possible effect that 10% or more of the labour force or more than 500 employees, whichever was the lesser, were likely to be retrenched in any 12-month period.

[10]Drafted in terms of Regulation 46(d)(1) of the MPRDA.

Future Forums enable workers to influence the outcome of a retrenchment process that allows them a form of “autonomous power” as described by Gorz (1967), because workers have the ability to challenge the very premise of managerial prerogative.

We turn now in Chapter 5 to an examination of various stakeholder views on Future Forums.

5. CHAPTER FIVE: PARTIAL FAILURE IN COMMUNITY CONSULTATION IN THE DRAFTING OF MINING CHARTER III AND THE FAILURE TO STRENGTHEN EMPLOYEE AND COMMUNITY PARTICIPATION IN DECISION-MAKING

5.1 Introduction

Although MC III did not make any provision to strengthen the inclusive representation of enabling mine communities to join mining employees on Future Forums, mining communities were at least made part of the Charter consultation process, and in this chapter, the consultation process with mining communities is analysed mainly from a DMR and community perspective to identify the challenges the DMR faced, and to identify the reason why the communities do not regard it as a successful initiative.

Secondly, the failed attempt to provide for employee and community representation on a company board, is analysed to determine if it was a missed opportunity, or a sensible decision.

5.2 Failure 1 - Lack of social partner participation in the drafting of MC III

5.2.1 Zwane era: flawed consultation process

Antonio (2019) from Amcu summarised the MC III consultation process as follows:

> We came through various stages, that started with the then-Minister of Mineral Resources, Mosebenzi Zwane, that published the first draft of the revised charter in the Government Gazette on 5 April 2016. This version of the Charter became known as the "Zwane-Charter". The Mining Minister did not consult with social partners, and that approach was met with disgust and resistance. On the other hand, the charter consultation under Minister Gwede Mantashe, that replaced Zwane in February 2018, included wide and extensive consultation with business, labour and Government that run parallel with the consultation with communities.

A senior employee of the Minerals Council South Africa, who submitted a written response on 10 April 2019, had the following recollection of the Charter consultation process under Minister Zwane:

> In April 2016 the tripartite stakeholders were invited to a meeting with the DMR in relation to the updates and process on the revised mining charter. The meeting was held at the DMR head office in Pretoria. What awaited the stakeholders was quite unprecedented. At this time, I had personally been involved in principal negotiations and

> meetings with the DMR for a period of eight years. For the first time stakeholders were required to leave all note pads, cell phones and other accessories in lock-up facilities outside the boardroom. The Deputy Director General of the DMR welcomed stakeholders to the meeting and proceeded by saying that the DMR had drafted the revised charter and that stakeholders would not be afforded the opportunity to debate the charter content but would merely be able to comment within a 30-day period. He also noted that the public would be afforded the same opportunity within this timeframe. This in itself was unheard of as all previous processes of this nature went through the tripartite forums for discussion before anything was released in the public sphere. Not being afforded the opportunity to debate or take substantial notes, and with no written documentation provided during the meeting, meant that stakeholders were unable to formulate any meaningful input to submit within the 30-day window.

Upon the release of the revised Zwane Charter on 15 June 2017, litigation processes were instituted by the Chamber of Mines (now the Minerals Council South Africa) to object to the lack of consultation about the content. In its founding affidavit submitted to the North Gauteng High Court on 17 October 2017 to set aside the draft Mining Charter, Tebello Chabana, senior executive for Public Affairs & Transformation of the Minerals Council, argued that "the publication of the Charter has, and continues to have, a disastrous effect upon the mining industry as a whole, as well as on investors, stakeholders and employees in that industry". He argued further that:

> the shock induced within all role players in the mining industry, including financial commentators, has been so profound that an amount in excess of R50 billion was wiped off the market value of shares in listed mining companies upon the publication of the reviewed Charter. The 2017-Charter was furthermore confusing and so contradictory in its core provisions, that not only are the mining companies perplexed as to what they are required to do, but legal experts themselves confused and find themselves unable to provide clear advice to their mining and investment clients as to the meaning and effect of the 2017 Charter.

He added "in short, the publication of the 2017 Charter had been an unmitigated disaster both for the mining industry as a whole and for South Africa" (The Chamber of Mines vs Department of Mineral Resources, 71174/2017).

Zwane was replaced by Gwede Mantashe in February 2018, the Zwane Charter was withdrawn, and an inclusive consultation process under Mantashe's leadership commenced on 17 March 2018.

5.2.2 The Mantashe era: Improved consultation process

Alberts (2019a) the head of legal at the DMRE explained that for "Minister Mantashe, the charter consultation was a consensus-driven process where social partners could debate issues and it was intended to be a give-and-take situation".

Adding to what Alberts said, Stehring (2019) from UASA stated that the consultation process under the leadership of Mantashe and facilitated by Mr. Mosa Mabuza, the Chief Executive Officer (CEO) of the Council of Geoscience, "was fruitful and meaningful." Stehring said that:

> at the end of the day, we tried to get to an agreement that was fit and proper for all, and fit and proper for the country in general. And when Minister Mantashe included the communities and traditional leaders in the consultation process, it gave them the platform they were asking for.

Matcha (2019) from the NUM did not agree with Stehring, because he saw the drafting of MC III as "a lost opportunity". He felt that the DMR succumbed to the pressure of the Minerals Council. He argued that the Council was in control of the whole consultation process by making continuous threats to take the DMR to court whenever differences arose and said that "as a result, the DMR was on the back foot since they were not keen on fighting a court battle". He added that he felt "that whatever was suggested from the side of organised labour, was not really taken into consideration, because the focus was on business, and to get them to agree to a DMR proposal". Gqubule (2019), who was invited to share his expert views with the Transformation Task Team, also did not feel that his input was taken into account and that the Mining Charter Summit that he also participated in, was merely a government "tick box" exercise to show that they have consulted widely.

Mining community involvement in the consultation process, will be dealt with under Section 5.2.

5.2.3 Failure of meaningful consultation on the Mining Charter Guidelines

With regard to the Implementation Guidelines for Mining Charter, published in the *Government Gazette* on 19 December 2018, according to Matcha (2019) from the NUM, "the process started off well, but suddenly it was rushed, and social partners were left in the cold towards the end of the process". Matcha added social partners were told that "the

President of the country wanted the guidelines finalised quickly". If you look at that document, it did not even have sufficient input from organised labour on matters that were important to us".

I can also affirm that organised labour was given short notice to attend a meeting on 24 October 2018 to consult with the DMR drafting team on the charter guidelines. We did not receive a copy of the draft guidelines beforehand and were unable to prepare for the meeting. At the meeting, the government officials only allowed us to comment on matters they felt had a bearing on trade unions and employees. Afterwards we felt that the main reason for the consultation was for the DMR to tick the box that unions were consulted.

Legal experts were also not pleased with the final content of the guidelines. In response to the guidelines, the partner from Fasken (2019) explained "that uncertainty exists around what 'carried interest' regarding employee and community shareholding entails, and companies and lawyers were hoping that the guidelines would have something more pertinent around that specific element". Agreeing with the partner from Fasken, Peter Leon (2019), partner and global co-chair of Herbert Smith Freehills, regarded the guideline drafting process as a "completely missed opportunity to shed some light on certain ambiguous Charter elements" and argued further that "it is overly technical and that in his discussion with the Minerals Council, they had the same view that it was another missed opportunity to clarify key Charter elements".

5.3 Failure 2 - Partial inclusion of mining communities in Mining Charter III consultation process

With regard to the role of the mining communities in the charter drafting process, Alberts (2019a) from the DMR explained that community consultations were run concurrently with the consultation with other social partners. Both consultation processes led to several amendments and concessions by the DMR.

> So, broadly speaking, I think the consultation process was very intense, but also very structured and very organised. We also held an inclusive Mining Charter Summit in July 2018, that was very productive and well attended, and I think a lot of things came out of the summit that was also factored into the final draft, Alberts said.

Kgomomkwe (2019) representing the youth in mining, was also pleased with the "outside voices" (communities) that were incorporated into the charter drafting process. He added that it was no longer "a bilateral as in the previous Charters that were written between a selected few, whilst the voices of the communities were ignored". He explained that communities played an important role in a company's social license to operate and if they were not satisfied, they could stop operations.

However, the community leaders' experience of the consultations was different. Liedtke (2018) explained that on 2 July 2018, 100 community representatives from several organisations gathered in Johannesburg to consider the Draft Mining Charter. The organisations included Mining Affected Communities United in Action (MACUA), Women from Mining Affected Communities United in Action (WAMUA) and Mining and Environmental Justice Community Network of South Africa (MEJCON-SA). The communities rejected the draft charter in terms of a resolution adopted at the meeting and at the centre of its resolution, MACUA and WAMUA said:

> the DMR's refusal to include Macua, Wamua and Mejcon in negotiations on the Charter despite a court[11] directing the DMR to do so, the Minister and the DMR had shown a complete disregard for their fundamental human rights and instead, the DMR treated communities as if they had no rights.

Appealing to the DMR, MACUA's National Coordinator Meshack Mbangula requested the DMR "to start formulating a charter that will appropriately reflect what communities have been asking for in their so-called People's Mining Charter"[12] (Liedtke, 2018).

Attorney Louis Snyman at The Centre for Applied Legal Studies (CALS) said the meetings held by the DMR across the country were "very haphazard". Sometimes communities would receive only 24 hours' notice to get to a remote area with no logistical support. "If it's not done properly, what is the use of doing it?" he asked. "There's been a complete failure on the implementation of the court order" (Nicolson, 2018).

Dlamini (2019) a community leader from the Barberton region, described the consultation process with mining communities as "ridiculous". According to Dlamini, community education regarding the mining charter was lacking. He explained that "the moment Minister

[11] Seven mining communities brought a successful High Court application on 20 February 2018, granting them an order to entitle them to participate in the Charter drafting process.
[12] The mining communities gathered to undertake a democratic process of collecting demands from mining affected communities across South Africa to bring all their demands together in a Peoples Mining Charter focusing on provisions that should be included in the MPRDA. The People's Mining Charter was adopted on 26 June 2016 in Berea by WACUA and MACUA.

Mantashe started talking about ownership, and percentages in terms of shareholding, the community didn't understand what he was talking about".

Like Dlamini, David Pheto (2019) a mine community leader of the Moruleng Chapter of Bakgatla-Ba-Kgafela, wanted to know "Where are they coming from when they say there was sufficient consultation? The consultation was a joke". Pheto explained further that:

> when the Chamber of Mines revolted against Government over the 2017-draft Mining Charter, the mining houses took Government to court[13], saying that they were never consulted. As communities, we also said that we were not consulted, and we also went to court and we got a favourable judgment. This judgment therefore allowed us to be included in the consultation process.
>
> Our challenge as community leaders was that when Minister Mantashe came here to discuss the draft Charter, it was clear that the Charter was already formulated and finalised. It was therefore not possible to delete or add something, and all that he wanted from us, was to either say "yes" or "no." Government tends to say the benefit of the mining industry is for all the people of South Africa, but the marginalised are severely prejudiced by the Charter.

The community leaders from the Eastern Cape had a similar view and experience. Mhlekwa (2019) explained that most of the people in Lusikisiki were connected to mining, but he was disappointed that the Minister did not visit their area. Mjoji (2019) also felt that the charter consultation process was unacceptable and he added that "the real information did not reach the community beneficiaries, and that the communities believed their leaders could not do what is best for them, because there was merely a superficial consultation with the chiefs". Pheto (2019) furthermore complained that government officials only consulted with chiefs and by side-lining the broader communities, they failed to get meaningful insight into the plight and needs of communities.

To explain the sensitivities with regard to the community versus the chiefs, Johan Lorenzen, a lawyer at the leading human rights firm Richard Spoor Inc. Attorneys, said:

> to circumvent the control of those who occupy or work the land, will have major repercussions for companies who have been negotiating mining rights with the tribal chiefs for decades. The implication is that such communities should be the negotiating body rather than traditional councils. It creates significant legal risk for all the deals already struck with traditional councils (Stoddard, 2018).

[13] This court proceeding refers to the seven mining communities that brought a High Court application on 20 February 2018, seeking an order to entitle them to participate in the Charter drafting process.

Stoddard (2019) a mining journalist, warned against future consequences of side-lining communities and explained that Anglo-American Platinum and Impala Platinum have both structured deals originally worked out with tribal chiefs and thereafter the deals triggered protests by community members who felt excluded. He added that “companies that don't increase worker or community participation risk a backlash of social unrest. If you don't comprehend this, then you probably should not be in this business in South Africa”.

During the charter negotiation kick-off meeting on 17 March 2018, Minister Mantashe explained to the social partners that despite the court order compelling him to consult with mining communities, he could not include the mining communities in that specific forum, because there were so many communities and so many chiefs that all claim they were representing mining communities, which made it impossible for the DMR to identify the correct people or communities with which to consult.

5.4 Failure 3 - SA mining sector not ready for German model of co-determination

5.4.1 Background

The first draft of the so-called Mantashe Charter, which was published for public comment on 15 June 2018, stipulated under clause 2.1.3.5 that “host communities and qualifying employees shall have representation on the board or advisory committee of a right holder”.

The clause was part of a compromise when the DMR proposed the lowering of the employee and community ownership in terms of share allocation from the 8% proposed in the Zwane Charter to a 5% “free-carry interest” share ownership allocation in terms of ESOPs. The explanation was that the previous 8% ownership allocation can have no real value if the company was not performing, but the 5% “free carry” means the issuing of shares with real value that will be issued at no cost to the beneficiaries. The unions were still not satisfied and we argued that mine workers and communities will merely regard it as “going backwards”, upon which we demanded that it should be an 8% free carry interest. Both the DMR and Council rejected the position and Solidarity then proposed the German model of employee representation, but also community representation on company boards as *quid pro quo* to accept the 5% ownership position. The DMR accepted the trade-off and included clause 2.1.3.5 in the draft charter. (Chapter 6 focuses in more detail on employee ownership and the carried interest allocation to employees and the community.)

Regardless of this compromise, the abovementioned provision was not included in the final version of Mining Charter III.

Alberts (2019a) explained why the provision was scrapped:

> I was part of the discussions when it was debated. Remember one would expect the shareholders of a company to be able to nominate who must run the company, because the company was essentially there to mine and to make a profit, and the business of mining required directors who supported that as the core business of the company. If something goes wrong, then those directors must be held responsible. We then felt uncomfortable if you have community and employee representatives who would become co-responsible and had to carry fiduciary duties, and we felt strongly that they should not be exposed to that risk. It defeated the whole object if they were exposed to a risk and then they must go back to their constituency and say, "we are part of whatever went wrong in the company and part of the consequences". Another consideration was that we were meddling with the corporate affairs of the company, and it might be a contravention of the Companies Act. So, it was a very difficult decision to take, but I think ultimately, it's probably the right one.

Despite the fact that unions felt aggrieved that there was an element of bad faith bargaining when the DMR reneged on the trade-off, Mosa Mabuza, the chairperson of the Transformation Task Team explained during the final Task Team consultation session, held on 14 September 2018 that the decision to remove the clause was indeed to protect workers and community representatives from all the onerous responsibilities associated with a board appointment. "But we were also informed that the Minerals Council was concerned about confidentiality-related matters," Mabuza told us[14].

Leon (2019) a mining lawyer, supported the DMR's view, even though he had always been an advocate of the German model of co-determination. He, however, said "you couldn't just achieve that through the Mining Charter". He argued that the Companies Act must first be amended but added that the MPRDA also required amendments and he was hoping that these

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[14]Since co-determination was a matter I personally felt strong about, I pursued the debate off-line with senior DMR officials. It became clear that since the DMR held individual meetings with the various social partners during the final week of charter negotiations, the decision to withdraw the co-determination clause was part of a compromise reached between the DMR and the Minerals Council. The clause was therefore removed to lure the Council into accepting certain other contentious clauses.

amendments would be instituted since he felt that the co-determination model can work in the mining industry.

The other respondents had mixed views on the inclusion and exclusion of the specific clause.

5.4.2 Arguments against employee and community representation on company boards

The Solidarity focus group (2019) that was in favour of worker representation on company boards, felt that communities should be excluded from company boards, because in their experience communities tend to be disruptive in meetings and drive their own agendas. Benson (2019) from Sibanye-Stillwater supported this focus group's concern regarding community behaviour. His experience had taught him that the communities who were represented on forums at municipality level could hardly be controlled in that environment.

Bolani (2019) from AngloGold Ashanti supported the decision to delete the clause. He explained that a company board reported to shareholders and that you could not have a representative of the community or a mineworker suddenly reporting to a shareholder. He added that a board member bears a great deal of responsibility, to which he added "that it would be important not to encumber an ordinary Mrs. Dlamini, with all those board responsibilities and it would be like punishment for her to carry all those responsibilities".

Lebogang Nkadimeng (2019), the governance manager of AngloGold Ashanti, together with Bolani, agreed that it would be a problem from a responsibility point of view. She explained that in terms of the King IV definition of a board member, the person must have specific competencies and she also argued that "how can you get the ordinary Mrs. Dlamini to come and sit on a board that produced billions and they've never even done simple accounting and couldn't read an income statement?".

The executive of Sibanye-Stillwater (2019) on the other hand stated that according to his information, the decision to exclude mine workers and mine communities from company boards was a compromise to persuade the mining companies to accept the revised mining charter. He nevertheless supported the removal of the clause and argued that the inclusion of mineworkers and mine communities on company boards can either compromise boards or otherwise cripple them in their ability to perform their function. "Biased board members may compromise the impartiality of such a board and their ability to act impartially."

Mjoji (2019) a Chief from the Eastern Cape, also felt that the decision was correct and explained "if communities got involved in company matters, it should not be at the highest level. If we got onto a board, and if that board got into disrepute, then we were part of the issue". He furthermore argued that strategic people sat at board level and the wrong people may frustrate other board members, adding that "even if you're not captured, people would say you were. And if the company had no money, you don't want community members to communicate that".

Whilst all previous respondents mainly based their reasons on complications with community representation, Antonio (2019) from a worker's perspective, believed that the highest form of industrial democracy for workers was to sit at board level and that it would liberate workers in future, but he surprisingly disagreed with the views of the other mining unions. Antonio argued that there were ideal models for worker representation, but it might be something for the future and he believed that the German model will not, at this stage, work in South Africa.

> The norm was that unions let management take the decisions, because if a worker was part of a decision to determine wage increases, the danger was that with employee representation on a board, the board could say that a percentage was agreed upon at board level and the employee representative was bound by it.

5.4.3 Arguments in favour of employee and community representation on company boards

With regard to the removal of the clause, the Solidarity focus group (2019) felt that top management merely wanted to protect themselves and hide behind issues that they label as confidential and therefore placed pressure on the DMR to delete the clause. Dlamini (2019) expressed a similar argument and stated that the DMR's removal of the clause with the support of mining companies simply meant that they were saying "that they didn't want people to know about the revenue they were producing, or the decisions on how the profits will be spent".

Matcha (2019) was also disappointed in the decision and argued that "how can mineworkers and communities become owners and shareholders as provided for in MC III, and the DMR was afraid of consequences around board representation". Neither could he understand:

> why workers and communities could be trustees on an ESOP or community trust where they have a say in company dealings, but when it came to board representation, they hide behind so-called onerous fiduciary duties, that defeated the object of inclusivity and ownership?

The NUM Focus group (2019) added that workers were the ones mostly affected by strategic decisions taken by the company and that they should be able to have a say in their future.

Kgomongwe (2019) supported the unions and felt that instead of the DMR reversing the decision based on fair reasons, they should have come up with an alternative and workable solution. According to Kgomongwe "a credible alternative platform to influence management decisions that affected the communities and employees should have been explored, because as long as workers and communities were excluded from decision-making, there would be a vacuum".

Further to comments made under Section 5.2 regarding charter consultations with chiefs, instead of the community, Stoddard (2019) and Pheto (2019) have the same theory on Government's rationale behind the deletion of the clause. Stoddard's suspicion was that the chiefs, who the ANC regarded as politically important, "wanted to cut deals directly with Government and companies on the side, and it made sense if they did not want communities to be represented on company boards". Pheto added that it was the norm for Government officials to talk to chiefs, without listening to the aspirations of the broader community. "Government told chiefs behind closed doors about what they were going to do, and the community would not know what the chief agreed upon."

Adler's (1998) view on "social-co-determination" by bringing in a community dimension where communities can join employees and senior executives in decision-making processes that will create wider societal interest, was embraced by mining communities. John Ngomane (2019), regional leader of the South African National Civic Organisation[15] (SANCO) in the Barberton mining area, agreed and argued that a mining community leader's main role is to protect and enhance the community interest and "if you remove the leader from strategic decision-making structures, you automatically remove the community as well."

[15] SANCO was not part of the mining communities that brought a High Court application on 20 February 2018, seeking an order to entitle them to participate in the Charter drafting process.

5.4.4 The continuous debate on board representation

Luckily, the debate about employee and community representation on company boards is not over and addressing the Investing in African Mining Indaba on 5 February 2019, President Cyril Ramaphosa posed a challenge to mining companies to have the courage to bring workers on to their boards. “I would like to encourage companies to have the bravery to do that,” Ramaphosa said (Creamer, 2019).

During his speech at the Minerals Council AGM, held on 22 May 2019, Mxolisi Mgojo, President of the Council, responded as follows to the call made by President Rampahosa:

> Employee board membership is a complicated issue. Over the past 30 to 35 years, our industry has been a leader in levels of consultation with employees, usually through their unions. Board membership would be a further leap, though the unions themselves may have some misgivings. Achievement of this challenge would be a sign of a well-developed mature relationship between companies and their employees’ representatives. That may perhaps make it something to aspire towards.

5.5 Failure 4 – Missed opportunity to strengthen the role of future forums in the decision-making processes

5.5.1 Introduction

As shown earlier in Chapter 4, future forums are a product of the MPRDA and should theoretically fulfil an important role in employee participation in decision-making. The next Section discusses the shortcomings MC III could have addressed.

5.5.2 The social partner’s experience and view on future forums

Alberts (2019), in emphasising the importance of a future forum from the regulator’s point of view, said that he was once involved in litigation when the DMR sought to cancel a mining right because the company’s future forum was not functioning. This came about when a mine set out to retrench workers and failed to advise the DMR through a Section 52 notice as prescribed by the MPRDA. An inspection by the DMR showed that the Future Forum was never operational, which could probably have prevented the downscaling if it was functioning as per the regulation.

All the mining union focus groups expressed a negative view on the functioning of a future forum. The Solidarity Focus group (2019) explained that when a future forum meeting was called at short notice, it was normally the precursor to a section 189[16] process because a company must consult with the unions before the issuing of a Section 52 and a Section 189 notice. Therefore, the future forum meetings were often merely being called to enable a company to comply with the said legal requirement. The NUM Focus group (2019) agreed and felt that under normal circumstances certain companies would merely call a future forum meeting, because the MPRDA stipulated that regular future forum meetings needed to take place and the result was regular meetings with no substance. Stehring (2019) supported this view and said, “with my more than 20 years of experience as a unionist in the mining sector, there was not a single company future forum that functioned well, due to a lack of commitment to meaningful consultation”.

Antonio (2019) differed from the other unions and in his view, there was confusion about the purpose of future forums. He explained that whilst “workplace forums” dealt with conditions of employment-related matters, a future forum dealt predominately with the future of mining operations and factors like productivity, volume targets, day-to-day sustainability issues and mining methods. He added that future forums also dealt with shaft performances and interventions required to prevent shafts from closure. According to Antonio “that was why a future forum was obviously a precursor to a Section 189 process”.

The United Association of South Africa (UASA) focus group (2019) interestingly enough made the observation that opportunities for organised labour to influence a company decision were often missed at a future forum because of union rivalry; unions tend to focus on their own interest and that of their members, instead of having “an organised labour position.”

From a company perspective, the senior executive from Sibanye-Stillwater (2019) explained that future forums fulfilled an important role in the mining industry given that mining was labour-intensive and a people’s business.

> The challenges facing any mining company did not only impact on management and shareholders, it impacted on all stakeholders. It was then important that workers and organised labour understood challenges facing the mining industry and how these challenges could impact on themselves. Unions provided a viewpoint different from that

[16]Section 189 of the Labour Relations Act refers to a retrenchment process.

> of management or shareholders and could greatly assist in addressing the current challenges.

He also added that the forums “were of significance, because when it was functioning well, key information shared at the forum about challenges facing a company would reach the entire workforce”.

Arendse (2019), looking at future forums from a junior mining perspective, agreed with the Sibanye executive that a future forum was a platform that even the small employers could use for communication between stakeholders to actively exchange thoughts, experiences and knowledge on a subject. With specific reference to the spirit of MC III, Arendse believed that future forums would continue to be effective in the mining industry.

For Benson (2019) the future forum was supposed to include the top leadership of the company and unions, he was of the view that the level of seniority from the side of the unions was a problem and he explained that:

> you end up talking to people who had a short-term (and not long-term) outlook and when you need to look at how to do things smarter to have a sustainable business, it did not assist the purpose if unions failed to send their senior officials to the meetings.

In slight contrast with Benson’s perspective on union ineffectiveness, Kgomongwe (2019) who was also a member of the Minerals and Petroleum Board (A statutory advisory body to the minister of Mineral Resources and Energy established in terms of section 57 of the MPRDA) explained that the Board’s sub-committee tasked with overseeing Section 52 notices regarding downscaling, engaged with mining companies and trade unions through future forums. Kgomongwe’s observation was that trade unions have a clear understanding of proper focus future forums should have when a retrenchment process became a reality, but he felt management seemed to be more concerned about the protection of confidential information and how to motivate the reason for retrenchment to the DMR than to actively engage with unions to find an alternative.

5.5.3 Community involvement in future forums

It was suggested in a report from the Centre for Applied Legal Studies (CALS) (2016:10) that future forums should be required to include community representatives as well. The report states that all structures, including the future forum, should form part of an umbrella of multi-stakeholder bodies, which collectively ensured oversight by the public over all aspects of the mining operation and this structure can also serve the role of integrating social and environmental considerations, especially at mine closures.

Although prevailing mining regulation does not provide for mining communities to participate in future forums, Pheto (2019) was of the view that companies could, in light of the High Court decision of February 2018 that allowed communities to participate in the Charter consultation process, no longer ignore the role communities could play in future forums. Matcha (2019) was concerned that communities tend to be disruptive by nature when they participate in company forums, but nevertheless admitted that it would make sense if the community representatives were part of a discussion when a company and unions dealt with community issues in a future forum, because they were the last people to know of developments inside the mine about matters that will have a negative impact on them.

Benson (2019) agreed that the functioning of future forums could be improved so that all social partners can jointly agree on how to do things differently and to extend the life of a mine. Therefore, Stehring (2019) was disappointed that an opportunity was missed during the drafting of MC III to merge community forums that are facilitated by local government with company future forums.

It was indeed a missed opportunity, especially since Solidarity proposed during the Charter negotiations that the alternative option for employee and community representation on a company board could be the inclusion of community members on a future forum. This could have been established for an interim or testing phase to determine if the goal of the German model of co-determination would be feasible. Unfortunately, the DMR and Minerals Council was not in favour of the alternative proposal to make provision in MC III for wider representation on future forums.

Government nevertheless agreed that future forums were not being implemented properly and Nogxina (2018) also felt that broader stakeholder input was required. Alberts (2019a) confirmed that the DMR "would look at ways to formalise guidelines around the functioning of future forums, especially as the mining industry moved into the mechanisation era and the disruption it would cause would result in future forums becoming even more relevant".

5.6 Trade union and employee involvement in the decision-making processes

Although an opportunity was missed to strengthen employee participation in decision-making through MC III, during the fieldwork I also engaged with the participants regarding their views on employee participation in day-to-day decision-making at mine level. The intention was to establish if there were other opportunities where workers could enjoy full participation in the decision-making processes.

The UASA focus group (2019) felt that operational and strategic decisions were made by senior and top management with limited input from middle management and lower occupational levels. Since it would be up to the latter to execute and implement decisions, they often have more knowledge of, it was deemed feasible to include them in the decision-making process given that their input could have prevented failure. Kgomongwe (2019) supported this view and explained that the workers who go underground daily must at least be consulted on decisions regarding capital investment in underground machinery, for instance, because the wrong decision could result in layoffs. The NUM focus group (2019), on the other hand, felt they were often consulted on ideas and initiatives that were already agreed upon at top management level and though they might have a strong view against it, they were unable to influence the decision.

In response to the views of the union focus groups, Benson (2019) stated that unions could not be included in all decision-making processes and explained:

> We don't allow unions to dictate on strategic decisions, because we believe these decisions should be made by top management that takes full responsibility and accountability for the managing of the business, because top management is appointed by the company board and accountable to the board. We also needed to report to the DMR on regulatory matters, to local government and DMR on Social and Labour Plans, and the Department of Labour on onerous statutory requirements where compliance was solely top management's responsibility.

An argument in support of Benson's view came from Stoddard (2019) who said that due to AMCU's violent tactics, militancy and brinkmanship that hardly represent the interests of most of Amcu members, it would be extremely unlikely that a company would seek to engage with them on strategic decision-making issues.

The mining executive of Sibanye-Stillwater (2019) had a more balanced view and explained that employees were indeed represented through their respective organised labour structures focusing on normal day-to-day activities. These structures include the forums for employment equity, transformation, recruitment, catering, skills development, housing, recreational, health and safety as well as transport. He was of the opinion that employees were therefore empowered through these structures to partake in decision-making that may impact on the company's sustainability.

A key area for worker participation in decision-making was linked to the Mine Health and Safety Act (MHSA), according to Arendse (2019), which empowers any mineworker to report safety incidents and occurrences that affects the mine. Mardon (2019) agreed with Arendse and explained that the MHSA provides for the direct participation of mineworkers in health and safety decisions and investigations through the health and safety management system and statutory forums. Section 23 of the MHSA (29 of 1996) also provides for a union to withdraw its members from an unsafe environment. He added that the success thereof was unfortunately inconsistent throughout the industry, as it is to a great extent dependent on the health and safety culture and knowledge of the workers at the mines and of their respective trade unions. For a further example on full participation in decision-making, the Solidarity focus group (2019) added that workers at all levels were also involved in decision-making on production-related matters, because production meetings took place at all the occupational levels of the company.

The UASA focus group (2019) felt that during wage negotiations or collective bargaining processes, they can offer input on conditions of employment and the remuneration of employees. Mardon (2019) did not agree with UASA and stated the following:

> When it comes to conditions of employment, mineworkers were mostly dependent on their respective trade unions through the mechanisms provided for in the Labour Relations Act to influence business decisions. But in practice, this influence was largely ineffective as labour relations was to a great degree confrontational and coercive instead of cooperative in nature and therefore only have an indirect effect and often very insubstantial effect when changes in conditions of employment, became a business decision.

Antonio (2019) also differed from UASA and argued that in terms of the traditional approach to participation in collective bargaining processes and especially regarding wage increases, the challenge for unions is that a budget had already been set for wage increases and a company will be guided by its budget during wage negotiations.

5.7 Conclusion of Chapter 5

The first partially failed initiative dealt with in this Chapter, relates to the DMR honouring a court order to consult with mining communities on the content of the Charter. Even though the DMR was legally obliged to consult with communities, it was unique since it was the first time that the Department officially consulted with mining communities around the content of the Charter. Unfortunately, the overall experience of communities was very negative, and their discontent would simply increase the distrust between the Department and mining communities.

The second failed initiative was the removal of the clause that provided for mining employee and community representation on a company board. But, by analysing the reasons given by the DMR, and the arguments for and against board representation, it seemed that the timing was not right for the implementation of the German-model of codetermination. It is nevertheless unfortunate that a phased approach was not followed by at least giving communities the right to representation on Future Forums.

6. CHAPTER 6: SUCCESS OF MINING CHARTER III TO REPLACE THE FAILED EMPLOYEE SHARE OWNERSHIP PLAN (ESOP) WITH A CARRIED INTEREST MODEL

6.1 Introduction

When looking at the mining sectors' past of exploitation and discrimination, and the sacrifices migrant labourers and their families needed to make, the financial participation and ownership by mine workers are key elements to compensate and to financially empower mine workers.

Other than normal remuneration, the Employee Share Ownership Plan (ESOP) was developed to strengthen the financial participation of mineworkers in the mining sector, but the employee share ownership provisions in MC I, MC II and other mining regulations in general did not lead to the financial empowerment of mine workers. Therefore, MC III had to address the shortcomings of the previous Charters and related mining regulation.

6.2 Employee ownership and the shortcomings of employees share ownership plans (ESOPs)

6.2.1 Trade union views on ESOPs

During the fieldwork, the respondents were asked for their views on the employee share ownership plans (ESOPs). The NUM focus group (2019) was very negative about ESOPs. One shop steward, who was serving on Sibanye-Stillwater's ESOP Board (Thusano Trust), described it as a "disaster". The shop steward explained that to revive their ESOP, they opted to put pressure on the company to re-negotiate certain terms of the trust deed so that the company could absorb some of the ESOP costs to make the scheme more viable. Matcha (2019) from the NUM agreed with his shop stewards and explained that at various ESOP negotiations, the NUM attempted to secure an interest free-loan to pay for employee shares, because the interest charge on loans resulted in high financing costs that first needed to be absorbed by the scheme before their members could get real value out of the share scheme. "The result was that all dividends that were declared, were used to repay the loan, and as a result, numerous schemes were under water at the time of vesting".

Antonio (2019) from Amcu agreed with the NUM that the biggest challenge for an ESOP was the funding element, but he showed a good understanding of the ESOP financial model and explained that it was exposed to external market exposure, loan repayments and no guarantee on returns. Antonio explained that "when the company share price drops below the price the shares were allocated to employees, the shares become worthless". He suggested that workers require a scheme where they can pay-off all the costs and debt in a shorter period, for example three years, for the shares to have real value thereafter.

Mardon (2019) from Solidarity argued that the failure of ESOPs mainly vested in the fact that most employees regarded their share allocation as a "quick buck". They speedily liquidate their shareholding and spend the cash, leaving them in a worse position than before, because the ownership or shareholding status gets lost when all the shares are sold. The Solidarity Focus group (2019) expressed that ESOP rules should provide for unions to appoint an independent expert to represent them on an ESOP board. They added that employee share schemes take years before vesting and by the time of vesting, many employees have left the employ of the company.

To confirm the legal status of an ESOP, the partner from Fasken (2019) indicated that "ESOPs were here to stay, because it was a prerequisite for the granting or renewing of a mining right by the DMR".

Although ESOPs are here to stay, the financial benefit employees derive from it is mostly insignificant and therefore most social partners involved in MC III negotiations felt that MC III had to address its shortcomings.

6.3 Employee ownership and shareholding as provided for in Mining Charter III

6.3.1 Ownership distribution in terms of MC III

In terms of Section 2.1.3.2 of MC III (2018), upon the application of a new mining right:

> A minimum of 30% BEE shareholding must be distributed in the following manner: A minimum of 5% non-transferable carried interest to qualifying employees from the effective date of a mining right; A minimum of 5% non-transferrable carried interest or a minimum 5% equity equivalent benefit as defined herein to host communities from the effective date of a mining right; A minimum of 20% effective ownership in the form of shares to a BEE Entrepreneur, 5% of which must preferably be for women.

MC III (2018) defines "carried interest" as "shares issued to qualifying employees and host communities at no cost to them and free of any encumbrance. The cost for the carried interest shall be recovered by a right holder from development of the asset".

The initial agreement at the Transformation Task Team regarding the percentage allocation of shareholding for qualifying employees and mining communities was 3%. The 3% was tabled at the Principals Forum on 10 April 2018 and none of the principals of the various social partners (excluding the community representatives who were not part of the meeting) had any objection to the said percentage. On 2 May 2018, at a follow-up Transformation Task Team meeting, the Minerals Council retracted their support and presented a revised position of 1% carried interest to employees and communities. The result was that the DMR accused the Council of bad faith bargaining and revised their position upwards to 5% carried interest – a position that was supported by all the trade unions. The result was that 5% ownership was contained in MC III.

6.3.2 Mining stakeholder's response to 5% non-transferable carried interest to qualifying employees

Firstly, to clarify the concept of "carried interest", the partner at Fasken (2019) explained that "carried interest was a concept that came from the private equity field, and it is usually profits that were paid in some delayed way to a fund manager and it constitutes additional profits that gets carved out".

Gqubule (2019) a BEE expert, was more in favour of the term used in the draft Charter that referred to "free carried interest" instead of "carried interest." He said:

> I've done research on other sectors of the economy under the top 100 companies, and what I found was that free carried interest exists in other sectors of the economy, so generally your employee and your broad-based ownership schemes would be funded by the company, or through a bank transaction, so companies generally either partially fund or fully fund the broad-based components.

Arendse (2019) a junior miner, was very positive about the employee ownership provision since it created physical and psychological ownership and it was a substantial move towards goal-congruence between employee and the mine. The important element for him was to ensure that employees felt and experienced the essence of ownership. Likewise, the NUM focus group (2019) embraced the new employee ownership provision in MC III and regarded it as a major improvement over what they were exposed to up until then. One shop steward added that "this was a scheme that would work since the financial benefit to employees was guaranteed by law", but Matcha (2019) disagreed with his shop stewards and felt that mining unions should have pushed for more than the 5% share allocation. Matcha explained that the worker ownership element was very problematic, and he felt that workers were not going to achieve the objective of having real ownership of a company in the way it was incorporated in the Mining Charter. He regarded it as more regressive than progressive for the struggle and that mineworkers are still stuck at the bottom.

It was a surprise that Matcha's view was supported by respondents from the employer side. The partner from Fasken (2019), who mainly represent mining employers, stated:

> The question I would ask, wasn't transformation or black economic empowerment best served when you get meaningful benefits to workers and communities who sat at the coalface of actually doing the work or being involved or exposed to whatever the activities of the mining company? So, to me, there's something very purposeful in an ESOP and the community trust. There's a very direct effect if it's a success story. So, I would lean towards not have it limited, for example, at 5%. I just think it was giving benefits at the level it's maybe most needed.

The executive from Sibanye-Stillwater (2019) agreed and felt that in order to alleviate poverty, mine workers and communities collectively needed to gain greater shareholding compared to black entrepreneurs who benefit as individuals.

Gqubule (2018) was adamant that the ownership or shareholding allocation for mining employees and communities was too low and motivated it as follows:

> It meant the end of BEE transactions in the mining sector before the industry had been transformed. Decent targets were especially not set for communities and workers and there was no indicator to measure and monitor nett value. The blame for such an event should be shouldered by the ruling ANC, the DTI and the DMR, which provided no leadership on the issue for many years and refused to scrap the Charter and align it with the DTI Codes[17], which have a compromised position on the once empowered, always empowered principle[18].

Gqubule (2018:134) justified his strong view by explaining as follows:

> The industry had provided minimal benefits for employees and communities. At the end of December 2017, employee share ownership plans had a nett value of R2,7 billion. This was equivalent to 0,4% of the value of South African mining assets. Community schemes

[17]Codes of Good Practice on Broad-Based Black Economic Empowerment (BBBEEE) in terms of which several transformation sector charters, were introduced, vetted and measured against for compliance.

[18] The so-called principle of 'once empowered, always empowered' refers to the situation where a mining company, after the exit of a black partner that held a stake in the company as a result of a BEE transaction, continues to be recognised as being BEE compliant in order to retain its mining rights, despite losing its black ownership due to such exit.

> and companies had a nett value of R14 billion. This was equivalent to 2% of the value of South African assets.

6.3.3 Mining Charter III and the non-racial element of the employee share ownership scheme

At the outset of the Mantashe Charter negotiations, which commenced on 17 March 2018, employee ownership was high on the agenda. When it came to Solidarity's turn for an opening remark at the outset of the meeting, the union made a broad statement that all employees regardless of race should benefit from an employee ownership scheme. The NUM, SAMDA and DMR officials objected to the inclusion of white employees as beneficiaries of any proposed employee share scheme. In response, Minister Mantashe accused those opposing it as "people suffering from class confusion". He stated it would also be "a class contradiction if employees on the same occupational level, don't have equal ownership rights because all employees below management level were equally exploited".

The result was that the employee ownership clause included in MC III (2018) was based on the class principle and "qualifying employees" were identified as follows in the new Charter:

"**Qualifying employees**", for the purposes of the ownership element, refers to employees of a mining company, excluding employees who already hold shares in the same company as a condition of their employment agreement.

It was interesting that none of the respondents who were interviewed during the fieldwork were opposed to the inclusive principle. Stoddard (2019) a mining journalist, indicated that "moving away from race exclusion should be welcomed at the lower levels where social class was more important". Gqubule (2019), known for his strong views on transformation, explained:

> In the rest of the economy and, if you look at original BEE transactions, white employees could participate. It's just that you can't count them towards the ownership score. So, let's take the typical company where the lower management is 90% black and around 10% white, you can only count the 90%, which I think is reasonable. I was involved in the talks around the DTI codes, and this was really not an issue.

Bolani (2019) from AngloGold Ashanti agreed and explained as follows:

> I don't think that shares from the company should discriminate. Because if we all contribute, we should all be rewarded equally, whether you're black or white. At the

> higher levels, whether you are black or white, people get shares. So, you cannot go one step below, then say this scheme should be based on race. I think that there will be an unfairness there.

Furthermore, “the application of certain ESOPs that are based on race, fostered feelings of discontent, resentment and prejudice against employees who were excluded from the ESOPs, that ultimately gave rise to discord and division amongst workers”, according to Mardon (2019) from Solidarity.

6.4 Conclusion of Chapter 6

The implementation of an ESOP is a regulatory requirement and the plan was developed with the aim of providing ownership and direct financial participation for employees in the mining sector. But, in practice, the objective for the mining houses was in most cases merely compliance and not to ensure that it is structured in such a way that mining employees are financially empowered through it.

On the other hand, the fact that employees, through their elected representatives, have representation on ESOP trusts or boards, strengthens the impression of employees enjoying a form of direct participation in the mining sector. But this Chapter has shown that since employees in general are unable to get real value out of an ESOP, it is another case of pseudo-participation.

The MC III’s introduction of a revised employee ownership and shareholding structured around a 5% carried interest with no cost to the employees, will result in it being a more viable scheme that will enable employees to derive real financial benefit from it. Although the more favourable new carried interest shareholding provision only gets implemented upon the application by a mining house for a new mining right, it will nevertheless encourage unions to explore avenues to structure the current ESOPs in such a way that the transaction costs do not dilute the financial benefit for mining employees.

7. CHAPTER SEVEN: DEFINING A COMMUNITY AND THE STRENGTHENING OF COMMUNITY PARTICIPATION IN SOCIAL AND LABOUR PLANS

7.1 Introduction

Although there is a strong overlap between the objective of Social and Labour Plans (SLPs) and community development, MC III do distinguish between the two community empowerment concepts. As a result, clause 2.1.4.2 of MC III stipulates that a host community development programme approved under MC III shall not replace Social and Labour Plan commitments as contemplated in Section 23 of the MPRDA.

This Chapter analyses in what way SLPs and community development as provided for in MC III empower mining communities in terms of participation in these two empowerment opportunities.

This Chapter also highlights the dynamics between the different types of "communities" and the need for the regulator (DMRE) to standardise the definition of the various forms of mining communities.

7.2 Defining mining communities

When it comes to community empowerment, the MPRDA, the Guideline for the Response of a Social and Labour Plan ("the Guideline") and Mining Charter differentiates on occasions between the specific community that would benefit from a specific provision. In this regard, the MC III (2018) refers in various Section to either "community", "mining communities", "host communities" and "communities from labour-sending areas".

The various definitions are explained as follows:

Mining Charter, 2018 refers to "communities", "mining communities", "host communities' and "communities from labour sending areas". The various definitions are explained as follows:

In terms of the Mineral and Petroleum Resources Development Act (MPRDA), "**broad based economic empowerment**" means a social or economic strategy, plan, principle, approach or act which is aimed at-

(a)…………

(b) transforming such industries to assist in, provide for, initiate or facilitate-

(i) to (v)…………

(vi) the socio-economic development of **communities** (own emphasis) immediately hosting, affected by supplying labour to operations; and

(vii) the socio-economic development of all historically disadvantaged South Africans from the proceeds or activities of such operations.

To clarify, the MPRDA stipulates that "**community**" means:

> "a group of historically disadvantaged persons (own emphasis) with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community"

David Pheto (2019), a mine community leader of the Moruleng Chapter of Bakgatla-Ba-Kgafela, disagrees that all historically disadvantaged South Africans can benefit from the Mining Charter, as referred to in the MPRDA definition. In his capacity as a community leader, a mining community would be "those people who were one - the landowners, two - affected by mining, and whose lives had been taken away by mining. Their forefathers have been ploughing their fields where the mines are now. Their cattle had been grazing here before that space was taken over by mining. These are the people who have been affected and must be regarded as the mining community". Pheto acknowledged that those people living nearest to the mine will be affected and must also benefit, but he felt that those who were directly affected by their land that was taken away from them, should benefit first, before benefits could be distributed to others.

When it comes to identifying the community beneficiaries flowing from a Social and Labour Plan (SLP), the terms of the Guideline, a "**community**" means: "*a coherent, social group of persons with interest of rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law*". The definition needs to be read with clause 2.5 of MC, 2018, that states that a **mine community** for the purposes of an SLP and community development projects, refers to "*communities where mining takes place, major labour sending areas, adjacent communities within a local municipality, metropolitan municipality or district municipality".*

Then, in terms of the MPRDA, a "**host community**" means: "*a community within a local or metropolitan municipality adjacent to the mining area*".

In terms of the Guideline, a "**labour sending area**" refers to: "*areas from which a majority of mineworkers, both historical and current are or have been sourced*".

7.3 Social and Labour Plans (SLPs)

7.3.1 Overview of Social and Labour Plans (SLPs)

In terms of regulation 46 (clause 41) and Section 2 of the MPRDA, the objectives of the social and labour plans are to:

- promote employment and advance the social and economic welfare of all South Africans;
- contribute to the transformation of the mining industry;
- ensure that holders of mining rights contribute towards the socio-economic development of the areas in which they are operating, as well as the areas from which the majority of the workforce is sourced; and
- the mine or production operation must, through consultation with communities and relevant authorities, provide a plan. The plan should be in line with the integrated development plans[19] (IDP's), as provided for in the Municipal Systems Act (32 of 2000) regarding the development of a mine community.

The regulation stipulates further that an application for a mining right must be accompanied by a SLP (clause 42) and the holder of a mining right must submit an annual report on the compliance with the social and labour plan to the DMR (clause 45).

The content of a SLP must *inter alia* include the following (clause 46):

- a human resource development programme;
- a local economic development plan;
- an IDP for the mining area and labour-sending area;
- the establishment of a future forum; and
- an undertaking by the mining right holder to ensure that the content and compliance with the social and labour plan is made known to the employees.

[19] An Integrated Development Plan (IDP) is a super plan for an area that gives an overall framework for development. It aims to co-ordinate the work of local and other spheres of government in a coherent plan to improve the quality of life for all the people living in an area.

The perspective from the beneficiaries of a SLP is that the seven mining communities bringing a High Court application on 20 February 2018, seeking an order to entitle them to participate in the charter drafting process, gave rise to the following arguments in terms of the state of SLP's from their experience:

> If permitted to intervene in the main application, it will be the Applicants' respectful contention that these previous versions of the Charter have not fulfilled their purpose with respect to mining host communities like the Applicants. There certainly has not been compliance with Section 2(i) of the MPRDA. Although we do not deal with the facts in detail in this application, I believe the following facts are true for most hosting communities:
>
> 31.1 Poverty levels have not improved as a result of the presence of mining. They have worsened in and around mining activities.
>
> 31.2 Mining companies have been allowed to renege on their Social and Labour Plans (”SLPs”) on a large scale. The Social and Labour Plan scheme set out in the MPRDA and MPRDA regulations has to date functioned as the primary method for attempting to facilitate mining affected community development and transformation, and the draft 2017 Charter seeks to better align with that system. The Department of Mineral Resources historically has not properly enforced the SLP commitments by the mining companies.
>
> 31.3 Mining companies continue to externalise much of the costs of mining, such as pollution costs, related health costs, conditions created by migration caused by mining and the like.
>
> 31.4 Reporting requirements have not been enforced. In this way, hosting communities have little information to assess whether SLP commitments have been fulfilled or in many cases even what the content of these plans is. (Chamber of Mines vs. Department of Mineral Resources, High Court Application, Paragraph 31, Case No. 71174/2017).

7.3.2 Challenges with Social and Labour Plans

Antonio (2019) from Amcu is of the view that “the delivery on social and labour plans is the best way to keep the community quiet and happy. For instance, by building a school, a road, or through farming initiatives”.

According to the Bench Marks Foundation's lead researcher, David van Wyk, “there were increasing numbers of mining communities that were protesting against mining activity in South Africa” and added that the communities were aggrieved with mining companies, because the biggest problem was that mining companies made promises to communities about SLP benefits that they did not keep (James, 2018).The problem described by Van Wyk was acknowledged by Roger Baxter, CEO of the Minerals Council South Africa, who wrote in City Press of 14 October 2018 that:

> alienated mining communities do not make for efficient mining operations. As it is, the industry spends an estimated R2 billion a year on local economic development in these communities and in labour-sending areas. But it is clear that we still have work to do to improve relationships with communities.

Baxter and Van Wyk were indeed correct that relationships needed to improve, but the challenges pertaining to SLPs were more concerning based on the findings of the Social Audit Baseline Report (2018), where research were conducted by Action Aid South Africa in 10 mining-affected communities across South Africa. The report shows that regarding the social responsibility of mining companies and the DMR, the following picture emerged:

- 91% of respondents did not know what a SLP was;
- 85% did not know of any structures in their community who engaged with the mine on SLPs; and
- 95% had never seen an SLP.

In terms of community benefit from having mines close to or in the vicinity of the community, the following emerged:

- 79% indicated that there was no benefit from the mines at all;
- 8% felt that the mine only brought negative benefits such as sickness, dispossessions and damages; and
- 13% felt there were positive benefits such as clinics, roads and employment (Action Aid Report, 2018).

All blame cannot be placed at the door of mining employers and in a 2019 report, called “Some Innovative Ways of Thinking in the Social and Labour Plan Space”, AngloGold Ashanti listed the following challenges the company faced to meet and align SLP targets:

- Misalignment of priorities between different tiers of government and DMR Guidelines
- Poor drafting of the integrated development plans (IDPs) as a result of lack of resources in local governments
- High community expectations from the company against short life of mine (LOM)

- SLP cycle periods of mining companies not in sync to allow for delivery of joint projects with high social impact
- Short-term cycle of an SLP (five years) impacts sustainability
- Lengthy process of approving and amending a SLP
- Capacity constraints especially in local government and DMR
- Backlog of service delivery at local level

7.3.3 The importance of community consultation in the identification of SLP projects

Mitigating some of the challenges requires mining companies to invest in community consultative and collaborative processes prior to the development or implementation of a mining community project. Mining companies, in collaboration with the relevant communities, must as a result conduct a joint assessment to determine the developmental needs of the mining communities and jointly identify ways to contribute towards community development (Arendse, 2019).

Nkadimeng (2019) deemed the IDP as the "shopping mall" for SLP projects and explained as follows:

> These were structures that have been set up with elected people out of the respective communities where the company and community representatives sat and decide on how to implement projects, as co-partners or stakeholders. These were formalised structures in cooperation with the municipality and communities. Once a company received the community's buy-in for a project, the company would start implementing, and they use the same forums for report back, and to discuss stumbling blocks. It was key for both the municipality and communities to be present at those consultative forums, for it to function properly.

Dlamini (2019) agreed with Nkadimeng and added that despite the good intentions to develop mining communities, consultation was important because:

> without consulting the community, there was nothing that a mining company could do, because you can't just come and roll-out community projects. If you are not consulting the people, they will stop the project. There must be a proper consultation with the community and without that, you were bound to fail because you simply needed to involve the community structure in decision-making. When you side-line them, and for example you wanted to expand the road or build a new road, then the community will react, and block your project.

During the Charter negotiations, the shortcomings in the SLP consultation processes were recognised and to strengthen and formalise aspects relating to the consultation processes, MC III (2018) added the following provision under clause 2.5:

> A mining right holder must, in consultation with relevant municipalities, mine communities, traditional authorities and affected stakeholders, identify developmental priorities of mine communities. The identified developmental priorities must be contained in the prescribed and approved Social and Labour Plan of a mining right holder.

7.3.4 SLP implementation

The key aspect of an SLP is obviously its implementation and a report issued by the SAIIA (2019) states that the current conflict at mining community level stems from the frustration of a lack of implementation and unfulfilled promises by companies and by local government. It adds that the Charter does nothing to relieve this mounting pressure (SAIIA, 2018:6). The latter statement is not true, since MC III (2018) stipulates in clause 2.5.4 that "a mining right holder must implement 100% of Social and Labour Plan commitments in any given financial year of the mining right holder".

However, Mjoji (2019) felt that the SLP implementation can only be effective if the DMR can police SLP compliance and explained that:

> the problem was that the DMR, by its own admission had said that they don't have enough people to police SLPs. If the DMR was ineffective, an SLP can still work if there is constant interaction with the company representatives who are responsible for the implementation of the Mining Charter and SLP projects.

In response to the comment made by Mjoji, Nico Pienaar, Chief Operations Officer (COO) of the Aggregate and Sand Producers Association of Southern Africa (ASPASA) and board member of the Minerals Council South Africa, interviewed on 8 February 2019, warned that compliance to a SLP in the current economic climate is a major challenge. Pienaar explained as follows:

> There were occasions when you have committed to a project during favourable market conditions when your business was doing well, but when conditions became unfavourable and you get into survival mode, you might not be able to deliver on your SLP promise. That is when your mining license comes under threat and the community gets upset with you and you are caught up between a rock and a hard place, and you may then be forced

to put your business' sustainability and job security of your employees on the line, to fulfil your commitments. The result could be that everyone ended up being losers.

This harsh reality was acknowledged by Minister Mantashe during the Charter negotiations by saying that at times, a mining company would have cash flow problems and would not be able to meet their SLP commitments. He explained that in those circumstances, the DMR and the mining right holder must sit down and agree on revised terms and implementation dates (Mantashe, 2019).

7.3.5 Examples of community participation in SLP processes

According to the senior executive of Sibanye-Stillwater (2019), a mining community in an affected mining area participates in a SLP in mainly two areas. Firstly, there is participation in community development projects, which create opportunities for community members to upgrade their skillset and in turn assist them to increase their employability. Secondly, a community participates in the development of their local economy through their own initiatives supported by mining companies. In a well-established mining area, the mining company, local government and communities engage in projects to support the development of the local economy and assist to alleviate the financial pressure and to provide for more stable environments to conduct business.

Benson (2019) gave the following example of meaningful interaction relating to community empowerment that takes place between a mining company, local government and host communities, from an employer perspective:

> Sibanye-Stillwater has quarterly meetings with local government and community representatives. At these meetings the company will give an update on progress on SLP delivery. There is also a recruitment forum and when the company needs people, the forum, that works with Teba[20] on the recruitment of mining employees that host a database of selected shortlisted people from the local community who have been screened and are suitable for employment. Sibanye would also browse for people from the Eastern Cape to come and work in their mines.

Another example of the proper functioning of a SLP process, from a community perspective, is the Barberton area in Mpumalanga. Dlamini (2019) explained that his community was involved in a company-community forum called the "Community Engagement Forum" that

[20]Teba – The Employment Bureau of Africa.

was introduced by the mining company the SSC Group[21]. He explained that "the company conducted extensive research on the preferred SLP engagement structure and what they came up with, was revolutionary". Dlamini explained:

> Formal community structures had been created where each mining community voted to determine who will represent their respective constituencies. The elected community engagement forum was then responsible for the management of the SLP funds and projects. In practise the community representatives would inform the community forum of their needs, and the community forum would in turn inform the SLP trust, to ensure that the project got executed.

7.4 The battle between communities for SLP benefits

When it comes to the beneficiaries of SLP projects, MC III (2018) stipulates in clause 2.5.3:

> For purposes of implementing the Social and Labour Plans and Mine Community Development projects, the term "Mine Community" refers to communities where mining takes place, major labour-sending areas, adjacent communities within a local municipality, metropolitan municipality or district municipality.

During the fieldwork it became apparent that there was competition between the host communities and those from the labour-sending areas to get the lion's share of the benefits derived from an SLP. The various communities were asked for a motivation on who must be the main beneficiary.

7.4.1 Arguments in favour of host communities

Dlamini (2019) was of the view that the main beneficiaries of SLP projects should be those living in the immediate affected community closest to the mine, who bears the direct negative effects of a mining operation. He added that before a mining house could obtain a mining license, the DMR must approve the employer's SLP and the environmental impact assessment (EIA). The EIA focuses on the communities and environment closest to the mining activity. Dlamini then argued that "those communities referred to and identified in the EIA, were the people who should benefit the most from the SLP".

Pheto (2019) also felt strongly about host communities being the main beneficiaries of SLPs and Mining Charter-related empowerment and made the following argument:

[21]Siyakhula Sonke Empowerment Corporation.

> Firstly, the real affected people by mining are those people in the vicinity of the mines that inhale dust, and those people whose land that their forefathers ploughed, have been taken away. These people used to live of their land, but now there was a mine operating on their piece of land. You would also never get poverty eradicated if rural communities, who are confined to their area, didn't get the full benefit from economic activity in their area.
>
> Secondly, we needed to deal with the influence of the social pattern of migrant workers. Those workers came here and used our resources. When they lose their jobs, they leave their children here for us to look after. In this way they had increased our social problems that also relate to diseases and food security. They take their termination package or pension package, which was going to assist our economy if they spend it here, and go back home, to breath fresh air, and we inhale mine dust every day. Our houses crack, our space to develop as community and to build houses, was taken away.
>
> In the third instance, people from Xolebeni[22] in the Eastern Cape, say no to mining in their area, and we say yes to mining here. Now we have people coming from Xolebeni to work here and you're saying to us, those people must benefit from what was happening here, when our land was destroyed, and they wanted to protect their land and benefit from our land.

7.4.2 Arguments in favour of labour-sending areas

Mhlekwa (2019) a community leader from the Eastern Cape, on the other hand, felt strongly that SLP and charter projects should favour labour-sending areas. He argued that when migrant workers went to work on mines, households and families were being destroyed and the breadwinner could not return home, because their role was to provide for their families. If the SLP focuses on portable skills training for migrant workers, the person could come back with farming skills that could be applied in the labour-sending areas. Mhlekwa nevertheless acknowledged that "there were two affected communities, and in most cases, two families were affected by mining and both must benefit from that". He added that a mineworker could easily have 16 dependants if you combine their dependents from the two areas.

The NUM focus group (2019) also felt that SLPs should focus on labour-sending areas, because those people were coming from disadvantaged areas. Migrant workers who return

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[22]The Xolebeni matter relates to the Australian company Mineral Commodities Ltd that sought to mine titanium along a 22km stretch of the Wild Coast. The residents were fighting off the mining of the Xolobeni dunes, because it would harm their livelihoods from agriculture (Ledwaba, 2019).

home would not have facilities like hospitals, clinics, schools, shops and tarred roads that you would find in mine areas. Workers and families from labour-sending areas therefore need to benefit from the movement of workers to and from labour-sending areas. The NUM shop stewards also felt that the poorest communities were those who were left back home.

Mjoji (2019) a Chief from the Eastern Cape, was initially more pragmatic when he stated that "wherever there was a need, it must be addressed. So, why would one community be given a priority", but Mjoji then argued that priority must preferably be given to the labour-sending area, because the infrastructure was substandard and they stay in areas that created numerous logistical challenges, since it was not as well developed compared to areas around mines.

Alberts (2019) said that the DMR acknowledged that the issue regarding which community should benefit the most, was a sensitive matter that required further deliberations between social partners, due to all the uncertainties and tension that could build around it.

7.5 Conclusion of Chapter 7

MC III prescribes 100% compliance by a company to the SLP that was approved by the DMRE. Compliance is especially important as a result of the expectation from communities to received tangible benefits out of an SLP, since it now linked to community development in the Charter.

To enhance community participation, communities also want to participate fully in the decision-making process during the project identification, and it means that there will be consequences in the form of a community protests, if a company either fails to deliver on a SLP promise, or if communities were not consulted to their satisfaction.

Other than an increase in community participation in decision-making in SLPs and community development projects, the danger still lies in it being perceived as pseudo-participation. In addition, the underlying tension between host communities and those from labour sending areas, together with the different regulatory interpretations in defining a community, may result in continued community discontent that will impact on mining's contested future.

This research report will recommend in its conclusion that the DMRE put steps in place to diffuse the potential conflict situation.

8. CHAPTER EIGHT: COMMUNITY DEVELOPMENT AND THE ESTABLISHMENT OF A TRUST CONSISTING OF COMMUNITY AND COMPANY REPRESENTATIVES

8.1 Community development as provided for in MC III

8.1.1 Introduction

The legal teams that represented the mining communities in February 2018 in their successful High Court bid to obtain an order to be included in the Charter consultation process, also argued that communities must have the right to identify community development projects. For the latter, they relied on research conducted by the South Africa Mining and Rural Transformation in Southern Africa (MARTISA) Project and the Society Work and Development Institute (SWOP) of the University of the Witwatersrand in 2015. The title of the research they relied on was "Mining and community struggles on the platinum belt: A case of Sefikile village in the North West Province". Mnwana (2015:8-9) demonstrated in this research study, through the case of the village of Sefikile, how platinum mining expansion into communal land in South Africa has resulted in few benefits for rural communities. Mining villages are characterised by complex struggles and tensions that render the benefits of mining marginal. He argues that such struggles epitomise the failure of the post-apartheid mineral policy reforms to ensure tangible benefits for rural communities on the platinum belt.

Mostert and Heyns (2018:33) add that the South African mining industry has experienced some of its worst times over the last few years. Recent unrest and a weaker economic performance in the extractive industries have caused substantial conflict between mining companies and mine communities. The "miner spring" of 2012 (Marikana-massacre) shows how mine communities still direct their anger at mining companies for representing the dark side of capitalism and the legacy of colonialism and apartheid. The apparently increased focus on mining communities in the Mining Charter can be interpreted as an attempt to find new means of addressing the unsolved problems faced by mining communities.

Mining community challenges need to be addressed through community development programmes. For Nogxina (August, 2018), community development "was all about social capital, and when investors look at contributions that they must make in terms of the Charter, they should not look at it as a 'cost', but as an investment in stability for their operations". He further explained that "if companies neglect community development", they will end up not operating within the areas of the host communities, because people will prevent mining operations". Nogxina added that investors must therefore understand the social orientation of MC 2018 and the intention behind it.

The frustrations and tension regarding mining communities were acknowledged during the Charter negotiations and they were addressed in various Sections of MC III.

8.1.2 The new community development provisions of Mining Charter III

With regard to community development, MC III (2018) clause 2.5 states the following:

> Mine communities form an integral part of mining development, which requires a balance between mining and mine community's socio-economic development needs. A mining right holder must meaningfully contribute towards Mine Community Development; with a bias towards mine communities both in terms of impact and size, and in keeping with the principles of the social license to operate.

Justifying the Charter's stricter provisions on community development, Nogxina (2018) argued that community development:

> was all about social capital, and when investors look at contributions that they must make in terms of the Charter, they should not look at it as a "cost," but understand its social orientation and see it as an investment in stability for their operations.

He further explained that "if companies withhold the 5% equity equivalent prescribed by the Charter, they will end up not operating within the areas of the host communities, because people will prevent mining operations".

In response, Bolani (2019) felt that the Zwane Charter had a higher focus on community development, and he was disappointed that MC III reduces the focus on community development. Bolani argued that the Charter's reduced focus on especially community development is in contradiction to what Minister Mantashe said on 4 February 2019 at the Mining Indaba when he explained to investors that "if you think about mining, you must automatically think about shareholders and communities at the same time".

According to Minister Gwede Mantashe, the lesser obligation (that Bolani referred to) on mining houses has a logical explanation. He explained that Government scrapped plans that was reflected in the Zwane Charter to compel mining companies to contribute 1% of their annual turnover to a community development agency, because Government feared that the funds could be abused. Therefore, there was a risk that the agency could easily be a slush fund for other people's conflicted interest (Mkokeli, 2018).

8.2 The establishment of a joint trust and the impact of MC III on mining community ownership and development schemes

8.2.1 MC III provisions regarding the trust

Clauses 2.1 and 2.1.4 of MC III (2018) read as follows:

> To give effect to meaningful economic participation; integration into the mainstream economy; and effective ownership of the country's mineral resources by the Historically Disadvantaged Persons', the equity equivalent benefit for host communities will be managed through a **Trust** (own emphasis).

Furthermore, MC III (2018) stipulates that the ownership or equity equivalent benefit awarded to communities shall be administered according to clause 2.4.1.1 that reads:

2.1.4.1.1 5% equivalent of the issued share capital of the mining right holder, at no cost to a trust or similar vehicle set up for the benefit of host communities;

2.1.4.1.2 the trust or similar vehicle shall be established and administered in terms of applicable legislation for the duration of the mining right;

2.1.4.1.3 the trust or similar vehicle shall comprise of representation from host communities (including community-based organisations, traditional authorities, etc.) and mining companies;

2.1.4.1.4 a mining right holder must, in consultation with relevant municipalities, host communities, traditional authorities and affected stakeholders; identify host community development needs;

2.1.4.1.5 the trust or similar vehicle shall be responsible for, amongst others, host community development programme, fund distribution and governance of the equity equivalent benefit;

2.1.4.1.6 all administration costs, project management and consultation fees of the trust or similar vehicle may not exceed 8% of the total budget;

2.1.4.1.7 an approved host community development programme must be published in, at least, two languages commonly used within the host community; and

2.1.4.2 a host community development programme approved under this element shall not replace a social and labour plan.

8.2.2 The principles of carried interest and equity equivalent

In response to Section 2.1.4 above, Matcha (2019) from the NUM stated that with regard to "carried interest"[23] and "equity equivalent" he did not know how a community would benefit from this type of shareholding and how it would work in practice. As a result, he was disappointed in the mining community ownership provision. Alberts (2019a) from the DMRE acknowledged that the various concepts pertaining to community ownership may be difficult to grasp and that it was also difficult to understand what it meant, especially for communities. He explained that "the advantage was that the carried interest and equity equivalent as provided for in MC III, take away the funding barrier challenge of the past, and it would be advantageous towards communities and workers too". He added that in his view:

> equity was not the right way to go and that was why the Charter specifically provided for equity equivalent, because communities did not really wanted to be owners, but they wanted to benefit from the mining itself in terms of the spin-offs and the benefits and the social investment.

Further to Albert's explanation, the partner from Fasken (2019) again explained that "carried interest" and "equity equivalent" are not foreign concepts and are used in the DTI Codes. He explained them as follows:

> What they really said was that you take the value of the 5% upfront and you put it in a trust. Then through that trust, you run development programmes that you annually needed to report onto the DMR focusing on the progress made through these development programmes. Equity equivalent then replaced the 5% shares you would otherwise give to the community. So, multi-nationals in the country can use that instead of giving any ownership away. The benefit to the community is that in this way, they enjoy financial benefits a lot quicker.

Leon (2019), looking at it from a legal perspective, was also positive about the "equity equivalent" clause, given the range of problems with community empowerment and he was of the view that the community ownership model under MC III (2018) is a step in the right direction of broad-based black economic empowerment that has always been very biased and in favour of the entrepreneurs, rather than workers and especially communities.

[23]Section 2.1.3.2(ii) of MC, 2018 states: a minimum of 5% non -transferrable carried interest or a minimum 5% equity equivalent benefit as defined herein to host communities from the effective date of a mining right.

From the Government's side, Minister Gwede Mantashe explained that:

> as for the shareholding requirement, the figure of 5% reserved for communities and 5% for employees which had to be given to them for free by the mining companies, was chosen because government was concerned that a higher proportion would deter mining investors (Campbell, 2019b).

Mantashe added that regarding the free shareholding for communities:

> the charter included the concept of equity equivalent to give companies and communities flexibility; instead of communities simply getting ownership in terms of shareholding, they could ask the mining companies for concrete benefits instead, such as a school or a bridge and so on (Campbell, 2019b).

8.2.3 Mining community responses regarding shareholding and the joint Trust

Ngomane (2019) from SANCO considered the 5% shareholding an insult and that he would have preferred something more reasonable to compensate for past exploitation. Likewise, Dlamini (2019) a community leader, was of the opinion that the 5% shareholding came from people who did not do much research about land ownership in the country. He argued "that you cannot talk about 5% shareholding by a mining community if the community once had 100% ownership of the land". On the other hand, Pheto (2019) a community leader did not have a problem with the 5% shareholding or equity allocation to communities, but he had a problem with the implementation thereof and was concerned that the DMR would do an injustice to the process. Pheto was seemingly not aware of the role of the trust, especially since Pheto (2019) also asked: "Who's going to be the community's watchdog to monitor the implementation of the development plans?"

Dlamini (2019) regarded the representation of mining companies on the trust as an insult, since it made him feel that the homeland government under apartheid, where a white government representative with the title of state secretary determined the community's needs. Although Mjoji (2019) a Chief from a labour-sending area are aware that only host communities will benefit from shareholding, he shared Dlamini's displeasure regarding trust representation and argued that the equity equivalent should be placed in the hands of the traditional council to cascade it down to the people on the ground.

The communities who were involved in drafting the People's Mining Charter would agree with Dlamini and Mjoji as the preamble of their charter stipulated that "affected people must determine their own destinies. For us this means choosing for ourselves both our own developmental paths, and to participate in all decision making and manage or co-manage the utilisation of our resources if we so choose”. A report of the SAIIA (2018:6) indicates that in view of its finding that the current type of broad-based community trusts that exist to manage community assets or interests have a poor track record on delivery in their current form, are not widely accepted as functional or legitimate vehicles and there are few examples of success.

Gqubule (2019) a BEE expert, who was in general highly critical of MC III, disagreed with the principle of a trust and would have preferred the following:

> Because there will be a lot of conflict in the communities once you allocate shares to them, I was also thinking of a mining development agency purely focused on the Charter. The mining development agency will be a well-run organization not linked to the DMR, because the DMR has been tainted by state capture. It would have a repository of the best brains in the country in terms of the structuring of transactions, and they would develop the best practice templates for communities as they participate in these shares. I think this should be a partnership between the agency and the mining companies to assist the mining companies, because they clearly don't have the tools to develop proper governance frameworks on their own, and to make sure that the communities truly benefit.

Gqubule (2018:139) also proposed that the Charter adopt a 25% public ownership target in addition to the existing black ownership target of 30% and that two vehicles should be used to achieve the 25% target: a sovereign wealth fund (SWF) and public mining company (PMC). The SWF would identify opportunities for the PMC and the SWF would also be established to act as an investment vehicle to manage community and employee share allocations and provide free advisory services.

8.2.4 MC III guidelines relating joint initiatives

In addition to the clauses dealing with ownership, shareholding and trusts in relation to mining communities, clause 2.5 of MC III (2018) provides further guidelines on matters relating to joint initiatives. Clause 2.5.2 reads as follows:

> Mining right holders operating in the same area, may collaborate on identified projects to maximise the socio-economic developmental impact, in line with their approved Social and Labour Plans.

In Mjoji's (2019) view, a joint company SLP initiative might be complicated if each company will be reporting individually to the DMR. If they can have a mutual understanding before they get into an agreement on their SLP, they will understand if it would work from a reporting point of view. He added that "communities would not have a problem with cooperation, but when SLPs are not in synch and do not talk to one another, then it causes differences on the ground". Mhlekwa (2019) also felt positive about joint initiatives and believed that it would save costs and more people would be able to benefit from a bigger project.

Matcha (2019) from the NUM indicated the following:

> It would make sense if companies that are operating in the same area join forces so that a greater impact can be felt in the community. But it is not something that is new, and from an operational point of view, companies are operating together when sharing a plant, smelter or where a contractor and primary employer work together on one mine.

The Minerals Council embraced this provision and Roger Baxter, CEO of the Minerals Council South Africa (2018) wrote:

> one of the great improvements the new charter will bring is its recognition for regulatory purposes of collaborative developmental efforts by companies with adjacent operations in particular mining towns. This should make possible the initialisation of meaningful projects using economies of scale and broader consultation processes.

In the end, whether it is an individual company project or a joint initiative, all that matters is that communities enjoy meaningful benefits, because there is a danger of a serious backlash when communities experience the reality that the Charter provisions bring no benefit for those currently living with the consequences of mining activity. The Charter is therefore raising expectations which would cause problems if the Charter does not live up to expectations (SAIIA, 2018:6).

Gqubule (2019) agreed and concluded: "We live in a volatile country with massive inequality, but we have the potential to achieve massive empowerment for employees and communities through the Charter."

8.3 Conclusion of Chapter 8

Although mining communities would be able to enjoy the benefits of the 5% shareholding or equity equivalent as provided for in MC III, they are not satisfied with the shareholding/ownership distribution provided for in MC III because BEE entrepreneurs are still getting the majority share.

This research has also shown that there is rivalry between the various communities to get the maximum benefit out of community development projects. This may lead to increased tension in the mining sector. In addition, community representation on a joint Trust that will oversee the community development projects, may also lead to competition amongst community leaders for a seat on such a Trust.

It was therefore shown in both Chapters 7 and 8 that the provisions in MC III dealing with community participation and community development, are not sufficient to address the needs and expectation of mining communities. As a result, full compliance to MC III is required to reduce the risk of community uprising.

9. CHAPTER NINE: CONCLUSION AND RECOMMENDATION

9.1 Conclusion

The history of South Africa's mining industry is overshadowed by the exploitation and marginalisation of black mineworkers and mining communities. The transformation process became a reality in 2004 with the promulgation of the MPRDA and the implementation of the first mining charter. The subsequent introduction of ESOPs, future forums and SLPs created a formal avenue for employee ownership and participation in decision-making and the development of mining communities.

What was missing was the "meaningful" financial participation and participation in decision-making by employees and communities, due the shortcomings of MC I and II. This resulted in the need for a revised mining charter, i.e. MC III.

The damaging Zwane era ended with the victory for mining communities of obtaining a court order confirming their right to lawfully participate in the drafting process of MC III. By honouring the court order, the new mining Minister, Gwede Mantashe, embarked on a national roadshow to consult with various mining communities, while the other social partners participated in the DMR's Transformation Task Team. This research report has shown that the communities regarded their participation as pseudo-participation and the court order ended up being a hollow victory for communities. The research has also shown that the communities' discontent does not only relate to insufficient consultation opportunities and the exclusive consultation with chiefs, but also their experience of poor logistics and the need for education on the Charter and follow-up sessions, to enable meaningful participation.

A second unsuccessful outcome has been the failure to strengthen the mining sector's version of a workplace forum, namely the future forum. Satgar's (2009:43-44) description of a workplace forum (the frontrunner of a future forum) as an attempt to promote worker participation in workplace decision-making after the South African workplace had long been dominated by managerial prerogative, is unfortunately still merely an attempt to worker participation where future forums are concerned. While the establishment of a workplace forum is a voluntarily process, the advantage for mining employees is that the establishment of a future forum is compulsory. This study has identified the weaknesses of future forums that merely provide employees the opportunity for partial participation in decision-making and does not provide for community participation. MC III has, unfortunately, failed to address both these shortcomings and it should be rectified, because a successful future forum model can become the blueprint to reviving the failed workplace forum model.

The third unsuccessful outcome of MC III has been the removal of the "co-determination" clause that would have provided for meaningful employee and community participation and representation on company boards. Other than the comment made by a senior mining executive that the board representation clause was scrapped as part of a compromise for employers to accept certain provisions, the other reasons given for its exclusion and arguments against it correspond with Webster's view that the German model of co-determination does not take sufficient account of the specific social and economic context of South Africa's distinct industrial relations system. It is also disappointing that an alternative co-determination model was not explored, especially since the 1998 White Paper on Minerals and Mining Policy identified the requirement for co-determination. The latter is especially disappointing in light of Michie's (2017) view that combining employee ownership with high levels of employee participation yields the most positive outcomes.

Likewise, an opportunity has been missed to introduce what Adler (1998) refers to as "social-co-determination", whereby wider societal interest would be served through the inclusion of mining communities' participation in decision-making at board level.

Michie (2017) also makes an argument that the plurality of forms of ownership would be a way of tackling the otherwise relentless spiral of ever greater inequality. In terms of MC III, the plurality of ownership relates to ownership provisions that benefit both employees and communities, like the 5% carried interest provided for them individually. Employee ownership, in the form of carried interest or through an ESOP, has the advantage that it offers financial empowerment to employees without them needing cash in hand to participate in a scheme in which they have direct ownership. The carried interest would replace the current failed ESOP that Fine (2002) regards in its current form as something being offered to workers to merely comfort them. The result will hopefully be more success stories like the Kumba Envision example, even though the latter was a once-off success.

Despite MC III providing for communities enjoying either 5% carried interest or its equity equivalent, they will also benefit from the employee ownership scheme as Pitegoff (2004) points out that employee ownership is a vital element for community development.

While the community benefits from the financial empowerment of mine workers, it has been interesting to note that none of the community leaders who were interviewed showed any concern or support for worker empowerment issues. Furthermore, when it comes to be a beneficiary of SLP benefits, it was also interesting to discover the tension and “rivalry” between host communities and communities from labour-sending areas as well as between ordinary community members and the chiefs.

The community ownership and development provisions in MC III will increase the effectiveness of the current SLPs, since MC III makes it compulsory for mining right holders to consult with communities on development projects through a joint trust between employers and communities. The community participation in decision-making in the trust also speaks to Woodworths’ (1981) “Type II” ownership, supporting full participation and power-sharing based on joint consensus seeking processes. In addition, MC III prescribes 100% compliance to a SLP that further strengthens project implementation and community development. The latter is important because this research has shown that there is an expectation from communities to receive tangible benefits out of an SLP or community development linked to the charter and if a company either fails to deliver on an SLP promise or if communities are not consulted to their satisfaction, then it is very likely that community unrest will follow.

This research report has also shown that the slow pace of transformation is an emotional and burning issue, and so it should be. I therefore understand if BEE experts like Gqubule, unionists’ like Matcha and a Chief, like Nkosi Mjoji, have been very disappointed by various elements of the MC III and especially the percentage ownership awarded to employees and communities. It has also been interesting to note the resentment from nearly all social partners regarding the ownership allocation and benefits awarded to black entrepreneurs - this response, will very likely contribute to mining’s contested future.

Equally interesting has been the admission by various union respondents that union rivalry and poor labour relations impacted negatively on the meaningful participation of unions in future forums and that is was a possible underlying reason that the German model of co-determination could not yet be implemented. Likewise, it has been surprising to learn that the general conduct of community members in mainly SLP-related forums also seem to be the reason for a reluctance to increase community participation in decision-making processes.

Despite its shortcomings, MC III is an improvement on the previous charter and sets an ideal platform for the next charter negotiations in that mining communities would be better organised as well as employees, communities will be able to build on the 5% carried interest and the achievement of board representation will be more feasible, especially after President Ramaphosa added his support to the co-determination principle.

The positive of the research has been the clear consensus of all social partners that a charter is a necessary tool to transform the mining industry. The negative that has been highlighted throughout the research are the high levels of mining employees and communities discontent due to the slow pace of transformation and the lack of real economic benefits derived from the mining industry.

9.2 Recommendation

The intensity of mining's contested future will be reduced by an understanding by mining companies that charter provisions should be regarded as an investment in peace and stability and not merely a cost. Furthermore, the community dissatisfaction with the consultation process will not disappear and it is recommended that the DMRE embark on further community roadshows to create a platform where communities could raise issues regarding the implementation of MC III. This will also enable the DMRE to identify future challenges.

With the mining charter being subordinate legislation, it is also recommended that certain key empowerment elements, like the ownership, community development and the functioning of a future forum (with the inclusion of community representation) be included in the MPRDA, so that any form of non-compliance could be treated as unlawful conduct. It would, also mean that it cannot be amended easily, at least not without going through all the parliamentary processes. Legislation of the said key elements will therefore create regulatory certainty pertaining to the issues.

It would also be advisable that some of Gqubule's recommendations are considered by the DMRE and especially the alignment of the charter ownership provision with the DTI Codes, the establishment of a sovereign wealth fund and the increase of worker and community ownership targets at the expense of BEE entrepreneurs. The motivation for an increase of employee and community ownership was also an element that was supported by senior company representatives and legal practitioners acting for employers, making it a key transformation matter to be considered during the review of Mining Charter III.

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