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AN ANALYSIS OF EMPOWERMENT POLICIES REGARDING HISTORICALLY  
DISADVANTAGED SOUTH AFRICAN OWNERSHIP AND MANAGEMENT OF NATURAL  
RESOURCES IN SOUTH AFRICA

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Submitted in partial fulfillment of the requirements for the degree

MAGISTER LEGUM (LLM) IN EXTRACTIVE INDUSTRY LAW IN AFRICA

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April, 2019

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## ACKNOWLEDGEMENTS

I want to thank my family for their immense support, my parents for encouraging me to pursue knowledge without any apprehension. My husband for providing me with thought provoking discussions regarding my dissertation and most importantly my son for being the light of my life and accomodating the change in his life without any complaints. Lastly I would like to show my utmost gratitude to Adv. Gerber for his guidance and providing me with the opportunity to learn and be present in the presence of the best.

## ABSTRACT

The Mining industry has been the backbone of the African economies especially South Africa. South Africa is a haven for minerals both onshore as well as off shore, and the exploration of such minerals has added beneficially to the growing economies of the country through the years. South Africa is one of the youngest countries to break from the shackles of imperialism and minority based rule and discriminatory policies.

The South African mining industry is regulated by the Minerals and Petroleum Resources Development Act, 2002 and the transformation and empowerment policy comes under the purview of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2004. One of the core criteria presented in the Charter deal with the ownership of companies interested in the mining and minerals sector, which is the subject matter of the research.

The dissertation intends to analyse the policies that were in place prior to 1994 that hindered the economic development of the local populace and the steps that were taken by the newly elected government to rectify the same. The focus of this research is to determine the policies implemented for the inclusion of the HDSA population by way of ownership in the mining sector. The research also looks at the factors that have affected the fruitful implementation of affirmative action policies in the mining sector, and whether the policies have aided in the upliftment of the discriminated population at large. The research also analyses an alternative method of ensuring HDSA participation by way of equity listing on the stock market and the benefits this method has on the economy as well.

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## GLOSSARY

<b>MPRDA</b>	The Minerals and Petroleum Resources Development Act, 2002
<b>Mining Charter</b>	Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry
<b>HDSA</b>	Historically Disadvantaged South African
<b>ICA</b>	Industrial Conciliation Act No. 28 of 1956
<b>EEA</b>	Employment Equity Act 55 of 1998
<b>BB-BEE Act</b>	Broad Based Black Economic Empowerment Act, 2003
<b>DTI</b>	Department of Trade and Industries
<b>BEE</b>	Black Economic Empowerment
<b>BEE Codes</b>	Broad Based Black Economic Empowerment: Codes of Good Practice, 2007
<b>Mining Charter I</b>	Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, 2004
<b>Minerals Act</b>	Minerals Act, 1991
<b>Mining Code</b>	Codes of Good Practice for South African Mining Industry, 2003
<b>Mining Charter II</b>	Amended Mining Charter, 2010
<b>2017 Mining Charter</b>	the Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals industry, 2017
<b>GATT</b>	General Agreement on Tariffs and Trade

## 1. INTRODUCTION

Southern Africa has had a tumultuous history with regards racial discriminations and the consequences of such policies which have adversely affected the indigenous populations of these countries. The racial policy exercised by the erstwhile government of South Africa known as apartheid not only lead to the sociological degradation of the local populace but also prevented and prohibited their economic development and independence. The downfall of apartheid and the establishment of the first democratic government of the Republic of South Africa led to the implementation of several legislations and policies by the new government to rectify the previous disadvantages that were faced by the local populace.

One of the most high-profile strategies implemented by the new government of South Africa was “Broad Based Black Economic Empowerment”. The term BB-BEE is defined as a broad-based process aimed at “the economic empowerment of black people, including women, workers, youth, people with disabilities and living in rural areas through diverse but integrated socio-economic strategies”.<sup>1</sup> A number of legislative requirements have been implemented for the inclusion and development of the previously disadvantaged “black”<sup>2</sup> people. The BB-BEE strategies have also been included in sector wise charters and notes which make it mandatory for different commercial sectors to aid in the fulfilment of the core principles of BB-BEE.

The South African mining industry is regulated by the MPRDA along with the ever-controversial Mining Charter. The Mining Charter lays down certain guidelines that the mining industry and its players must follow with regards the development and empowerment of the economically backward black person(s). It is the aim of the Mining Charter to warrant the socio-economic HDSA as defined therein. One of the core criteria presented in the Mining Charter deal with the ownership of companies interested in the mining and minerals sector.

This research intends to examine the empowerment policies that have been introduced in South Africa with specific emphasis on the requirements of compulsory local ownership. The Mining Charter will be evaluated based on its impact and results that have been observed since its implementation and if it has led to overall holistic development and upliftment of the HDSAs.

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<sup>1</sup> Broad-Based Black Economic Empowerment Act, 2003.

<sup>2</sup> It is important to note that the term “black” in context of South Africa includes Africans, Indians and Coloureds as defined in in the Broad-Based Black Economic Empowerment Act, 2003.

## 1.1. Background to the study

The African continent is a haven for minerals both onshore as well as off shore, and the exploration of these minerals plays a vital role in the contributions it makes to the development of these economies<sup>3</sup>. The discovery of minerals especially gold and diamonds in the erstwhile Transvaal and Kimberly in South Africa in the early 1800s not only transformed the economy of this far flung country but also greatly influenced the country's socio-political and cultural development.<sup>4</sup> The unprecedented growth of the mining industry in South Africa caused rapid urbanisation and an amalgamation of individuals migrating from all over the country to the developing gold mining communities. Historians argue that it is this gold rush that promulgated the growth of segregation policies as a need to procure cheap labour.<sup>5</sup>

Racial segregation had gradually become a societal norm of the South African diaspora, but its legitimacy was established in the first South African elections of 1948. The Herenigde National Party which was later renamed as the National Party won the elections held in 1948 and categorically "began to embed apartheid in South Africa's legal system."<sup>6</sup> It was in the year 1955 that the African National Congress adopted the Freedom Charter which laid down the demands of the African people with regards their share in the wealth of the nation and the need for transfer of the mineral wealth of the nation to its people.<sup>7</sup> This was the first document of its type which highlighted the commitment of the African National Congress to satisfy the demand of the populace for nationalisation of mineral assets and land reform.

Racial discrimination has become a bitter and harsh reality of the world which has over time lost its overt nature, but it was the systematic and legal nature of this racial segregation that made South Africa unique.<sup>8</sup> It is imperative to note that between the years of 1955 to 1994, the apartheid government enacted a series of 25 statutes that institutionalised racial segregation,<sup>9</sup> which caused an immense sociological and economic imbalance between the citizens of South Africa. The constant efforts by the African National Congress and its leaders and the changing world scenario

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<sup>3</sup> International Council on Mining and Metals (2016), Role of mining in national economies- third edition. Table 1: An updated and revised Mining Contribution Index-top 25 countries in 2016.

The mining sector contributed 7.3% to the gross domestic product of South Africa and employed 7.9% of all private sector labour. Fact and Figures 2016, Chamber of Mines (2017)

<sup>4</sup> KPMG South Africa Blog- Role of mining in the South African Economy, <https://www.sablog.kpmg.co.za/2013/12/role-mining-south-african-economy/>.

<sup>5</sup> Apartheid Museum (online), Chapter 1: the origins of apartheid.

<sup>6</sup> *Ibid*

<sup>7</sup> African National Congress (1955), The Freedom Charter, [www.anc.org.za](http://www.anc.org.za).

<sup>8</sup> UNISA- Chapter Two- A Historical basis for affirmative action in South Africa.

<sup>9</sup> Archibong, U., & Adejumo, O. (2013). Affirmative Action in South Africa are we creating new casualties?, Journal of Psychological issues in organizational culture.

ultimately led to the eradication of apartheid and the first democratic elections of South Africa were held in 1994 which was followed by the enactment of the Constitution of South Africa, which further laid down the intention of the new government to correct the wrongdoings of the past century towards its own people.

Some of the initial steps taken by the new government to narrow the gap between the population, were the enactment of several laws ensuring equitable employment opportunities for the HDSAs. The mining sector being an important contributor to not only the economy but also an employer of great numbers was one of the first sectors that implemented the Mining Charter. In my research I will analyse the affirmative action policies that have been implemented with regards the mining sector and the impact that the Mining Charter has had in fulfilling the terms of the Freedom Charter and the Constitution of South Africa.

## **1.2. Aims and objectives**

### *1.2.1. Aims*

*The aim of this research is to determine whether the prescribed compulsory ownership requirements as mandated by the Mining Charter has helped the HDSAs on a holistic level and whether it is the only way to ensure the upliftment of HDSAs. The research aims to decipher whether providing free carry ownership rights to capital intensive mining projects helps in the active participation of HDSAs and can be deemed to be “effective ownership”.*

### *1.2.2. Objectives*

- i. The objective of this research is to understand the history of the segregatory policies of the previous apartheid government and the affirmative action policies that have been implemented by the Government of South Africa and what was the objective behind them.*
- ii. One of the key initiatives of the new government of South Africa is to ensure active participation of the HDSAs by providing them with effective ownership of mining projects and assets, this research will list down the process that is followed to meet this agenda and if this has helped HDSAs at the grassroot level.*

- iii. *Globalisation and liberalisation have opened the world for all, the research aims to determine if the upcoming capital markets of African nations can help fulfil the goal of effective ownership and active participation of HDSAs in the mining sector.*

### **1.3. Research Questions**

#### *1.3.1. Primary Research Question*

*Is compulsory ownership, as laid down in the Mining Charter, the most effective means to develop and uplift HDSAs?*

#### *1.3.2. Secondary Research Questions*

- i. *What are the historical drivers behind affirmative action policies in South Africa?*
- ii. *How is compulsory free-carry ownership requirements incorporated through existing empowerment policies in South Africa?*
- iii. *In comparison to compulsory free-carry, are there notable differences for the empowerment of HDSAs through equity markets*

### **1.4. Research methodology**

#### *1.4.1. Methodology*

*An analytical study of the legal and institutional framework of the affirmative policies implemented in South Africa with regards the mining sector. A specific focus on the research would be on the compulsory ownership that is prescribed under the Mining Charter and whether enforcing free-carry ownership rights is the most economically viable step for a developing country like South Africa.*

#### *1.4.2. Limitations*

*The subject of Black Economic Empowerment has previously been researched in extensive detail however for this thesis I have tried to consider the literature which specifically focuses on the impact and results of black empowerment, hence the data and information used for this research paper. The Black Economic Empowerment structure in South Africa is dynamic and constantly undergoing change especially the Mining Charter which has as on the date of writing this research paper been gazetted*

*by the Minister of Mineral Resources, for this research I have considered the empowerment policies in force as on August 2018. Attempts on compulsory listing of mining companies to ensure local participation have been initiated in some African nations such as Kenya however as the law concerning this is very recent there is limited empirical data available to compare its viability to the compulsory free carry rights that are provided in other jurisdictions such as South Africa.*

## **1.5. Relevance of the study**

Black Economic Empowerment is considered one of the primary principles of the new government and its implementation will not only impact the previously disadvantaged South Africans but also the economy on a global perspective. The corporate world has always accepted change apprehensively and any drastic change that can affect the economics of the corporate structure tends to impact not only the corporations but the economy of a nation. This study aims to contribute to the existing literature on the impact of economic empowerment policies and attempt to provide an alternative method to enable the previously disadvantaged South Africans become owners and active participants in the economy which would be beneficial to them.

## **1.6. Chapter outline**

The study consists of five chapters, a brief introduction for the same are provided below-

### Chapter 1: Introduction

I will be introducing the background of this research in this chapter. A brief history of the development of the extractive sectors in South Africa and the promulgation of racial segregation in mining and how the changing world scenario has aided in the formation of policies to rectify the previous racial discrimination on social, political and economic front.

### Chapter 2: History of Affirmative Action in Southern Africa

This chapter will deal with the introduction of affirmative action policies in South Africa and the need for such policies vide legislation. I will briefly cover the apartheid laws that specifically impacted the mining sector and discuss the empowerment laws that were introduced by the new government. I will be looking at the development and constant change that these policies have undergone over time.

### Chapter 3: Analysis of the empowerment laws in South Africa in the mining sector

This chapter will analyse in detail the Mining Charter focusing on the compulsory free-carry ownership requirements and if imposing this has helped in the upliftment of the HDSAs in its true sense. I will also highlight the several issues that have plagued the enforcement of empowerment policies and the steps that the regulators and the government has taken and/or intends to take to curb the misuse of such policies.

### Chapter 4: Other Suitable Options

In this chapter I will analyse the benefits of having a mature and well-established stock market and the contribution it can have not only for the enforcement of the empowerment policies but in the economic development of the nation. How encouraging retail investing in the stock market will enable the previously disadvantaged populace to engage in the ownership of the mining sector through the route of acquiring a stake in projects through the listing of securities on the local stock exchange.

### Chapter 5: Conclusion

In the concluding chapter I will be deciphering the data that has been presented in the previous chapters and concluding whether the compulsory ownership aspect as laid down in the Charter has in actuality helped develop a new entrepreneurial class amongst the HDSAs or only helped a selected "few". Also, if the most suitable way to ensure economic participation of the HDSAs in the mining sector is through compulsory free carry ownership or through the equity markets.

## **2. HISTORY AND DEVELOPMENT OF BLACK ECONOMIC EMPOWERMENT**

This chapter will be highlighting the history of affirmative action policies in South Africa and the factors that have played a big role in the development of such policies. The intent of this chapter is to explain the need for legislative action for the implementation of the empowerment agenda of the government. The renowned author and diplomat Shashi Tharoor said about the past that it is “not necessarily a guide to the future, but it does partly help explain the present.”<sup>10</sup> The affirmative action policies implemented by the democratically appointed government of South Africa and the subsequent legislations passed by the parliament are greatly influenced by the past discriminations and the laws that helped enforce apartheid.

### **2.1. History of The Need for Affirmative Action Policies in South Africa**

The first democratically elected government of the Republic of South Africa was faced by the crucial task of remedying the previous wrongdoings that the majority population of the country suffered for more than 40 years. The erstwhile race laws had an impact on every aspect of the social-economic life of indigenous South Africans by not only prohibiting social contact between the races,<sup>11</sup> but most importantly sanctioning “white only” jobs which led to the extreme economic degradation of the HDSAs which in turn prevented technical education being imparted to the HDSAs as they were deemed “unfit” or “unskilled”. The discrimination of the indigenous South African population in the work front predated the legalisation of apartheid, however this discrimination was intensified by the implementation of the segregatory laws passed during apartheid.<sup>12</sup>

As discussed in Chapter 1 the mining sector being a core economical and financial pillar in the South African economy was one of the main sectors which not only benefited but one can say was the perpetrator for the development of segregatory policies. The aim of the mining industry was to ensure speedy recovery of the ore in the most cost-effective manner, the price of gold back in the 1940s was “pegged” internationally<sup>13</sup> hence the only way for the mining industry to attain maximum profits was by limiting wages of the large number of labour that had to be employed in the mines. The government played in tow with the mining industry by enforcing laws that ensured there was always an ample availability of migrant labour for the highly revenue contributing mining industry.<sup>14</sup>

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<sup>10</sup> S. Tharoor (2016), *An Era of Darkness: The British Empire in India*.

<sup>11</sup> For example the Prohibition of Mixed Marriages Act, 1949 which prohibited any marriages between individuals belonging to different races as classified under the Population and Registration Act, 1950.

<sup>12</sup> T. Deane (2005), *Understanding the need for anti-discrimination legislation in South Africa*, 2005 911-2) *Fundamina*.

<sup>13</sup> Gold prices were fixed at an internationally agreed upon price of USD 35/troy ounce as per the Bretton Woods Agreement signed in 1944 by the United States of America.

<sup>14</sup> CPJME Foundation (2014), *Roots of Apartheid, South Africa's Mining Industry*.

This chapter will highlight a few of the apartheid laws that specifically had an impact on the mining sector especially with regards the employment and the skill development of HDSAs and the contribution these laws made to the inequality which is present in South Africa till date. This chapter will also be listing down the new affirmative action legislations that have been enacted by the post-apartheid government as an answer to the erstwhile laws which impacted the HDSAs and the mining sector.

## **2.2. Racially Discriminatory Laws Impacting the Mining Sector**

The previous apartheid government had gradually implemented more than 25 statutes that promulgated racial segregation and hindered the progress of the HDSAs.<sup>15</sup> Almost every step taken by the Government was in every way detrimental for the development and growth of the HDSAs. Several legislations had been passed by the apartheid government over the years however the below mentioned few are the ones that jeopardised the integration and participation of the HDSAs in an extensive manner.

### *2.2.1. The Native (Urban Areas) Act No 21 of 1923 and Natives (Urban Areas) Consolidation Act, 1945*

*The Native Urban Areas Act, 1923 gave specific powers to the local authorities to control the influx of the black population in the urban areas and also permitted forced removal of those persons who the authority deemed fit, namely the one who were not employed.<sup>16</sup> The act was a part of the “pass laws” structure of the apartheid legislations in force which made it compulsory for HDSAs to carry “passes” in the urban areas which were designated as exclusive “white” areas. This was a method of not only segregating the population but also to allocate the migrant labour as only the persons employed by white employers could procure the “passes” to stay within the urban areas. This practice of obtaining passes only when employed by a white person and having contracts of limited duration meant that the HDSAs were forced to return to their rural homelands, “it was a system of oscillating migration that was enforced by means of the “pass laws” ...regulated the supply of black labour at wages which the mining sector could control methodically “.*<sup>17</sup>

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<sup>15</sup> See *Supra* note 12.

<sup>16</sup> [www.sahistory.org.za](http://www.sahistory.org.za).

<sup>17</sup> F. Wilson (2001), Minerals and Migrants: How the mining industry has shaped South Africa, Daedalus Vol 130, No. 1.

### 2.2.2. *Industrial Conciliation Act No. 28 of 1956*<sup>18</sup>

*The main aim of the ICA was to divide the industry unions on racial lines, the ICA prohibited registration of any unions that consisted of members belonging to different races. The ICA was enacted to weaken the resolve of the trade union movement by derecognising any unions which had a mixed membership. Section 77 of the ICA also made mandatory reservation for the whites for any skilled jobs.*

### 2.2.3. *Mines and Works Act, 1911*<sup>19</sup>

*The Mines and Works Act was the primary legislation governing the duties of mine workers in South Africa. This Act is also popularly considered as the legislation that legalised the employment “colour bar”. The Mines and Works Act laid down specific discretionary powers that were given to the Governor General to provide certificates of competency for skilled work, which could be cancelled or suspended if the skilled job was not being conducted by a white person. This act was enacted with the main agenda that the welfare of the white population would suffer significantly if the black jobs were not legislated out of the market.<sup>20</sup> The policies encompassed in both these legislations were seen as affirmative action for whites against cheap black labour and to employ large number of whites for not only skilled but also semi-skilled jobs.<sup>21</sup>*

## 2.3. **Development of Affirmative Action Policies**

The above-mentioned legislations are only a few examples of the methodical approach that was implemented in the apartheid era to have a devastating effect on the social, economical and political growth of the black population. International pressure and the constant revolution undertaken by the African National Congress ultimately led to the downfall of apartheid, and the first democratic elections were held in South Africa in 1994 and the new multiracial constitution was promulgated in 1996. It was the preamble of the constitution that laid down the principle policy of the new democracy to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.<sup>22</sup> The newly elected democratic government that came into power was faced with the crucial dilemma of ensuring a smooth transition of power and political functioning but also mitigate policies to rectify the wrongdoings of the past. The ANC recognised that in order to

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<sup>18</sup> The Industrial Conciliation Act, 1956 was further repealed by the Industrial Conciliation Act, 1979.

<sup>19</sup> The Mines and Works Act 1911 was amended in 1926 and underwent further changes in 1956 and 1959.

<sup>20</sup> <https://www.sahistory.org.za/topic/segregationist-legislation-timeline-1920-1929>.

<sup>21</sup> See *Supra* note 12.

<sup>22</sup> South African Constitution (1996), Preamble.

rectify the previous non-participation of the HDSAs and ensure inclusion of the majority population in the mainstream economy crucial remedial steps will have to be taken to “de-racialize business ownership completely through focused policies of black economic empowerment.”<sup>23</sup> The Reconstruction and Development Programme that was framed by the ruling ANC also calls for affirmative action as a tool by which inequality of the past can be mitigated. As Justice Madala of the Constitutional Court of South Africa said in his speech:

*“that the issue of developing a clear policy and implementation plan for affirmative action is nor more firmly on the agenda of the government and other stakeholders than ever before.”*<sup>24</sup>

Since the late 1980s voluntary steps were being taken by organisations and indirectly by the government attempting to take steps for the integration of HDSAs in places that were previously restricted to them such as schools etc. The greater majority of apartheid laws were gradually being abolished and a slow integration of the HDSAs commenced by them entering into businesses which were previously only permissible to be conducted by the white minority, it was slowly becoming clearer to not only the government but also the private players of the economy that change was on its way and steps to include the majority population in the workings of the economy will have to be taken to thrive in this new South Africa. These steps were primarily characterised by the abolishment of the great apartheid laws and small attempts made by the state and the private sector to integrate the majority population and to not only consider them to be as a workforce that could be exploited but whose wellbeing was core for the modernisation of the economy.<sup>25</sup> Even though efforts were made by the private sector the magnitude was just not that would correct the years of discrimination and lack of access the HDSAs had to the economy.

Affirmative action legislation has always been an emotive subject, at times being considered “anti-white” or in the case of South Africa called reverse apartheid, however it is imperative to note that affirmative action policies are introduced to benefit those who have suffered over years and not to punish the ones who benefited from the apartheid era laws. In the case of South Africa, it is more important for the state to get involved as enact affirmative action legislation as economic, social and political discrimination of the majority population was also legislated and the most suitable way to correct this would be vide legislation. In order to promote the development of the HDSAs, the government of South Africa passed a number of affirmative action laws specifically focusing on the

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<sup>23</sup> ANC (1994), Reconstruction and Development Programme: A Policy Framework.

<sup>24</sup> T.H Madala (1998), Affirmative Action-A South African Perspective, paper presented in Texas on October 22, 1998.

<sup>25</sup> A. Leonard (2005), Chapter 3: Affirmative Action in South Africa: Development approaches and legislative requirements, University of Pretoria etc.

advancement of the majority workforce in those positions that they were previously restricted from.<sup>26</sup> South Africa attained pure democracy at a time when the world was undergoing radical changes in its economical functioning. The concept of globalisation and liberalisation were at a stage of furore in the mid-1990s being backed by global financial bodies such as the International Monetary Fund and the World Bank. The next section will discuss the major legislations that have been passed by the government to regulate labour conditions and the regulatory provisions that are specifically implemented for the development and advancement of the HDSAs.

### 2.3.1. *Employment Equity Act, 1998*

*Considered first formal “building block in what would become the Black Economic Empowerment architecture”<sup>27</sup> was the enactment of the EEA. The chief agenda of the EEA was to eliminate unfair discrimination when it comes to the employment of the previously discriminated individuals namely Africans, Indians and Coloured and to promote equal opportunity to all the previously disadvantaged groups. The EEA is the prime example of affirmative action which aims at taking steps to redress previous discriminatory acts and ensure that those discriminatory acts be ceased from ever being committed again.<sup>28</sup> The state also passed the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 which was a tool to further strengthen the government’s resolve of trying to remedy the discriminatory policies of the past. The EEA specifically lays down provisions whereby employees must ensure equitable representation of the HDSAs and preferential treatment can be used to achieve the representation goals of HDSAs, and any failure to do so will make the employee liable for punitive action. The EEA was one of the first attempts of the newly elected government to diversify the work force in the organised sector and open avenues for HDSAs which were previously restricted. The EEA was the founding stone of affirmative action policy in South Africa and which was in due time strengthened by the implementation and execution of the “Broad-based Black Economic Empowerment Act, 2003*

### 2.3.2. *Broad Based Black Economic Empowerment Act, 2003*

*Considered by many as a radical approach for black empowerment, the BB-BEE Act was introduced as a counter the criticism the government was facing with regards the narrow*

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<sup>26</sup> The Government also passed several other affirmative action laws such as the Labour Relations Act, 1995, Basic Conditions of Employment Act 1997 and the Skills Development Act, these laws however focused on affirmative action as a way of fair treatment to the HDSAs rather than laying down specific rules for their inclusion in jobs and advancement.

<sup>27</sup> R. Burger and R. Jafta (2010), Affirmative action in South Africa: an empirical assessment of the impact on labour market outcomes, CRISE Working Paper No. 76.

<sup>28</sup> See *Supra* note 12.

*approach to black economic empowerment that was popular in 2003/2004. The government had initiated several plans and strategies to address the problems of discrimination as mentioned above, however the extent of damage that had been made by the apartheid era policies on the socio-economic structure and standing of the HDSAs would require a comprehensive plan of action that would enable HDSAs to become active members in the economy. One of the central objectives of the Reconstruction and Development Programme of the ANC was to deracialise business ownership<sup>29</sup> and take steps to diversify the corporate structure. The BB-BEE Act was enacted with the main agenda of providing opportunities to HDSAs to become active members in the mainstream economy by way of ownership of businesses and their integration in the corporate world. The BEE process not only focused on the ownership aspect of corporations by HDSAs but also included other elements such as skill development, procurement and employment equity. One can come to understand that the BB-BEE Act was a cumulation of affirmative action policies implemented by the government which was stricter in its application and enforcement. The deracialising of the economy is not only an economic imperative but also a moral requirement to keep in tandem with the values of the Constitution.<sup>30</sup>*

The BEE Commission was established in 2001 under the Department of Trade and Industries ministry to come up with a strategy to speed up the process of inclusion of HDSAs in the management and control of enterprises, which was finalised by the DTI and led to the subsequent passing of the BB-BEE Act which is now considered the paramount subject in the empowerment debate. The BB-BEE Act was assented in 2003 with the sole purpose of it being the tool for economic empowerment of black people, the BB-BEE Act called for the development of “Codes of Good Practice”<sup>31</sup> which would set the guidelines that companies would have to follow in a broad area of issues impacting HDSAs, the generic Codes of Good Practice or popularly known as the BEE Codes were to be the indicators to measure the black economic empowerment of companies and whether the set goals are being achieved. The BB-BEE Act encompassed a broader approach for the upliftment of HDSAs which not only covered the equity ownership and management control but also several other issues that were covered in the BEE Codes which were promulgated in 2007 by the assistance of industry experts. The BEE Codes explained in detail the steps that firms with the turnover as stipulated in the BEE Codes have to apply in their economic activities and the points that each enterprise will procure on fulfilling these conditions, it is these points that would consider the

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<sup>29</sup> See *Supra* note 14.

<sup>30</sup> Department of Trade and Industry (2014), South Africa's economic transformation: A strategy for broad based black economic empowerment.

<sup>31</sup> The Codes of Good Practice developed as per the conditions of the BB-BEE Act have been amended in October 2013.

BEE rating or standing of the enterprise and determine the contribution that the company is playing the empowerment scheme. The BEE Codes set out 7 elements<sup>32</sup> for the scoring of the enterprises namely;

- i. Ownership element- measures the effective ownership of companies by HDSAs.
- ii. Management control: measures the effective control of companies by HDSAs
- iii. Employment equity: which measures the steps taken by the companies to establish equitable representation in the workforce
- iv. Skill development: measures the steps being undertaken by companies to enhance the skills of the HDSA employees.
- v. Preferential Procurement: measures the extent to which companies procure goods and services from those companies that have a strong record on satisfying the BEE Codes.
- vi. Enterprise Development: measures the extent to which companies take measures to assist in the development of other companies.
- vii. Socio-economic development: measures the extent to which companies contribute towards the socio-economic development of HDSAs.

The BB-BEE Act and the BEE Codes were amended in 2014 and 2015 respectively, the BB-BEE Act and the BEE Codes had substantially helped in the economic transformation of the HDSAs however there were several shortcomings that were recognised, which I will be discussing in detail in Chapter 3. The new amendments fundamentally changed the implementation of the BB-BEE Act and the BEE Codes by removing the “voluntary”<sup>33</sup> feature that was made available to enterprises and introduced penalties in specifically in the case of false reporting of ownership status as stipulated in the BEE Codes and BB-EEE Act. The new amendment also modified the elements on black empowerment which would determine the score of each enterprise with regards the empowerment strategy fulfilment, the scores of the enterprise is the one that determined its ranking that is listed in the BEE Codes. The government has in its development and implementation of the BEE Policy tried to satisfy all the concerned stakeholders namely the white companies, black entrepreneurs and organised labour.<sup>34</sup>

The BB-BEE Act also calls for industrial sector wise charter that can be formulated by a specific sector in co-ordination with the Department of Trade and Industry and encompass the main principle of economic empowerment of HDSAs. Various sectors in the South African economy over time

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<sup>32</sup> Department of Trade and Industry (2007), Codes of Good Practice on Black Economic Empowerment. The 7 elements were changed by combining the enterprise development/preferential procurement and management control/equity participation by the Amendment to the BEE Codes that came into force in 2014.

<sup>33</sup> Werksmans (2015), Amendments to the BBBEE Act and the Codes explained.

<sup>34</sup> R. Tangri and R. Southall (2008), The Politics of Black Economic Empowerment in South Africa, Journal of Southern African Studies.

released the empowerment charters that would govern their businesses such as construction, defence and most importantly the mining sector. The concept of BEE is now an integral part of the political and economical workings of South Africa and with the mining industry being such an integral part of the economy the empowerment strategy has had a profound impact on it. The mining sector was one of the first sectors to adopt and implement a Mining Charter 1 in 2004. The application of Mining Charter 1 was a result of the need for transformation practices that were called for in the BB-BEE Act and the MPRDA. The mining sector was also the first sector to adopt a comprehensive BEE score-card.<sup>35</sup>

The new government elected by the majority in 1994 was faced by the ultimate obstacle of striking a balance between transformation and economic development of the HDSAs and attracting investment which had been hindered by international pressure and divestment due to the apartheid process. Though South Africa was considered to be the most developed of the southern African nations, the development was highly skewed in favour of the minority. The history of South Africa has shown the efficacy of laws whether discriminatory or not and the impact that it has on the society. Hence it is easy to understand why mere voluntary measures by the private sector would not help in transforming the white hegemony that existed for more than a century. The erstwhile government of the apartheid era was actively involved in the legitimising of discriminations by declaring racial segregation a state policy and by implementation of laws, hence to remedy effects of “wrong” legislation the new government had an imperative to introduce and implement laws that were in its truest form “just” and “fair” to all citizens of South Africa. The new democratic government was given the responsibility of ensuring that the disadvantaged population was given an opportunity to actively participate in the fields of business and economy that they were deprived of. Chapter 3 will elaborate on the several legislations that have been enacted for empowerment of the HDSAs in the mining sector, it will also discuss the narrow approach of equity ownership that is laid down in the Mining Charter and the various challenges the enforcement of the ownership element is faced with. I will be critically analysing the ownership requirements as stipulated in the Mining Charter and whether the call for changes in that structure would be beneficial to the HDSA population at large.

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<sup>35</sup> SS. De Klerk (2008), A Critical Analysis of Broad-Based Black Economic Empowerment in the Mining Sector, University of Johannesburg.

### **3. ANALYSIS OF THE EMPOWERMENT LAWS IN SOUTH AFRICA**

Former President Thabo Mbeki said the “non-racialism in politics has to be accompanied by non-racialism in the economy,<sup>36</sup> and it is a battle. The democratically elected government of South Africa has very rightly adjudged the socio-economic disadvantages that the majority population had to deal with during the apartheid era, and in order to assist the HDSAs to get on an even footing as the minority necessary legislative and administrative steps were taken. The mining sector is one of the key contributors to the economy of South Africa, contributing up to 83 billion Rands in just one quarter of the year which constitutes 8% of the gross domestic product of South Africa.<sup>37</sup> It is one of the biggest employers in the country directly employing approximately 450,000 employees,<sup>38</sup> which does not include the ancillary jobs that are created as a result of an expansive mining industry.

There has been a decline in the contribution the mining sector has made to the economy as a whole over the years however the importance of the sector has not been overlooked by the government and the world. Southern Africa is gifted with abundant natural resources beneath its earth, though popular for gold South Africa has enormous resources of Platinum Group Metals and coal, in fact it is estimated that the country has 335 years' worth of available Platinum Group Metals resource and 256 years of coal reserves available.<sup>39</sup> As noted above the extractive sector is vital for the development of South Africa however it is also imperative to note that it is one of the most subsidised and protected industries by the government. This co-dependence has enabled the government to force white capital to either embrace BEE or face liberalisation.<sup>40</sup>

This chapter will analyse the primary legislation that governs the mining sector, the MPRDA and the intent of its enforcement which is backed by the fulfilment of the empowerment policies of the state. The chapter will also explain the Mining Charter which was promulgated as per the terms of the MPRDA and its objectives specifically with regards to the ownership element, and the clashes its implementation has caused between the industry and the government.

#### **3.1. The Minerals and Petroleum Resources Development Act, 2002**

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<sup>36</sup> As quoted by O. Iheduru (2004), Black Economic Power and Nation-building in Post-apartheid South Africa, *Journal of Modern African Studies*

<sup>37</sup> Stats SA (2017), Gross Domestic Product Quarter 3 2017 media presentation.

<sup>38</sup> PWC(2018), SA Mine 2018, 10<sup>th</sup> edition.

<sup>39</sup> Stats SA (2017), Economic analysis, Environmental Economic Accounts Compendium.

<sup>40</sup> O. Iheduru (2004), Black Economic Power and Nation-building in Post-apartheid South Africa, *Journal of Modern African Studies*.

The newly elected democratic government was faced with the responsibility of attaining suzerainty over the mineral wealth of the country to enable equitable development of the population that has been deprived of utilising the mineral wealth. The previous law governing extraction of minerals in South Africa was the Minerals Act, which was repealed by the MPRDA. As per the Minerals Act the ownership of the minerals below the surface of the land belonged to the land owner vide the legal principle of *cuius est solum*,<sup>41</sup> hence the mineral exploitation prior to the enactment of the MPRDA was subject to the approval given to the mining company by the land owner himself. However, this concept was repealed by the enforcement of the MPRDA in 2004, the MPRDA in turn implemented an administrative law based regulatory regime which would be managed by the Department of Mineral Resources.<sup>42</sup> The MPRDA in turn granted the state “custodianship”<sup>43</sup> of the mineral resource wealth of the country for whose exploitation the state would grant rights and permits to qualified persons. The acknowledgement of state custodianship recognises the internationally accepted principle of “permanent sovereignty over natural resources”.<sup>44</sup> This principle is covered within the preamble of the MPRDA which declares the state to be the custodian of the mineral resources, by way of vesting custodian powers to the state which in turn enables the state to have a greater authority permitting the exploitation of the resources.<sup>45</sup>

The extractive sectors is a capital-intensive field as a result of which the players in the mining sector have always been limited, in order to enable HDSAs to become active participants in the mineral sector the MPRDA has provisions that call for financial and technical assistance that can be provided to any HDSA who aspires to obtain rights for prospecting or mining. In order to benefit the labour and the communities within the vicinity of the mining/prospecting area, the MPRDA makes it mandatory for the right holder to develop a social and labour plan which would include programs that the right holder is mandated to undertake. The MPRDA clearly mentions the paramount intention of the state to aid in equitable access to the mineral resources of the country by all the people of South Africa,<sup>46</sup> a legislative expression of the Reconstruction and Development Programmes vision of the mining industry of South Africa and confirm its aims of mobilizing the resources of the country for the final eradication of apartheid.<sup>47</sup> The MPRDA was also one of the first legislations that called for the formation of a specific charter pertaining the mining sector, that would lay down provisions for the

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<sup>41</sup> Rights of the owner of immovable property extend up to the heavens and down to the centre of the earth.

<sup>42</sup> P. Leon (2018), Presentation of Resource Nationalism versus nationalisation, University of Pretoria.

<sup>43</sup> Section 2 , MPRDA.

<sup>44</sup> Adopted by the United Nations General Assembly vide resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources.

<sup>45</sup> F.T Cawood (2004), The Mineral and Petroleum Resources Development Act of 2002: A paradigm shift in mineral policy in South Africa, The Journal of the South African Institute of Mining and Metallurgy.

<sup>46</sup> See *Supra* note 40.

<sup>47</sup> S.V Rungan, F.T Cawood and R.C.A Minnitt (2005), Incorporating BEE Into the New Mineral Law Framework For the South African Mining Industry, The Journal of the South African Institute of Mining and Metallurgy.

implementation of the principle of the BB-BEE Act. The MPRDA specifically instructs the Minister of Minerals and Energy to develop a “broad-based socio-economic empowerment charter” within six months of the enforcement of the MPRDA,<sup>48</sup> for the mining sector to implement the governments objectives of equitable representation and ownership by HDSAs in the mining sector. The Mining Charter was developed with the sheer aim to deracialise the South African mining sector which would be true representation of the country’s demographics.<sup>49</sup>

### **3.2. Broad-Based Socio-Economic Empowerment Charter, 2004 / the Mining Charter**

The Mining Charter was promulgated as per the requirements mentioned in the MPRDA, the primary objective for the development of the Mining Charter was to lay down a strategy that the mining industry should implement to meet the objective of the MPRDA.<sup>50</sup> The Mining Charter was released in 2002 after a rocky start and industry furore. The apprehension of the mining industry for the Mining Charter was because of a “leaked” draft that proposed that black ownership in all mining ventures be increased to 51% within 10 years. This drastic step though just a “rumour” caused a dramatic response from investors and the financial markets, with local south African mining stocks losing up to billions Rands on the stock market.<sup>51</sup> This dramatic response lead to the government and the relevant stakeholders of the mining industry to engage in a fruitful manner to and reach a conclusion to release a more “investor friendly” Mining Charter in October 2004.<sup>52</sup> Mining Charter 1 worked on the concept of broad-based development of HDSAS inspired by the BB-BEE Act and covers a number of factors that would “substantially and meaningfully empower HDSA, utilise existing skills and expanding the skill base of HDSAs, develop social and economic welfare of mining communities”.<sup>53</sup> The development of the Mining Charter 1 by consultation between the relevant stakeholders makes it possible for the objectives of State to be met in accordance with fair market and human right principles.<sup>54</sup> The Mining Charter covers nine socio economic upliftment objectives namely-

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<sup>48</sup> Section 100 (2), MPRDA.

<sup>49</sup> See ‘Poisonous Whispers at the Dawn’, Business Day, 6 February 2007.

<sup>50</sup> See *Supra* note 47.

<sup>51</sup> A. Makhunga (2008), Black Economic Empowerment and its Impact on Wealth Creation in the New South Africa, University of Pretoria.

<sup>52</sup> See *Supra* note 45.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

- 3.2.1. Human Resource Development: Initiative and steps that are to be taken by the mining companies for skill development of the workers and communities living within the vicinity of the mining area. Mentoring programmes and scholarships would be considered a suitable method to encourage development of HDSAs to improve their earning capabilities.
- 3.2.2. Employment Equity: As discussed in Chapter 2, inclusion of HDSAs in the mainstream economy was of paramount importance to the new government. The mining companies were required to publish targets and strategies that they would employ to achieve active amalgamation of HDSAs in the management structure of the corporations especially on junior and senior management.
- 3.2.3. Migrant Labour: Mining companies will not discriminate against migrant foreign labour, as was the case in the early 19<sup>th</sup> century whereby the monetary compensation of migrant labour from other African nations was less than those from South Africa and the white minority population.<sup>55</sup>
- 3.2.4. Mine Community and Rural Development: The mining companies will in cooperation with the government and local government and municipal bodies develop plans for the development of local communities. This is also a requirement as under MPRDA which requires each right holder to develop social and labour plans that list in detail the activities that the right holder would undertake for the development of the local populace, at all stages of mineral resource development.
- 3.2.5. Housing and Living Conditions: Mining corporations will take all necessary steps to improve the living conditions of its workforce. The single-sex hostel system will be modified to include family units and will take steps to encourage home-ownership amongst its employees by introducing relevant schemes.

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<sup>55</sup> See *Supra* note 17.

- 3.2.6. Procurement: Procuring services from HDSAs or HDSA owned companies fulfils the ethos of the Constitution of South Africa<sup>56</sup> by ensuring equitable opportunities to HDSA to prosper. Mining companies should make all viable attempts to procure capital goods and services from HDSA owned companies, by giving the preferential status. This encouragement from mining companies will assist HDSAs to gradually enter the fields that were restricted to them previously.
- 3.2.7. Ownership- The main objective of Mining Charter 1 was to attain ownership of mining ventures by HDSAs, it laid down provisions for accomplishing HDSA ownership levels of 15% in five years and 26% within 10 years of the enactment of MPRDA. The Mining Charter provides two forms which would entail the equity participation of HDSA;
- i. Active involvement is in the case of HDSA owned and controlled companies in which HDSAs have 50 percent plus 1 vote or strategic joint ventures in which the HDSA partner holds 25 percent plus 1 vote which would still provide management participation and say in the functions of the company.
  - ii. Passive involvement would mean a certain shareholding of the mining entity in which the HDSA partner would not particularly have any involvement in the management. This is the case of employee stock options and trusts.<sup>57</sup>

The main aim of mandating the ownership of mining companies was to enable the HDSA population to venture into the capital-intensive mining sector, which was earlier restricted to them. This element is clearly one of paramount importance for the government to achieve, as the extent of success of this element would in fact be the success story of MPRDA and the Mining Charter.<sup>58</sup> To further incentivise the mining industry on the contentious issue of handing over ownership, the Mining Charter lays down provisions for setting off shortfall in targets for the other elements of the Mining Charter in the event of extra HDSA ownership participation, over and above the required provision. The mining companies could achieve such targets either by selling the required stakes to HDSA partners or entering into joint venture agreements. It is however worth mentioning that the Mining Charter 1 gives emphasis to the economic concept of “willing seller-willing buyer”, whereby the sale of a stake in the mining corporation will be done at a fair market value.<sup>59</sup> This element plays a very vital role for any

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<sup>56</sup> Section 217 of the Constitution of South Africa enlists the conditions that the government or any government body must comply with regarding services procured from a third party. The Constitution also permits the government to implement a procurement policy that would assist in the advancement of persons who have been disadvantaged by the unfair discrimination.

<sup>57</sup> Section 4.7 Mining Charter 1.

<sup>58</sup> O. Matlau, Empowering the Mining Industry: lessons From The Last 10 Years, SA Mining Columnist [www.businessmediamags.co.za](http://www.businessmediamags.co.za).

<sup>59</sup> See *Supra* note 47.

mining aspirant to enter in this field as the MPRDA clearly highlights the need for “equitable participation”<sup>60</sup> of HDSAs and it can be concluded that the Mining Charter puts an obligation on the mining companies to comply with the provisions of the MPRDA when applying for new mining and prospecting rights.<sup>61</sup> The genius of the Mining Charter was that it leveraged the power that the Department of Mineral Resources (previously the Department of Mineral and Energy Affairs) to grant mining rights to drive transformation within the companies looking to secure such rights.<sup>62</sup>

### **3.3. Amendments of the Mining Charter**

#### **3.3.1. Revised Mining Charter, 2010**

The Department of Mineral Resources commissioned a study to assess and review the implementation of Mining Charter 1 in 2009.<sup>63</sup> The Mining Charter Impact Assessment was formally presented in October 2009. The aim of the report was to record the steps that have been taken by the mining sector to meet the requirements of the socio-economic elements of the Mining Charter. The results of this report were far from pleasing for the authorities. It was reported that the mining sector had not completely complied with the provisions laid down in Mining Charter 1, and the transformation was slow and non-uniform. One of the criticisms that arose of the Mining Charter 1 was with respect to the subsequent Codes of Good Practice for South African Mining Industry or Mining Code that was passed in 2003. The scorecard was supposed to be a systematic target list that the mining companies were to follow to comply with Mining Charter 1. However, it was observed that the Mining Code along with Mining Charter 1 had very few concrete targets namely only the one requiring compulsory transfer of ownership of mining entities. The Mining Code will be further discussed in detail following section of this research.

There were several shortcomings that were discovered vide the impact assessment report because of which Mining Charter was amended in 2010 to provide “more measurable items, scales and targets”.<sup>64</sup> The revised Mining Charter II laid down specific aims and targets for the mining sector clarifying the ambiguity that existed in the Mining Code and

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<sup>60</sup> Section 2(d) of MPRDA, Section 23(1)(h) says that a mining right would be granted to an applicant if such a grant would further the objectives of the MPRDA and is in accordance with the Mining Charter.

<sup>61</sup> C. Rogerson (2011), Mining Enterprise, Regulatory Frameworks And Local Economic Development In South Africa, African Journal of Business Management.

<sup>62</sup> V. Jack and K Harris (2007), Broad Based Black Economic Empowerment- the Complete Guide as cited in SS. De Klerk (2008), A Critical Analysis of Broad-Based Black Economic Empowerment in the Mining Sector, University of Johannesburg.

<sup>63</sup> G. Mitchell(2013), Making Sense Of Transformation Claims In The South African Mining Industry, The Journal of The Southern African Institute of Mining and Metallurgy.

<sup>64</sup> N.V Moraka and M. Jansen van Rensburg (2015), Transformation in the South African mining industry – Looking Beyond The Employment Equity Scorecard. The Southern African Institute of Mining and Metallurgy.

Mining Charter I. Mining Charter II introduced as one of its objectives the concept of sustainable growth of the mining industry which would ensure the sustainable transformation and growth of the mining industry.<sup>65</sup> Though the ownership requirements remained at 26% in the amended charter, the companies were given a further incentive that these requirements could be off set against the value of beneficiation conducted by the mining operation.<sup>66</sup> One of the primary changes that were introduced in Mining Charter II was the responsibilities imposed on each mining company to report its transformation goals and the levels of compliance with the Mining Charter on an annual basis, and any non-compliance with the elements of the Mining Charter would be penalised as per the terms of the MPRDA. The ownership element is the key focus of this research and Mining Charter II aided in removing the ambiguity that existed with regards equity transfer to HDSA partners. The new definition of “effective ownership” and “meaningful economic participation” provided greater clarity with regards the extent and kind of equity partnership the Government expects to be considered acceptable to their goal of transformation. The main agenda behind this amendment to the Mining Charter was to provide numerically stable targets that the mining companies would be bound to abide by, as opposed to the previous Mining Code which was in the form of a questionnaire. The Mining Code will be discussed in the next section of this research.

### 3.3.2. Mining Charter Amendment, 2017

The review of the Mining Charter was due in 2014 as the targets that were set for the fulfilment of the transformation objectives of the MPRDA and the Mining Charter. The assessment conducted by the Department of Mineral Resources was published in 2015 which was a report that “presents the findings of the assessment of implementation of the Mining Charter against each element, effectively quantifying progress of implementation of the instrument in an aggregated manner over a ten-year window period”.<sup>67</sup> The assessment report submitted did highlight progress that has been made by the industry, the data collected from the industry players did however indicate that many of the targets stipulated had not been achieved. With specific reference to the ownership of mining companies by HDSAs it was observed that more than average HDSA ownership achieved by mining companies was at 30.6% which was more than the prescribed 26% in Mining Charter I, however it was observed that the actual benefits of ownership by HDSAs had

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<sup>65</sup> Department of Mineral Resources (2010), Amendment Of The Broad-Based Socio-Economic Empowerment Charter For The South African Mining And Minerals Industry.

<sup>66</sup> Section 2.1 Mining Charter II, the term beneficiation has been defined in the Mining Charter II. The importance of beneficiation in the South African Economy has been discussed in detail in the Department of Mineral Resources document The Beneficiation Strategy for the Minerals Industry of South Africa published in 2011.

<sup>67</sup> Department of Mineral Resources, 2015, Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, Pretoria.

not been achieved. The meaningfulness of economic participation more or less remained elusive and the optimal benefits of ownership had not been reported.<sup>68</sup>

The most judicially debated charter for the mining industry, the Broad-Based Black Socio-Economic Empowerment Charter for the South African Mining and Minerals industry, 2017 was gazetted by the Minister of Mineral Resources in June 2017, and immediately came under severe scrutiny from the Chamber of Mines. The 2017 Mining Charter which was declared to be a “win-win” situation by the Minister for all was immediately discredited by the Chamber of Mines which declared that the process that was followed in the development of the 2017 Mining Charter was flawed and was developed without stakeholder consultation.<sup>69</sup> The Chamber of Mines wasted no time in applying for an interdict to prevent the implementation of the 2017 Mining Charter.

The 2017 Mining Charter introduced a multitude of changes that were radical and demanding in its approach, below are the a few which were deemed to be the most contentious;

#### I. Ownership

Applicants for new prospecting rights must have a minimum shareholding of 50% by HDSA (the definition and use of the term HDSA was replaced by “Black People”). The rationale behind requiring compulsory HDSA ownership in the prospecting stage is unclear as the prospecting phase is highly capital intensive and not revenue generating.<sup>70</sup> The 2017 Mining Charter also introduced the concept of ensuring shareholding by communities affected by the mining activities and employees of the mining company by way of community holding and employee stock option schemes, for all companies engaging in mining activities.<sup>71</sup> Though the intention behind allocation of shareholding for HDSA employees is noble, the implementation can cause racial tensions between employees on racial undertones, whereby a feeling of exclusion by employees of different races can overcome the crux of the entire policy.<sup>72</sup> Existing holders were also expected to top up their HDSA shareholding to 30% from their previously reported HDSA shareholding within 1 year from the enforcement of the 2017 Mining Charter. The right holders were also expected to pay a

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<sup>68</sup> N.V Moraka (2015), Transformation Review in South African Mining Industry: Barriers Affecting Compliance to the Mining Charter, Problems and Perspective Management, Volume 13.

<sup>69</sup> Media Statement Chamber of Mines (2017), Chamber Of Mines Rejects Unilateral Imposition Of The Dmr’s Charter On The Industry.

<sup>70</sup> P. Leon (2017), Mining Charter III: An analysis, [www.politicsweb.co.za](http://www.politicsweb.co.za).

<sup>71</sup> Applicants for new mining rights are required to have 30% HDSA shareholding, which would be divided such that 8% is held by employees, 8% by mining communities and 14% by a HDSA entrepreneur.

<sup>72</sup> AFP (2018), Sasol strike: White S.African Workers March Against Black Share Scheme, [www.thesouthafrican.com](http://www.thesouthafrican.com).

minimum of 1% of their annual turnover on a preferential basis to the HDSA shareholder over and above any other distribution. One of the most challenging provisions in the 2017 Mining Charter was the compulsory maintenance of the HDSA shareholding of the mining company at all times and the de-recognition of historical BEE deals<sup>73</sup> for any renewals of the rights held by them.

## II. Procurement

The procurement targets were further strengthened in the 2017 Mining Charter with the 2017 Mining Charter prescribing the mining companies to spend a minimum of 70% of the total mining goods procurement on goods that are manufactured in South Africa. It also demarcated the kinds of companies that mining goods should be procured from on the basis of their shareholding which included companies with majority HDSA shareholding and companies in which a HDSA female was an equal partner. Though a noble yet far reaching effort, this particular procurement hurdle violates the obligations that South Africa has under the GATT, as the provisions of GATT call for an obligation on the part of South Africa to afford imported products the same treatment as that of locally produced products.<sup>74</sup>

### **3.4. Critique of the Ownership Element of Black Economic Empowerment in South African Mining Industry**

The policies implemented by the new government for the upliftment of the HDSA especially in the mining sector had a tremendous impact on the perception of the state both politically and socio-economically on the international forum. At a time when the world was engaged in the economic globalisation, the newly elected populist South African government had to ensure that any steps that it would take to mitigate the economic discrimination that was faced by the majority, would not in any way cause unnecessary interference in the workings of the South African economy.<sup>75</sup> The government after due negotiations with the relevant stake holders implemented a relatively neo-liberal economic program, that laid emphasis on the importance of international financial and investor community and adhered to the principles of the Washington Consensus.<sup>76</sup> The primary aim and agenda of the empowerment policies implemented by the government was to ensure a transformation in the economy of the country by increasing the number of black people that manage,

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<sup>73</sup> Empowerment transactions that had been concluded between mining companies and HDSA shareholders prior to the enactment of the MPRDA and the Mining Charter.

<sup>74</sup> See *Supra* note 70.

<sup>75</sup> A. Habib and V Padyachee (2000), Economic policy and power relations in South Africa's transition to democracy. World Development.

<sup>76</sup> *Ibid.*

own and control businesses vital the development of the country, thereby reducing the pre-existent income and social inequality.<sup>77</sup> However extensive research and analysis of the data provided has shown that empowerment policies though nobly thought have not been able to fulfil their own primary goals of empowering disadvantaged South Africans but have managed to empower only select few wealthy black South Africans, which in turn has led to further feelings of disenfranchisement and inequality amongst majority of HDSAs.<sup>78</sup>

The advent of democracy in the country also led to an increase in awareness of the existing businesses to meaningfully engage and encourage the inclusion of the majority population. It was duly recognised that the increase in the participation of the HDSA population in the mainstream economy would become the vanguard of black integration into the mainstream, and aid in preventing any potential strife that could arise due to the racial economic disparity.<sup>79</sup> The extractive and energy sector were one of the first industries to voluntarily implement empowerment strategies and policies to rectify the pre-existing inequalities present in the South African economy. A number of businesses that were pre-dominantly run by the white minority endorsed and supported the need for the empowerment of the HDSA population to aid in the emergence of a black bourgeoisie class and a number of measures were taken to cultivate corporate black entrepreneurship.<sup>80</sup> Several empowerment deals were undertaken by the white conglomerates voluntarily to meet with the growing demands of HDSA inclusion in the economy. A vast amount of equity was provided to upcoming black entrepreneurs in companies listed on the Johannesburg Stock Exchange (JSE). One of the main reasons for this unbundling of white owned equity and its distribution to HDSAs was the acknowledgement of big business that steps needed to be taken to encourage HDSA involvement in the mainstream economy in an attempt to soften the governments stance on any radical policies it might implement with respect to black empowerment.<sup>81</sup> In fact, the original notion of black empowerment was primarily based on a transfer of ownership and emphasised even by the state in its original BEE commission report which aimed at “redressing the imbalance of the past by substantially and fairly transferring the ownership...” of South Africa’s resources to the majority of its citizens.<sup>82</sup>

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<sup>77</sup> A. Herringer, C. Firer and S. Viviers (2009), Key challenges facing the social responsible investment sector in South Africa, Investment Analysts Journal.

<sup>78</sup> R. Horne (2017), Patterns of empowerment and disempowerment in the South African mining sector, African Review of Economics and Finance.

<sup>79</sup> *Ibid.*

<sup>80</sup> See *Supra* note 40.

<sup>81</sup> A. Handley (2005), Business, government and economic policymaking in the new South Africa, 1999-2000, Journal of Modern African Studies.

<sup>82</sup> BEE Commission (2001), Black Economic Empowerment Commission Report, Skotaville Press.

The mining sector was one of the first industries to engage in voluntary equity distribution to black entrepreneurs. A number of empowerment deals were signed between existing big business and upcoming black entrepreneurs, in fact as per a report by Ernst & Young<sup>83</sup> a total of 1,364 empowerment deals were concluded between 1995 and 2005 costing the mining sector a whopping R340 billion,<sup>84</sup> making it one of the largest contributor by value to empowerment. It is noteworthy that most of these transactions were undertaken by corporates prior to the official regulatory requirements laid down by the Mining Charter or even before the implementation of the MPRDA. One of the most notable empowerment deals in the mining sector was the joint venture between African Rainbow Minerals owned by Patrice Motsepe and Harmony Gold acquiring the gold mining assets previously owned by AngloGold and the investment made by Tokyo Sexwale in the diamond mining industry by raising its stake in Trans Hex to 24.5%. One of the most dramatic change in the extractive sector was the voluntary decision of Anglo American to reduce its stake in its listed entity on the JSE and the sale of its assets to recognised black investors. The acquisition of Johannesburg Consolidated Investments (JCI), a mining company owned by Anglo American by famous political prisoner Mzi Khumalo was deemed to be the post-apartheid model of black economic empowerment.<sup>85</sup> The primary agenda of the new government and to a certain extent of the white corporate houses was to show to the masses that transformation and economic inclusion was the key prerogative of the state. Empowerment deals and equity distribution to the well-known and politically connected HDSA individuals and consortiums was at that point in time the easiest way to highlight the intent of the state to encourage HDSA participation in the economy at large. The distribution of assets and equity to these “comrade capitalists”<sup>86</sup> was based on the belief that this enrichment of a few would lead to a trickle-down effect, which would in turn improve the socio-economic status of all HDSAs.<sup>87</sup> Furthermore, white corporates had anticipated the increase in pressure for HDSA participation in the economy and the apprehension of increased governmental intrusion to advance the aforementioned purpose.

The public opinion with regards to the attitude of the white mining houses with respect to apartheid was of ignorance and complacency mainly due to the benefits these organisations enjoyed due to the exploitative nature of apartheid policies. In order to continue with their pre-existing political influence, the businesses had to improvise in their selection of “empowerment partners”, the most suitable and beneficial persons for their purpose were former politicians and ones who could shape

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<sup>83</sup> Ernst & Young (several years) Mergers & Acquisitions: A Review of Activity. Johannesburg: Ernst & Young.

<sup>84</sup> Dr. F. Cronje (2014), Digging for Development: The mining industry in South Africa and its role in socio-economic development, IRR South African Institute of Race Relations.

<sup>85</sup> See *Supra* note 34.

<sup>86</sup> See *Supra* note 40.

<sup>87</sup> S. Ponte and S. Roberts (2006), To BEE or not to BEE? South Africa's Black Economic Empowerment, Corporate Governance and the state in the south. DIIS Working Paper no 2006/27.

state policy in favour of the business,<sup>88</sup> or in the case of multinational firms getting favourable conditions for their functioning and operations.<sup>89</sup> One way in which white corporate houses justified their partnerships with the politically active HDSAs in business was their educational qualifications. Prior to 1994 the indigenous black population was provided under-funded and expensive education with the main agenda of keeping them illiterate or under educated, as was highlighted by the National Manpower Commission, 1993 that 56% of South Africans were functionally illiterate. However, the black empowerment leaders were considered well qualified as most of them obtained higher educations from UNISA while incarcerated as political prisoners or were educated overseas and provided scholarships by anti-apartheid supporters after they were exiled from South Africa.<sup>90</sup> In fact, the image of white business voluntarily welcoming black participation in the form of politically connected “empowerment partners” has only raised further scepticism amongst the general populace about the true intentions of the big corporate houses. It was openly perceived that such steps were initiated only to improve the “white only” image of corporates, use black leaders to control the difficult labour on ground and to generally improve social stability whilst maintaining status quo.<sup>91</sup> The extent of collaboration between the politically active and their enrichment by being appointed directors on existing businesses was such that more than 50 members of the ANC who were politically elected hold directorial positions on the companies listed on the JSE. This is consistent with the notion that the white controlled businesses did intend to secure their standing with the new government, and these exertions were more of a norm when it came to black empowerment.<sup>92</sup>

The disbursement of assets and equity to even the selected few by existing businesses had led to a change in the composition of ownership, which on the Johannesburg Stock Exchange had increased to 20% and a drastic improvement was seen in the mining sector with an increase to 26%, with firms that were primarily being controlled by HDSAs raising funds to the value of R 67 billion from the JSE about 6% of the value of shares traded on the stock exchange.<sup>93</sup> However even though this might be a pleasing number to see a change in the JSE, the story lies in the numbers. Of the JSE listed companies only 18% are held by HDSA individuals, of which more than 80% of these are non-executive positions giving them only title but no control.<sup>94</sup>

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<sup>88</sup> See *Supra* note 50.

<sup>89</sup> R. Desbordes and J. Vauday (2007), The political influence of foreign firms in developing countries, Economics & Politics.

<sup>90</sup> G. Murray, Black Empowerment In South Africa: “Patriotic Capitalism” Or A Corporate Black Wash?, Griffith University, Queensland Australia.

<sup>91</sup> *Ibid.*

<sup>92</sup> D. Acemoglu, S. Gelb and J. Robinson (2007), Black Economic Empowerment and Economic Performance in South Africa, accessed via [www.treasury.gov.za/publications](http://www.treasury.gov.za/publications).

<sup>93</sup> See *Supra* note 40.

<sup>94</sup> R. Knight (2006), South Africa 2006: Challenges for the Future, [https://www.researchgate.net/publication/236144345\\_South\\_Africa\\_2006\\_Challenges\\_for\\_the\\_Future](https://www.researchgate.net/publication/236144345_South_Africa_2006_Challenges_for_the_Future)

Though the empowerment of the black elite was considered to be the first step for black integration in the economy, it was also presumed that this growing black capital class would further invest in the upcoming black business sector. However, this assumption of the a trickle-down and the continuous sustainability of the “black elite” came into question very soon after its implementation. Although the black entrepreneurs were provided with extensive ownership via shareholding in corporates by virtue of them bringing in their political capital, the monetary capital was at most time brought in by the existing white businesses.<sup>95</sup> Most of the empowerment deals that were executed between HDSA entrepreneurs and the big corporate houses relied on share price performance, only when there is an appreciation in the value of the shares of these target companies could the HDSA entrepreneurs pay of the capital that was provided to them, by way of dividend, which due to the 1998 global stock market crisis could not be satisfied. The HDSA shareholders were unable to survive the increased interest rates due to the global crisis and defaulted on their debt obligations to financial institutions which were then placed on the short end of the stick holding worthless shares of companies which were provided to them as collateral. The impact of the Asian Crisis was made glaringly obvious when the HDSA business representation on the Johannesburg Stok Exchange went down from 7% in 1999 to 4.8% in 2001 and 2.2% in 2002.<sup>96</sup>

It was the financial structuring of these empowerment deals that actually led to their downfall as well. The debt-ridden vehicles that were used by corporations specifically in the mining sector were extremely vulnerable to the fluctuations in the global market, it is due to this that in most cases that value of liabilities (debt provided by financial institutions to fund the equity acquisition) exceeded the value of assets.<sup>97</sup> This led to the HDSA entrepreneurs to reduce their stake in the companies they had until very recently been provided as a token of altruism by the corporates. In its true sense these black capitalists were actually capitalists without capital who were lent capital by existing players or by financial instructions influenced by existing white business, a situation which further stalled the expansion of black ownership due to the extensive capital burden on emerging entrepreneurs.<sup>98</sup>

One such failure of empowerment deals that in its true sense disillusioned the empowerment model and compelled the government to take a firm stand with regards the progressive participation of the HDSAs was the failure of JCI which was acquired by Mzi Khumalo. In a deal that was considered to be a “magnanimous gesture towards wealth sharing” by the mining giant Anglo American was in

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<sup>95</sup> R. Southall (2007), Ten Propositions about Black Economic Empowerment in South Africa, Review of African Political Economy.

<sup>96</sup> C. Reddy (2003), Not much change in black business control, Mail & Guardian.

<sup>97</sup> See *Supra* note 35.

<sup>98</sup> R. Southall (2004), Black Empowerment and Corporate Capital in South Africa.

<http://repository.hsrb.ac.za/handle/20.500.11910/7579>.

tatters with the share price of JCI crashing and further being delisted on the JSE and compelling JCI to resell the assets it had acquired from Anglo-American back to the original hands.<sup>99</sup> The failure of JCI and the primary blame that was laid on Mr. Khumalo began the incessant wave of criticism that was showered on empowerment deals both by white business and the black political class. It was observed that this preferential treatment that was being given to the politically connected HDSAs had created a new culture of “entitlement” amongst the “tendpreneurs” as they had come to be known. BEE and affirmative action in South Africa especially in the mining sector had become about “who you know” rather than “what you bring” to the business. Critics of BEE have called for more efforts to be made on skill development that will enrich more people as opposed to the equity ownership aspect, which only enriches a few individuals.<sup>100</sup>

The harsh reality that HDSA individuals whether they be the politically elite or a hardworking citizen of the country had been deprived of technical skills for a large part of the century and this sudden thrust of corporate power handed to them has only emphasized on this shortcoming. The empowerment deals and the appointment of HDSA individuals on the board of major conglomerates generated very little returns for the shareholders and in fact expenses for financial and legal advice increased due to their lack of business knowledge.<sup>101</sup> The mining industry is an intrinsically technical industry at all levels, and persons who till prior to 1994 were against the notion of privatised mining and belonging to communist oriented labour unions have been made in charge of running these organisations without any managerial experience. This lack of business knowledge poses a serious problem for black entrepreneurs as it inhibits them from making optimum use of the resources that are made available to them.<sup>102</sup>

The HDSA elite also lost their credibility on the basis of them engaging in a number of empowerment deals with existing businesses, the mining sector especially bulk commodity players of coal have been dependent on government contracts for their sale. One of the ulterior motives for the decision by the big mining houses to engage with HDSAs and provide them equity was their perception of change in government activities with regards inclusion of HDSAs in the corporate sector. This made the selected few HDSA entrepreneurs a fine catch for several companies and in a small span of a few years newly formed black businesses were suddenly stakeholders in old businesses that played a vital role in the economy. As most of these deals were either debt funded, any failure of the

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<sup>99</sup> The Economist (1998), Cautionary Tale of Black Business accessed online.

<https://www.economist.com/international/1998/01/08/cautionary-tale-of-black-business>

<sup>100</sup> L.P Kruger (2014), South African managers’ perceptions of black economic empowerment (BEE): A ‘sunset’ clause may be necessary to ensure future sustainable growth, Southern African Business Review.

<sup>101</sup> J. Ngcamu (2002), The History and Development of Black Entrepreneurship in South Africa, Rand Afrikaans University.

<sup>102</sup> *Ibid.*

company to meet their debt obligations did not detrimentally affect the HDSA, however this did discredit the reputation of BEE players in the corporate sector as only being interested in reaping the benefits of ownership and not taking any risk.<sup>103</sup> HDSA investors were just made the face of the company to procure government contracts, in most cases they acquired less than 20% and very rarely were they given any executive control or say in the management of the companies. This curtailed the HDSA investors to beneficially add any value to the company and became more like silent investors of a company in whose success they did not have much to lose or gain.<sup>104</sup>

There was a growing frustration amongst the civil society and trade unions, that the narrow BEE policy that was being encouraged was primarily about a creation of a black elite and not provide significant benefits to the majority of the country's poor.<sup>105</sup> This led to the establishment of the Black Economic Empowerment Commission in 2001 which called for the state to take a more assertive policy towards BEE including setting up mandated ownership requirements by corporations and make attempts to rectify the errors of the narrow top-down approach of equity ownership with a more broad-based approach which would cover skill development, employment equity and preferential procurement. It was at this time that the government made a calculated decision to enforce sector wise transformative charters that would set BEE procedures and timeframes for meeting the required standards. The steps taken by the government to mandate ownership requirements however benefitted the politically connected and now well established "comrade businessmen" with the largest deal of 2003 between ARM Gold and Avmin indicating that at least 72% of the deal benefitted the same elite class of six black business consortia. The issue with implementation of BEE policies even after state intervention is because instead of focusing on the quality of empowerment focus is only given to the quantitative measures implemented, and at most times only for the purposes of being compliant with state policy.<sup>106</sup>

Even though the importance of empowerment is understood by big businesses, the cost for enforcing empowerment is an investment by the same business, for which an anticipated return of the capital invested is the primary focus, hence steps are taken to find such faces who can be beneficial for the business by way of their political connections.<sup>107</sup> The mandatory ownership initiatives of state policy which were introduced post the enactment of the BB-BEE Act and the Mining Charter have led to a

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<sup>103</sup> T. Shange (2012), Challenges When Implementing a BEE Deal at a South African Financial Institution, University of Johannesburg.

<sup>104</sup> R. Southall (2004), The ANC and Black Capitalism, Review of African Political Economy.

<sup>105</sup> R. Hamann, S. Khagram and S. Rohan (2008), South Africa's Charter Approach to Post- Apartheid Economic Transformation: Collaborative Governance or Hardball Bargaining?, Journal of Southern African Studies.

<sup>106</sup> R. Horne (2015), Patterns of Ownership and Labour Unrest Within the South African Mining Sector, Journal for Contemporary History.

<sup>107</sup> S. Kilambo (2016), Black Economic Empowerment and Changes in Ownership and Control in South Africa's Mining Industry, University of Edinburgh.

creation of an artificial demand to fulfil the numerical quotas and encouraged the use of HDSA employees as “insurance policies” to be deemed BEE compliant for the sake of policy rather than meeting the ultimate purpose and goal of the BEE agenda.<sup>108</sup>

Besides the risk of liquidity shortage and debt refunding that HDSA entrepreneurs had to face with respect to the empowerment deals they ventured into, it was the greater problem of “fronting” which seemed to have plagued the mining industry predominantly. The concept of “fronting” had been observed by the government in several transactions, especially pertaining to procurement of government contracts. This was prevalent in the tender system as the government gave preference to corporations with majority HDSA shareholding or management control. The term “fronting” was officially recognised when the BB-BEE Act came into force and described it as a deliberate circumvention of the BB-BEE Act and the BEE Codes and could include any misrepresentation of facts pertaining to the HDSA ownership, management control or any other such regulatory compliances.<sup>109</sup> The DTI also came across several kinds of misrepresentations that were being made by companies to obtain government contracts, such as;

- i. Window dressing which was a process of appointing HDSA persons as a “token” without actively participating in the activities of the corporations,*
- ii. Benefit diversion which means that the economic benefits that the corporations derived because of their fabricated BEE status, in no way benefited or flowed down to the HDSAs, and*
- iii. Opportunistic intermediaries is a corporation that leverages another enterprise's favourable B-BEE status through contractual agreements. The circumstances of the transaction generally include restrictions concerning the identity of the opportunistic intermediary's proprietary information (suppliers and clients), contractual terms that are not considered fair and reasonable, and other indicators of fronting activity.*

All the above methods were utilised by businesses to invariably retain control of the operations of the companies while still reaping benefits of government contracts, finding creative schemes to invade government checks and making it almost impossible to monitor.<sup>110</sup> The DTI in its investigations reported 37 cases of fronting between 2006-2007,<sup>111</sup> and the BB-BEE Act does not provide for any stringent punitive action that can be taken against the guilty businesses besides

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<sup>108</sup> E. Hoffman (2008), A Wolf in Sheep's Clothing Discrimination against the Majority Undermines Equality, While Continuing to Benefit Few under the Guise of Black Economic Empowerment, Syracuse Journal of International Law & Com.

<sup>109</sup> Section 2, BB-BEE Act.

<sup>110</sup> A. Kassner (2015), Diggin' Deep into Gold Fields: South Africa's Unrealized Black Economic Empowerment in the Shadows of Executive Discretion, Cornell International Law Journal.

<sup>111</sup> Department of Trade and Industry (2009), BEE Guidelines, [www.dti.gov.za](http://www.dti.gov.za).

blacklisting them from any further government released tenders. This lack of power and intent of the state to prevent the contravention of the BEE policy acts as an encouraging tool to future wrongdoers. It can be however argued that since fronting tends to include misrepresentation of data and information pertaining to corporate bodies which are regulated by law, can be construed as fraud and hence be a valid stand for prosecution.<sup>112</sup> Furthermore, what was more disheartening was the involvement of well-established and JSE listed mining companies in these transgressions of fronting, political influence and misrepresentation of facts that benefitted non HDSAs, that were reported by the media between the years of 2010-2011. It was the magnitude of the BEE governance in the mining sector that also endorsed the problems that engulf this sector for the meaningful implementation of the BEE policy.<sup>113</sup> Since “fronting” is primarily used in the tender system to obtain government contracts, it not only violates the basic tenets of the BEE policy but also hampers the development of small business and other ordinary companies to benefit from the BEE system.<sup>114</sup>

Critics of BEE especially the ownership element of the empowerment process have called this a systematic approach of white business to “buy off the leadership of the black resistance movement” by providing them with extreme financial incentives.<sup>115</sup> The above research shows that the failures in implementation of the ownership element of the BEE policy and the subsequent Mining Charter have failed to make inroad in addressing the socio-economic inequality present in the mining sector. One of the reasons given to encourage a narrow top-down approach to empowerment was to deracialise the top of the society however any changes made in the economic status of the political elite has not benefitted the working class. Research conducted by the World Bank to measure inequality highlights that inequality in South Africa has worsened since 1994 even though there has been a decline in poverty.<sup>116</sup> The political bourgeoisie were previously considered the voice of the working class against the big mining houses, however since the new distribution of power and the ownership granted to these political elite has not bought much change in the conditions of the working class. It was presumed that the political elite would act assertively to develop and promote policies for the benefit of the working class, both in the private and public sector. In fact, former President Mbeki who was a primary supporters of the narrow approach of ownership criticised the black capitalists stating that “black capitalism rather than being the antithesis” to white minority

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<sup>112</sup> E. Kalula and A. M’Paradzi (2008), Black Economic Empowerment: Can There Be Trickle-Down Benefits For Workers?, *Speculum Juris*.

<sup>113</sup> A. Thomas (2014), Media-Reported Corporate Governance Transgressions In Broad-Based Black Economic Empowerment Deals In The South African Mining Sector, *African Journal of Business Ethics*.

<sup>114</sup> E. Shava (2016), Black Economic Empowerment in South Africa: Challenges and Prospects, *Journal of Economics and Behavioural Studies*.

<sup>115</sup> Moeletsi Mbeke as quoted in *Supra* note 78.

<sup>116</sup> <https://www.worldbank.org/en/country/southafrica/overview>.

capitalists has actually conformed to a form of “parasitism”,<sup>117</sup> continuing with the injustices of the past.

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<sup>117</sup>Thabi Mbekei as quoted by S.Andreasson (2007), *The African National Congress and its Critics: “Predatory Liberalism”, Black Empowerment and Intra-alliance Tensions in Post-apartheid South Africa, Democratisation.*

#### 4. OTHER OPTIONS TO ENCOURAGE OWNERSHIP OF ASSETS BY HDSAS

As discussed above, the new attempts made by the government to ensure a broad-based empowerment of HDSAs has been considered to be a reasonably viable answer to improvement of HDSA economical stature. Increasing the skills of HDSAs will further encourage a sense of entrepreneurship and confidence in the positions they are employed in and benefit both themselves as well as the corporations. This chapter will discuss the other options that can be utilised to encourage ownership of the resources and the companies engaging in the extractive sector, by HDSAs.

The initiation of affirmative action and HDSA development policies brought about unprecedented changes in the economic stature of HDSAs and the role they play in the economy at large. The steps taken both by the government and the corporate sector for the empowerment of HDSAs has led to a dramatic increase in the economic affluence of HDSA persons from 22% in 1995 to 41% by the year 2000,<sup>118</sup> the black ownership of capital on the JSE is also on a rise due to the result of a number of industry charters. Even after the introduction of the BB-BEE Act which called for a broader empowerment structure, equity transfer still remains a significant component of BEE empowerment with the highest score on the BEE scorecard still reliant on equity ownership by HDSAs.<sup>119</sup> As discussed in the previous chapter one of the hurdles for actual equity ownership provided to HDSAs was their lack of knowledge pertaining to the operations of the corporations. Since the onset of BEE and empowerment deals that were implemented by corporations and well known HDSA entrepreneurs, it was the lack of capital availability which has continued to pose as continuous hurdle for these deals to withstand the test of time.<sup>120</sup> It has been widely discussed that empowerment deals have been deemed unsustainable due to the short-sightedness of the parties involved, the deals that have expensive funding structure with the shares of the entities being sold at a premium relying solely on the share price movement have invariably failed to add benefit to any party involved.<sup>121</sup>

In order for an empowerment deal to deliver value to all its stakeholders it has to be structured in a robust manner taking into considerations all possible economic and market scenarios.<sup>122</sup> There has been considerable development in the growth of the new black affluent class since 1994 which is on

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<sup>118</sup> R. Burger, R. Burger and S. van der Berg (2004), Emergent Black Affluence and Social Mobility In Post-Apartheid South Africa, Development Policy Research Unit November 2004 Working Paper 04/87.

<sup>119</sup> Generic scorecard- Codes of Good Practice, BB-BEE Act, 2003.

<sup>120</sup> A. Makhunga (2008), Black Economic Empowerment and its Impact on Wealth Creation in the New South Africa, University of Pretoria.

<sup>121</sup> D. Molapo (2008), Factors influencing Financial Structures in Mining Empowerment, University of Pretoria.

<sup>122</sup> I. Albinski (2007), How to Build a BEE Deal That Lasts, Business Day.

a steady rise,<sup>123</sup> it this increase this affluence which would also make available the funds which could be viably used for investments into existing and emerging businesses of the economy.

This chapter will be discussing the benefits of having a well-developed and robust retail stock market in developing countries like South Africa, and how the presence of such a capital market will also enable the state to encourage empowerment and the HDSAs to take their empowerment in their own hands.

#### **4.1 Benefits and Need for Development of Stock Markets in Emerging Economies**

As discussed in the previous chapters empowerment deals are highly capital intensive especially in the extractive sectors. Due to the paucity of capital available to HDSAs historically, the HDSA shareholder had to depend on financial assistance either from the state, the white owned businesses that were providing shares to the HDSAs or private financial institutions.<sup>124</sup> The need for capital not only arose due to the historic disadvantage of HDSAs but also due to the decision of old business and the state to encourage equity distribution to just a few beneficiaries rather than encouraging an equity disbursement system to various beneficiaries.

The targets that were established by the enactment of the Mining Charter calling for 26% black ownership are extremely high reaching and would require funds amounting to R180 billion which would need the participation of both the private sector and the state.<sup>125</sup> The primary source of funding for majority of the empowerment deals concluded between the years of 1994-2004 were from third party financial institutions, who were expected to fund these deals without insisting on “traditional security” from the borrower in this case the HDSA shareholder.<sup>126</sup> This was further reiterated by the implementation of the Financial Services Charter which allocated R80 billion for financing various aspects of BEE.<sup>127</sup> A number of methods have been used in order to achieve the targets set by the state, but the key aspect in all the methods was the mobilisation of funds which would increase ownership and entrepreneurship. The previous empowerment models were highly dependent on third party provided funds for acquisition of equity, as the shares that were being provided to the HDSA shareholders were not a small quantity and hence required large amounts of funds to be completed. This led to the development of special financial arrangements which made these deals highly leveraged in nature, with corporations being under pressure to meet the set targets and HDSA

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<sup>123</sup> See *Supra* note 115.

<sup>124</sup> See *Supra* note 105.

<sup>125</sup> *Ibid.*

<sup>126</sup> K. Sartorius and G. Botha (2008), Black Economic Empowerment Ownership Initiatives: a Johannesburg Stock Exchange Perspective, Development Southern Africa.

<sup>127</sup> Financial Sector Code as amended in 2017, <https://fstc.org.za/pdf/fsc-codes/gazetted-amended-fsc-dec2017.pdf>.

shareholders having to comply with financial arrangements that beneficial for them.<sup>128</sup> It can be argued that it was this rush to meet targets that lead to the failure of empowerment deals, as it has been observed that only robustly structured cash flow-based deals have the ability to add value to the companies and the relevant stakeholders.<sup>129</sup>

The black middle class has been increasing at a phenomenal rate of 21% per year more than eight times faster than the adult population of South Africa as a whole, this growing middle class has also been the main beneficiaries of the BEE policies of the state.<sup>130</sup> It is this growing middle class that was gradually participating in the economy pursuant to the myriad of opportunities that were being made available to them due to the market expansion post 1994 and the legislative advancement through the BEE policies.<sup>131</sup> Since the advent of democracy in 1994 and the initiation of BEE policies pertaining to education and skill development the income of HDSAs has been steadily increasing. In growing economies such as South Africa. The majority populace has only recently started being integrated in the economic functioning's of the state. One of the key features of the apartheid era was the restriction of access of the economy by HDSAs, this rudimentary education that was imparted to HDSAs acted as a handicap for them to progress economically even after the end of apartheid. For the stock market in South Africa to develop on a retail level and to encourage the upcoming HDSA middle class population to invest their saving in equities it is imperative for them to be educated about functioning of the stock market. This education must be both on an individual as well as a firm level, as at the firm level it is important to "allay the fears" by highlighting the virtues of listing for the companies. At the level of retail individual investors, stock markets can be used to tap in the financial resources which exist outside the financial system by providing training on the functioning of the stock market.<sup>132</sup>

It has been hypothesised that in growing economies such as South Africa, stock market development and income levels work in tandem with each other.<sup>133</sup> In order for new businesses to develop rapidly especially ones controlled or managed by HDSA shareholder, the stock markets can play a vital role for their economic enhancement as stock markets tend to mobilise and allocate funds efficiently

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<sup>128</sup> W. Jackson, T. Alessandri and S. Black (2005), The Price of Corporate Social Responsibility. The Case of Black Economic Empowerment Transactions in South Africa, Working Paper No. 2005-29, Federal Reserve Bank of Atlanta.

<sup>129</sup> A. Fauconnier and B. Mathur Helm (2008), Black Economic Empowerment in the South African Mining Industry: A Case Study of Exxaro Limited, Southern African Journal of Business Management.

<sup>130</sup> As per the Livings Standards Measure as cited in R. Southall (2006), The Logic of Black Economic Empowerment, Danish Institute for International Studies Working Paper.

<sup>131</sup> L. Schlemmer (2005), Lost in Transformation: South Africa's Emerging Middle Class, Centre for Development and Enterprise Occasional Papers.

<sup>132</sup> C. Yartey and C. Adjasi (2007), Stock Market Development in Sub-Saharan Africa: Critical Issues and Challenges, International Monetary Funds Working Paper.

<sup>133</sup> V. Garcia and L. Liu (1999), Macroeconomic Determination of Stock Market Development, Journal of Applied Economics.

along with providing the stock buyer the right of trading the said equities easily thereby reducing their risk of loss.<sup>134</sup> Mining projects have a long gestation period and any return on investment is only expected at the stage of production, a liquid stock market has the ability to reduce the downside risk and costs of investing in projects that require a long-term obligation of capital, as the shareholder has the liberty to dispose the shares owned by him at any given time. A liquid stock market provides investors the opportunity to invest in long term profitable projects along with providing them access to their wealth prior to the completion of the project and distribution of profits.<sup>135</sup>

The empowerment deals that were structured though in the face of it provided HDSA shareholders with equity in the white owned businesses however there were several limitations that were put upon the HDSA shareholders with respect to their shareholding. Most empowerment deals called for a lock-in period by virtue of which the HDSA shareholder(s) were bound to hold the equity provided to them for a certain period of time in order to maintain the BEE status obtained by the companies by sale to HDSAs. Lock in clauses in empowerment deals limit the decision-making capabilities of the HDSA shareholder by not only curbing their involvement in the functioning of the companies but also their ability to make profits and minimise their risks by disposing their shares as per their own volition. Lock in clauses in empowerment deals contributed to continued indebtedness of HDSA investors.<sup>136</sup> It is this restriction in economic activities that was imposed upon HDSA shareholders that calls for the development of a liquid open stock market which would enable the HDSA shareholder to utilise their equity for their own economic development, stock markets are not only an important tool for the utilisation of savings but also a profitable self-liquidating investment.<sup>137</sup>

The development of stock markets also works as a two-fold safety net for HDSA shareholders, a well-established stock market will protect investors from idiosyncratic risks<sup>138</sup> of investing only in certain projects that are provided to them. By having a myriad of projects available to invest in, the HDSA investor will be able to maintain a varied portfolio of assets, which would make available the equities to different investors thereby encouraging higher output growth.<sup>139</sup> A well-functioning stock market empowers retail investors to invest their capital in productive projects at a relatively low cost,

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<sup>134</sup> C. Adjasi and N. Biekpe (2006), Stock Market Development and Economic Growth: The Case of Selected African Countries, African Development Review.

<sup>135</sup> R. Levine and S. Zervos (2010), Stock Market Development and Long Run Growth, Journal of World Bank Economic Review.

<sup>136</sup> See *Supra* note 105.

<sup>137</sup> Q. Khetsi and I. Mongale (2015), The Impact of Capital Markets on the Economic Growth in South Africa, Journal of Governance and Regulation.

<sup>138</sup> See *Supra* note 134.

<sup>139</sup> M. Devereux and G. Smith (1994), International Risk Sharing and Economic Growth, International Economic Review.

but the results of growth remain the same irrespective of the size of the equity transfer.<sup>140</sup> The failure of debt finance for fulfilling the BEE agenda has been witnessed by South Africa in the fall of several ventures that were considered to be the pinnacle of affirmative action but were based on an inappropriate funding structure. Moreover, most financial institutions are risk averse and extremely picky when it comes to providing and prefer providing loans only to safe-borrowers. Bank loans in developing nations may be limited to selected group of companies or individuals, however stock markets can finance “risky, productive and innovative investment projects”.<sup>141</sup> Whereas a well-functioning stock market will enhance a firms access to finance as a transfer of shares for funds is a straight forward process.<sup>142</sup>

In a nation like South Africa where societal transformation is not only an aim but a need to rectify the damages of the bygone era, it is imperative for the businesses to engage in sound business practices. In emerging markets corporate governance is its nascent stages and not very developed, however the stock markets are the first organisations that dwell into ensuring corporate governance measures are implemented by the companies listed on the exchange.<sup>143</sup> In most nations the need for development of stock markets arise due to the need of the state to borrow from its population and also for the further growth of the emerging private sector.<sup>144</sup> Trading of business equity on the stock market assists in developing a liquid trading and price determination mechanism, which can be beneficial to both short- and long-term investors on the basis of the current prices of equity on the exchange.<sup>145</sup> The economy of South Africa is developing at a competitive pace with an increase in new businesses and old businesses making attempts to meet the empowerment requirements as regulated by the state. Stock Markets encourage a free and independent system for equity sale and purchase which acts as a further incentive for investors, as investors would be disinclined towards a market segment in which fair competition is stifled.<sup>146</sup> Research has empirically shown that countries with well-developed capital markets experience higher economic growth, and in the case of African nations it has been observed that countries that have introduced reforms for the development of capital markets have grown at a relatively higher and sustainable rate than others.<sup>147</sup>

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<sup>140</sup> M. Dailami and M. Atkin (1990), Stock Markets in Developing Countries: Key Issues and a Research Agenda, World Bank Policy Research Working Paper.

<sup>141</sup> G. Caporale, P. Howella and A. Soliman (2004), Stock Market Development and Economic Growth: The Causal Linkage, Journal of Economic Development.

<sup>142</sup> C. Osakwe and A.C Ananwude (2017), Stock Market Development and Economic Growth in Nigeria: A Camaraderie Reconnaissance, Research Journal of Economics.

<sup>143</sup> See *Supra* note 111.

<sup>144</sup> E. Arowolo (1971), The Development of Capital Markets in Africa, with Particular Reference to Kenya and Nigeria, Staff Papers International Monetary Fund.

<sup>145</sup> See *Supra* Note 140.

<sup>146</sup> M. Vaughn and L. Ryan (2006), Corporate Governance in South Africa : A bell-weather for the continent. Corporate Governance.

<sup>147</sup> See *Supra* note 137.

## 4.2 JSE Empowerment Measures

The JSE is one of the oldest and most well-established stock exchange with a market capitalisation of 12,520.972 ZAR billion as on November 2018. Understanding the need of the of empowerment and the evidence that a liquid well-functioning stock market would play an active role in the economic development of the state, the JSE has developed the “empowerment segment” which is secondary market for HDSA shareholders to trade the equity that has been provided to them bide employee share stock options and other BEE share schemes. This would enable HDSAs to engage the securities market in a regulated fashion. This process of would also ensure that only HDSA shareholders are able to trade in the equities which are specifically reserved for them.<sup>148</sup> This systematic approach to sale/purchase of equities by HDSAs is also beneficial to the companies listed on the exchange as it provides them with the “comfort of perpetual empowerment, because as long as it is listed, it will ensure they retain their empowerment credentials”.<sup>149</sup> These factors will aid in the development of a robust stock market as there will be a constant supply of securities that would be listed on the JSE which can be acquired by the growing black middle class. By the presence of a responsible liquid stock market the safe investors of the industry which would include pension funds and provident funds are also enticed to invest in the market. This would amount to indirect ownership by HDSAs, however the ultimate benefit of this stock ownership would empower the HDSA contributors of these funds. The indirect ownership of companies listed on the JSE is not recognised for determining prescribed ownership targets, but arguments have been made to the DTI to consider black pension monies count as a qualifying criteria for the targets of BEE, as this would provide formal recognition to these funds and give them the capacity to influence the investments.<sup>150</sup> This method would be a suitable method to determine ownership of the JSE, 15% of the shares owned on JSE are held by pension funds which are linked to trade unions,<sup>151</sup> which is a dramatic increase in ownership by HDSAs over a period of 10 years.

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<sup>148</sup> <https://www.jse.co.za/empowerment-segment>.

<sup>149</sup> JSE rival ZAR X wants to be a specialist for black economic vehicles (2018), <https://businesstech.co.za/news/business/251487/jse-rival-zar-x-wants-to-be-a-specialist-for-black-economic-vehicles/>.

<sup>150</sup> See *Supra* note 95.

<sup>151</sup> N. Natrass and J. Seekings (2010), *State, Business and Growth in Post-Apartheid South Africa*, Research Programme Consortium for Improving Institutions for Pro-Poor Growth.

## 5. CONCLUSION

In this research paper a study was conducted to assess the affirmative action policies that have been implemented by the state of South Africa for the economic inclusion and upliftment of the HDSAs. Chapter 2 of this research focused on the history of segregatory laws highlighting the systematic enforcement of anti-black legislations especially with regards to the mining sector. The chapter focused on the need for affirmative action policies to be implemented in South Africa to reduce the pre-existing disparity (economic, social and educational) between the white and HDSA population. This chapter also discussed the initial regulatory measures prescribed by the democratically elected government for the re-integration of HDSAs in the political and economic mainstream.

As one of the primary aims of the new government was to ensure the HDSA population was provided with ample opportunities to obtain ownership in the economy of the state, a number of laws were enacted with specific focus on ownership and skill development. It is noteworthy that liberalization has also played a vital role in the voluntary initiatives taken by corporations to assimilate the HDSA population into the mainstream. The first attempts to reintegration of the HDSAs were voluntary measures taken by the big business conglomerates, research has shown that these steps were taken to protect themselves from the radical policies of nationalization and expropriation that were popular in the freedom struggle. In Chapter 3 the primary laws that impact the mining sector were discussed including the MPRDA which was a path breaking legislation in the case of South Africa as it provided the government with the discretion to only permit those companies to exploit the natural resources of the country that took stringent steps for the socio-economic development of HDSAs.

The Mining Charter was a further initiative undertaken for the transformation of the industry laying down a number of steps a mining company had to comply with respect to transformation of the sector and be in line with the BEE policy of the state. Both the MPRDA, the Mining Charter and its amendments were focused on ensuring a transfer of ownership of mining assets to HDSAs. In this chapter number of sources were examined to determine the invalidity of the ownership element of the Mining Charter and how it has only benefited some politically connected individuals rather than the HDSA population at large. The research shows that white companies engaged with the well-connected politically associated individuals and got into business with them to protect themselves. A number of factors have been discussed showing the reasons for the selection of the political elite, and the narrow approach of transformation undertaken. Most of the deals that were concluded with the elite have fallen through the crack of the global meltdown or made them extremely rich without any benefits reaching the poor.

Even changes brought forward by the state after understanding the shortcomings of the narrow approach are very limited as ownership is still a key component of the policies and the other targets for the elements of skill development and procurement can be set off if any company meets the ownership requirements as prescribed. The chapter discussed the various methods that were used by companies to provide ownership to HDSAs and their shortcomings. In Chapter 4, the benefits of the stock market were discussed and how the listing of mining company equities could be traded freely by HDSAs enabling them to engage meaningfully in the functioning of the organizations. In this research I conclude that even though measures have been taken by the state to encourage broader based empowerment by the enactment of the BB-BEE Act the over emphasis on ownership initiatives has slowed down the process of transformation and transgressed from the primary objective of social development to individual development.

In the next chapter emphasis was given to the idea of listing of securities and stock market investments as a tool of empowerment by enabling HDSA investors to procure shares in companies that would get listed on the stock exchange to raise capital. Evidence was provided which emphasized on the benefits of a liquid stock market and its development in emerging economies. Raising capital by listing securities on the stock market is beneficial to both the corporates and the HDSA shareholder on the basis of diversification. This theory has been accepted by Kenya in Mining Act, 2016 which calls for listing of mining securities on the stock exchange to encourage local participation and raise money for the capital-intensive mining industry. I conclude that BEE is a requirement of South Africa and is needed to ensure integration of the HDSA population in the mainstream economy and functioning of the state, however the approach of focusing on ownership as opposed to excessive focus of skill development is fuel to the critics of affirmative action. Retail stock markets have proved economically sound in many emerging markets and have also helped in improving the corporate governance structures of companies listed on the stock exchange.

## **Recommendations**

The government in association with the JSE should encourage stock market participation of HDSAs by providing education and information on the stock market and the benefits of participation should be highlighted to HDSAs.

Upcoming mining companies should also be encouraged to raise the capital needed by them for their operations by way of listing on stock markets as opposed to debt finance via banks.

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