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Are Share Options an acceptable form of shareholding in terms of the Mining Charter?

A question that we as BEE consultants are often faced with is whether Share Options are an acceptable form of shareholding in terms of the Broad-Based Socio-economic Empowerment Charter for the Mining and Metals Industry 2018.

Amid the Broad-Based Socio-economic Empowerment Charter of 2018 (the "Charter") confusion and how it impacts the B-BBEE status of mining organisations, answers have finally come in the form of caselaw. In this article we aim to provide an alternative ownership structure solution to the mining industry.

What are the minimum 'ownership requirements' in order to be issued with a mining licence?

The Mining Charter requires an organisation to have the following shareholding to comply with the policy and be issued with a mining licence:

- **30% minimum black shareholding to be distributed as follows:**

- **5%** to qualifying black employees;
- **5%** to black mining communities;
- **20%** to a black entrepreneur, of which 5% must be to a woman.

The question is therefore: Can mining organisations use Share Options as a valid form of ownership as is permitted by the Companies Act 71 of 2008 (the "Companies Act") as well as paragraph 3.13 of statement 100 of the B-BBEE Codes?

A Share Option can briefly be described as a contractual right to buy a share in a company within a predetermined period, with the holder of the right exercising voting rights and holding the economic interest attached to the option without any restrictions.

On 21 September 2021, a full bench of the Gauteng division of the High Court delivered a brutal anonymous judgement in *Minerals Council of South Africa v The Minister of Mineral Resources and Energy and Thirteen Others 2022 (1) SA 535 (GP),* confirming that the mining charter 2018 is simply that, a policy and not legislation.

Many clauses of the Charter have been set aside, including those that set the BEE ownership requirements in stone. This judgement is welcomed by investors who have been withdrawing from mining ventures, and will promote *B-BBEE compliancy.*

In conclusion:

This means we can be guided by the Companies Act as to how the above shareholding can be held; therefore, as long as voting and economic rights are ceded, share options must be accepted as a valid form of ownership when applying or reapplying for a mining licence.

If you comply with the Charter, you will of course also comply with BEE regulations as the Revised Codes of Good Practice have a less stringent regulation of 26% (25%+1) ownership and various means to achieve this. As can be seen from the above, share options play an important role in achieving the objectives of the BEE Act as they provide an opportunity for black people to acquire rights of ownership in businesses while looking for finance and funding to acquire the shares outright. *SERR Synergy specialises in unique solutions for implementing ownership transactions, including Share Options.* Our *BEE consulting services* range from basic elementary requests to the most complex and integrated BEE solutions specifically aimed at addressing B-BBEE challenges.

About the Author: Deseree-Lee van der Watt completed her LLB degree in 2013 at the University of Pretoria and has worked in the BEE industry since 2008. She currently holds the title of Bloemfontein BEE Manager.