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Black economic empowerment and state-business relations in South Africa: the case of mining

Introduction

South Africa's negotiated transition to democracy hinged on bargains reconciling incumbent white economic elites with ascendant black political elites, whereby African National Congress (ANC) commitments to economic liberalisation would be accompanied by deracialisation of private-sector ownership through black-economic empowerment (BEE) (von Holdt 2013). As one of the ANC's key redistribution strategies, BEE was institutionalised under the Mbeki Presidency through legislation requiring larger companies operating in licensed sectors or seeking state tenders to pursue affirmative action in employment and procurement, alongside meeting targets for equity ownership by historically disadvantaged South Africans (HDSA). Mining has been pivotal to BEE as the industry with the largest BEE deal value, with an estimated R101bn transferred through equity sales in established mining companies to HDSA between 2000-2105 (Intellidex, 2015). However, BEE policy for mining has been subject to fierce and prolonged contestation. This has revolved around complex, multi-faceted disagreements over the design and implementation of the Mining Charter, a landmark BEE policy document introduced in 2004 after years of fraught negotiation. The Charter has since gone through several iterations, the latest published in September 2018.

The paper analyses the processes shaping the Charter's successive iterations, focusing on ownership transfer, its most contentious aspect, and drawing on case study material from platinum-group metals (PGM) mining, the most important mining sub-sector by employment, and pivotal to the Charter's design and implementation (Capps 2012a). Through this, the paper provides new analysis of the outcomes of BEE for the political economy of South Africa. The underlying aim of BEE policy was to provide a relatively market-friendly means of

redistributing wealth and gradually deracialising control of the private sector, with its ANC architects envisaging the formation of a ‘patriotic’ black capitalist class, who would align industry with government at the economy’s ‘commanding heights’, around a progressive developmental agenda (Southall 2004). Extant literature on BEE is predominantly from the late-Mbeki and early Zuma presidencies (Iheduru 2004, 2008; Gumede 2008; Freund, 2007; Tangri & Southall 2008; Taylor 2007; Mbeki 2009; Ponte 2007; Butler 2011). While taking different positions on its redistributive efficacy, this literature broadly agreed BEE had increased alignment between white economic and black political elites, though more around maintenance of South Africa’s liberal economic framework than a progressive developmental agenda.

However, as this paper argues, this process of alignment has increasingly unravelled over the past decade due in part to the shortcomings of BEE. The downturn in the commodities cycle exposed the inherent fragilities of conventional BEE asset transfer models, which the paper argues represent a form of ‘financialised redistribution’. The model typically involved highly-leveraged share purchases, with redistributive outcomes hinged on volatile equity returns and the vagaries of global commodity markets, alongside a form of ‘adverse incorporation’ in which BEE partners were included as owners but structurally disadvantaged through their positioning at subsidiary level and in less viable mining assets. This approach, predicated on the creation of tradable minority stakes in the existing economic base, has created some relatively successful BEE holding companies but few independent black-owned mining companies of significant scale (see also Zalk, 2017), and has therefore not facilitated meaningful transformation of economic control in the manner envisaged. In a broader context of economic stagnation, this contributed to increased factional and ideological fragmentation in the Tripartite Alliance over economic strategy and a deterioration in relations between the state and big-business as ascendant nationalist factions in the late-Zuma period pushed for

‘radical economic transformation’ involving a more confrontational, accelerated approach to ownership transfer. Ultimately, the prolonged slump in the mining sector and concomitant concerns over falling employment and investment, alongside the fragmentation of power in the ANC, has enabled the mining industry to resist these pressures to a degree. The first Charter was a fractious but ultimately negotiated compromise between white business elites and a powerful multi-class, nationalist ‘empowerment alliance’ (Capps 2012a, 325) comprising the ANC, trade unions, the South African Communist Party (SACP) and the nascent black business class. However, the intense political contestation around the third Charter reflects growing division within the Tripartite Alliance and an increasingly differentiated black business elite.

The paper uses qualitative documentary analysis to trace the complex dynamics of both specific BEE deals and more general contestation of the Charter legislation. Sources include published materials from major mining companies, trade associations, the Department of Mineral Resources (DMR) and other relevant state agencies, and investment banks. Analysis of specific BEE deals is supported with analysis of company annual reports and annual financial statement.

1: BEE and the post-apartheid political compromise

Adopted by the ANC in the mid-1990s, BEE embodies the compromises of post-apartheid transition. While the ANC would dominate electorally, the economy remained highly consolidated and white-dominated. Six conglomerates controlled approximately 85% of the Johannesburg Stock Exchange (Chabane et al, 2006), wielding enormous economic influence (Carmody, 2002). Apartheid’s racialised ownership restrictions meant the black business class was small, fragmented and lacking management experience (Iheduru, 2004). Seeking to placate white big-business and attract FDI, the ANC underwent ideological conversion and abandoned

socialist economic strategies, notably nationalisation, in favour of economic liberalisation (Carmody, 2002; Marais, 2011). Correspondingly, white big-business tacitly committed to BEE as partial transfer of equity to HDSAs, to secure political legitimacy (Bassett 2008; Butler, 2011). A fundamental tension underlies BEE. For white business elites who had initially devised the model, BEE was a means of defensive self-preservation. For liberation movement adoptees, however, BEE was envisaged as a means to a more transformative end through the formation of a ‘patriotic bourgeoisie’ of black business owners and managers (Gumede 2008; Southall 2004). Cooperation with white big-business and accumulation by a narrow, politically-connected BEE elite was intellectually justified as a phase in the National Democratic Revolution (NDR), whereby formation of a progressive black capitalist class preceded more far-reaching social change (Hart 2013, 174-181). Replacing avaricious apartheid business elites, the patriotic bourgeoisie would align government with leadership of the economy’s ‘commanding heights’ around a shared developmental programme to unmake the colonial economic structure (Southall 2004; Hart 2013).

Early BEE deal-making was ad-hoc and at the voluntary initiative of white big-business, which was rapidly internationalising (Carmody 2002; Murray 2000). Widespread disillusionment with this process within the nascent black business class (Murray, 2000) propelled government legislative initiatives, culminating in the 2003 Broad-based Black Economic Empowerment (BB-BEE) Act, the 2007 Department of Trade and Industry (DTI) Codes of Good Practice, and Charter documents for sectors subject to licensing, like mining and finance, that set targets for HDSA equity ownership, employment in management positions, and preferential procurement (Hamann et al 2008). Notwithstanding tense negotiations, these were ultimately welcomed by white business for their conciliatory approach (Hirsch 2005, Tangri & Southall 2008). Earlier scholarship interpreted this as indicative of increasing alignment between white big-business, BEE elites, and a business-friendly ANC leadership, around maintaining a liberal economic

framework then producing rapid growth (Tangri & Southall 2008, Taylor 2007, Iheduru 2008, Marais 2011, Mbeki 2009). As Ponte et al (2007) argue, within this framework, BEE de-politicised redistribution, rendering it ‘technical, set within the limits of codification, measurement intervals and systemic governance’, beyond popular-political demands. Taylor (2007) argued BEE was a component of a durable ‘reform coalition’ comprising liberal ANC factions and white business elites, furthering liberalisation. Cooperative state-business relations were bolstered by the accumulation opportunities for black elites created by BEE, generating a “tunnel effect” that insulates the state from popular pressures’ (*Ibid*, 191). For critics, this was at the expense of the poor, signalling a shift from racial to ‘class apartheid’ (Bond, 2005), as black business elites were ‘absorbed into the existing white economic elite ... adopting this group's ways of conspicuous consumption, attitudes and norms’ (Gumede 2008, 296). The following sections examine how this process evolved in mining.

2: BEE in the mining industry

Mining has been a central focus of BEE policymaking. For the ANC, it constituted a strategic element of the economy’s ‘commanding heights’ alongside finance and SOEs (Southall 2007). Contributing 14% of GDP and 600,000 jobs in 1994, mining diminished relative to economic output in the preceding decades, to 8% of GDP in 2017. Nonetheless, mining has remained pivotally important economically, due to the massive rents it generates in boom periods – notably during 2004-2008 – its linkages with other heavy industries and services, and its outsize contribution to export revenues, approximately 60% of which derives from minerals, metals and chemicals.¹ Mirroring wider patterns, mining ownership during apartheid was concentrated among a handful of conglomerates. Despite complex restructuring processes, this concentration was retained in the early democratic period, with mining’s capital intensity forming a

formidable entry-barrier. Voluntary BEE deal-making created some significant new black-owned mining enterprises but undershot expectations, compelling legislation. The result was the 2002 Minerals and Petroleum Resources Development Act (MPRDA), and the 2004 Mining Charter (henceforth, MC1) deriving from it. PGMs were a particular focus for policymakers, who saw them as having the best BEE potential (Capps 2012b, 323). Firstly, due to anticipated demand growth from the automotive industry as gold mining waned. Secondly, because of South Africa's dominance of global production, with the country holding 80% of the world's platinum reserves (*Ibid*; Cawthorn 2004; HSBC 1999). However, here and for other commodities, concentrated ownership was an obstacle. Following mid-1990s conglomerate restructuring, PGM mining was dominated by three companies: Anglo-American Platinum (Amplats), created from JCI's PGM assets and controlled by Anglo American; Impala Platinum (Implats), eventually unbundled from Gencor; and Lonmin, created from London-listed Lonrho's mining subsidiaries. They accounted for 98% of 1997 output – 55%, 25%, and 18% respectively – with similar dominance of resources.² South Africa was among the few jurisdictions with private ownership of subsoil minerals, and during apartheid mining conglomerates acquired large portfolios of undeveloped mineral rights (Capps, 2012a).

Government accused mining companies of exclusionary, anti-competitive hoarding, which the MPRDA addressed by nationalising mineral resources and requiring companies to apply for 'new-order' licences (*Ibid*). A 'use-it-or-lose-it' principle meant unutilised rights risked confiscation (Cawood 2004). These licenses provided a means to compel transformation, and were contingent on fulfilling MC1's BEE targets. This included HDSA ownership of 15% by 2009 and 26% by 2014, alongside targets for human resource development, employment equity, migrant labour, community development, housing, procurement, and beneficiation (DME 2004). The ownership target, the most significant element in economic terms, was for 'equity equivalent' ownership. Besides selling shares to BEE partners, the target could be met

by disposal of mining assets, operational or otherwise. In concessions to the Chamber of Mines (CoM), the mining trade association, transactions would be willing-buyer-willing-seller, at fair-value, with government ‘facilitating’ a market-driven process (*Ibid*, 7). This compromise was hard-fought. Some within the Tripartite Alliance favoured tougher measures. A leaked June 2002 draft with 51% ownership requirements shook financial markets, resulting in the more modest 26% final target (Iheduru 2008, 355). Mining companies, especially Amplats, fiercely opposed resource nationalisation and BEE-ownership targets, threatening investment strikes (Amplats 1995; Amplats 1999). However, as Capps (2012b, 325) notes, the CoM faced ‘an informal yet relatively cohesive “empowerment alliance”” comprising the ANC, SACP, trade unions and nascent black business associations. Differing on details, they were unified on fundamental principles with ‘a strongly nationalist character [that could] confront monopoly capital with a popular front claiming to represent the black majority’, and thereby force concessions (*Ibid*). The outcome was therefore much in keeping with the tenor of the broader compromises of the post-apartheid transition discussed in the previous section (*Ibid*).

3: Exchanging financial for political capital: Implementing the Mining Charter

While generally perceived as a successful damage limitation exercise, the implications of MC1 for industry were significant. The Charter introduced a range of obligations towards affirmative action in their workforce, procurement, and community development through Social Labour Plans, a fuller exploration of which is beyond this paper’s scope (see Rajak 2011; Farrel 2012). Most significant from a financial perspectives and to the wider politics of economic transformation were the ownership requirements. This section analyses the responses to this aspect of the Charter. Using examples from PGM mining, it presents a brief typology of BEE deals to illustrate the range of BEE entrepreneurs and forms of ownership transfer. Of the major

PGM mining companies, Amplats had most to lose from ‘use-it-or-lose-it’. Its spread of undeveloped rights, particularly on the Bushveld Complex’s Eastern Limb in the former Lebowa homeland, gave it ‘unique operational flexibility’ (Amplats 1995, 7), and almost double Implats and Lonmin’s combined reserves. Compelled to be proactive, it agreed with the Department of Minerals and Energy (DME, now DMR) to relinquish mining rights and establish BEE-partnerships in advance of the MPRDA (HSBC 2000). Its early deals provide the typology. The first involved the debt-financed purchase of shares in an existing operation by BEE-entrepreneurs. In 2000, Amplats underwrote former-Gauteng premiere and Robben Island inmate Tokyo Sexwale’s Mvelaphanda Resources’ (Mvela) purchase of 22.5% of Northam Platinum, which Amplats majority-owned (RBC 2001). Mvela conducted further deals in platinum, gold and diamonds, at one stage controlling the fifth-largest PGM resource-base (Amplats 2014). This model of debt-financed, vendor-backed purchases of minority-shareholdings by a politically-connected cross-sectoral holding company was replicated throughout mining and elsewhere, notably with Cyril Ramaphosa’s Shanduka. For mining companies, this involved the implicit exchange of financial for political capital. However, the range of BEE-entities is diverse, with important divergences in form and strategy. Amplats’ second transaction involved the BEE entrepreneur entering as a joint-venture partner. In 2001, Patrice Motsepe’s African Rainbow Minerals (ARM) took a 50% stake in Amplats’ undeveloped, Eastern-Limb Modikwa project, building on earlier successful entry to mining services and acquisition of gold mines in 1990s BEE deals. Motsepe, now South Africa’s fifth-richest individual (Forbes 2017), lacked ‘struggle credentials’, though counted ANC luminaries Cyril Ramaphosa, and Jeff Radebe as brothers-in-law. Rather than an investment holding-company, Motsepe created an operational mining company. Joint-ventures enabled ARM to hurdle several entry-barriers: access to reserves, smelting and refining capacity, and technical expertise. The model was, initially, favoured by the DME for these reasons. There were also

benefits for Amplats. Besides sharing capital-expenditure, it prevented dilution of existing shareholders (Macquarie 2007). ARM became an established, JSE-listed multi-commodity miner, adding a PGM joint-venture with Implats, and the exemplar for BEE entrepreneurialism alongside Exxaro in coal and iron ore.

Amplats' third deal involved a corporatised tribal authority, the 2002 50:50 joint-venture with the Royal Bafokeng Nation (RBN) for the Bafokeng-Rasimone Platinum Mine (BPRM) on land registered to the tribe. Much of South Africa's PGM deposits underlie densely-populated, impoverished former 'Homelands', and several other tribal authorities have followed the Bafokeng in becoming BEE shareholders. For tribal authorities, equity ownership appeared more lucrative than existing royalties, while for mining companies, the arrangement promised improved community relations and land access, with local political elites helping secure the operating environment. Developmental outcomes have been frequently disappointing, with a range of political conflicts over tribal authority governance, discussed extensively elsewhere (see Capps & Mnwana 2015; Mnwana 2015; Manson and Mbenga 2014; Capps and Malindi 2017). The RBN was the pioneer and most successful. The BPRM joint-venture was in 2009 restructured into JSE-listed RBPlats, the first majority black-owned PGM-focused mining company, and one of the largest black mining companies on the JSE. A 2007 royalty-to-equity deal made it Implats' largest shareholder with a 13% stake. Finally, DMR (2010) concerns over disproportionate gains accruing to a handful of BEE entrepreneurs – discussed below – saw smaller employee share-ownership programmes (ESOP) widely introduced.

The 'big three' PGM-miners used differing combinations of the above to meet BEE ownership targets. Details of the transactions, 12 for Amplats, five for Lonmin, and seven for Implats, are too lengthy for inclusion (see Gqubule 2017), but according to CoM research, weighted by value, 49% of PGM BEE-ownership transactions have involved BEE entrepreneurs, 46% 'communities' (predominantly tribal authorities) and 5% ESOPs. This compares to 60%, 29%

and 11% for mining aggregated (CoM 2015). BEE deals reflected strategic opportunism and convenience, particularly as deadlines loomed, with industry interviewees suggesting that securing BEE-partners with requisite financial capacity was challenging. Coinciding with the mid-2000s commodities boom, this made mining a key contributor to the formation of the BEE elite examined in earlier literature. As the next sections shows, however, in more recent years there have been intensifying disagreements over the measurement, quality and extent of BEE ownership transfers, while inherent weaknesses of transfer mechanisms have been exposed by the cyclical downturn in commodity prices.

4: Financialised redistribution and the fragility of BEE

As a redistributive mechanism, BEE equity transfer was market friendly in that rather than direct state expropriation of assets or increased taxation, transfers would hypothetically take place through sale at fair-value, on a willing-buyer-willing-seller basis with companies choosing BEE partners, and BEE partners able to realise value by exiting their investment. Share ownership would, hypothetically, align BEE partners' interests with existing shareholders around corporate imperatives. Deals were typically highly-leveraged, with BEE partners usually unable to purchase shares with cash, and redistributive outcomes contingent on equity returns. BEE was therefore a highly financialised form of redistribution in its functioning and logics. Figure 1 provides a stylised representation of the mechanism. BEE partners commonly purchased shares via a special purpose vehicle (SPV) with credit from commercial banks, development finance institutions or the vendor mining company. The shares purchased acted as collateral, with dividend payments enabling loan-repayment and, subsequently, income for BEE-beneficiaries.

Figure 1: Stylised model of BEE financing mechanism

This model functions when companies generate sufficient surplus to pay dividends and share prices are stable or rising, but it is inherently vulnerable to downturns. Without dividends debt-repayment stalls, while falling share prices erodes collateral value, entailing covenant breaches with commercial lenders. Most BEE deals were struck during the 2004-2008 boom-years, entailing high purchase-prices and accompanying debt burdens (Figure 2). Post-2008, mining equities slumped, falling further-still post-2014. In many cases, this resulted in a form ‘adverse incorporation’ (Hickey & Du Toit, 2007), to repurpose a livelihood studies concept, in which formal inclusion of BEE-partners has not produced the expected benefits due to their structural disadvantages.

Figure 2: Mining BEE Transactions and values for JSE Mining Index and JSE Platinum Mining Index, 2000-2014

Sources: Chamber of Mines; Bloomberg.

The slump has been particularly severe in PGMs, with falling metal prices hitting rising costs, profits declining and dividends halting (Table 1). These financial strains have contributed to severe labour and community conflict, met with harsh repression, most significantly in the Marikana massacre of August 2012 (Bolt & Rajak, 2016). Particularly in the case of tribal authority BEE-partners, these dynamics intersect with the financial difficulties engulfing key BEE deals (Capps & Malindi 2017). This heightened distributive pressure on companies’ dwindling cash flows, and increased socio-political tensions as anticipated benefits from BEE evaporated. The following discussion examines some illustrative examples.

Table 1: Platinum sector profit margins and dividends paid

Source: Company accounts, author’s calculations.

Lonmin's has been the most high-profile example. Incwala Resources was formed in 2004 to purchase 18% of Lonmin's operating subsidiary, Lonplats, from Implats (Lonmin 2004, 5). BEE-investors, some closely linked to Mbeki's government, purchased 53% of Incwala. Incwala struggled with indebtedness after 2008 (Investec 2010), and Lonmin facilitated Incwala's takeover by Ramaphosa's Shanduka with a \$304m loan, to avoid repeat problems with inflexible commercial lenders (Lonmin 2010). Critics see this as the apogee of reciprocal rent-distribution to a politically-connected elite, particularly following controversy over Ramaphosa's role in Marikana as a Lonmin board-member (Alexander 2013). Lonmin's unprofitability combined with the deal's leveraging entailed limited economic benefit for BEE-partners, such that Phembani, merged with Shanduka, still owed Lonmin \$376m in 2016 due to accrued interest (Lonmin 2016). One of Amplats' key BEE deals was the 2009 vendor-financed sale of 51% of the Bokoni mine to Atlatsa Resources (then Anooraq). For R3.6bn, Atlatsa gained the country's third-largest PGM resource-base, 24% of Amplats' 2004 resources (Amplats 2010; Credit Suisse 2012). However, struggling with costs, Bokoni has been perpetually unprofitable with low PGM prices, and remained heavily indebted as a result. Repeated financial restructurings culminated in Amplats writing-down their entire R3.2bn debt and equity interests in the project (Amplats 2015, 52). At the time of writing, the mine is under care and maintenance.

This and similar instances produced many BEE vehicles that are essentially insolvent, but sustained to preserve BEE credentials. Elsewhere, BEE partners have exited leaving companies with diminished BEE ownership. Notably, the aforementioned Mvela's BEE-shareholders sold their shares in Northam during 2009-2012 as share prices plummeted, leaving Northam with only 4% BEE-ownership (Northam 2015). Under DMR pressure, Northam re-empowered to reach 26%. This relates to a significant point of tension in the Charter's interpretation, discussed in greater detail in the following section, concerning questions of 'once-empowered-

always-empowered' (OEAE): do companies retain empowerment credentials when BEE investors exit, or must they 're-empower'? Difficult economic conditions in mining after 2014 emphasised the importance of this question. For example, ARM's sliding share-price briefly put its BEE trust into financial difficulties, risking its black shareholding falling below 50%, and with it the empowerment credentials of joint-ventures with Amplats and Implats (Creamer 2016). Explaining the difficulties retaining BEE shareholders in-perpetuity, Motsepe said:

You've got teachers, small business owners, shebeen queens, spaza shop owners, domestics who say to me, Patrice, my son or my daughter is at university and I can't pay the university fees. I've got shares in African Rainbow Minerals as part of the ARM-BBBEE and they have done well and I have to sell (*Ibid*).

Similar logic underlay RBH's sale of 5% of Implats, shifting capital out of mining into more lucrative opportunities provided by financial services, but putting Implats below 26%-BEE ownership (Seccombe 2016). Essentially, exiting investments is a key means of BEE-beneficiaries translating ownership into income, indeed, during periods of low profitability it may be the only means. However, this risks undermining the fundamental aim of BEE in deracialising control of the economy. This problem came to produce severe tensions between big-business and government the Charter.

5: Conflicting interpretations of change and deteriorating state-business relations

The challenges discussed in the previous section produced complex outcomes for ownership patterns. Interpretation of whether this represented compliance with the Charter and meaningful transformation of apartheid legacies has been a matter of considerable dispute. For the CoM, the industry exceeded MC1's 2014 ownership targets, with 39.5% BEE ownership

in PGMs weighted based on value transferred, and 38% for the mining industry as a whole (COM 2015). From one angle, the sector has diversified considerably. For example, in PGMs the big-three's wholly-owned mines' output-share declined from over 90% in 1997 to 60% in 2015 (Figure 3). By 2016, nine additional companies were producing, with four more developing mines.³ Other commodity groups, notably coal, have also seen a wide range of new entrants.

Figure 3: Structure of South African platinum production, 1997-2016

Source: Company annual reports.

However, for critics, most notably the DMR, the outcomes were unsatisfactory (see also Gqubule). This relates partly to disputes over measurement explored in the next section. Significantly though, the piecemeal diversification of ownership did not produce meaningful transformation of control given the absence of independent black-owned companies operating at significant scale. In PGMs, all companies came to include BEE shareholders, but by 2016 there were only three significant majority-black-owned producers, ARM, RBPlats, and the moribund Atlatsa, collectively accounting for 8% of output. Non majority black-owned companies accounted for 70% of non-big three output since 2000-2016. The only serious challenger to their concentrated power has been Sibanye, a global top-10 gold producer now the third-largest platinum producer after a recent PGM mine acquisition spree. Crucially, the big-three retained control over refining, a strategic funnel-point in the PGM value chain with massive barriers to entry. Typically, joint ventures or asset disposals were accompanied by agreements to pass output through these refineries, giving the big-three additional revenue and strategic control.

Furthermore, 'black-owned' means only formal majority ownership. In practical terms, the black-owned PGM miners have remained tightly entwined with the big-three. In Atlatsa's case,

Amplats owned 23% of the company, 49% of its Bokoni mine, and extended nearly R2bn of loans (Amplats 2016). While significant, ARM's PGM production is via joint-ventures with Implats and Amplats, which, analysts argue, allow the latter to halve risky mining capital and operational-expenditure but still capture downstream refining revenues, 'utilising more fully [their] vast beneficiation machine at a marginal cost' (JPMorgan 2005). Critics, notably the DMR (2009), argued BEE partnerships at subsidiary rather than group level restricted BEE-partners' strategic influence. For RBPlats, up until a 2018 sale, Amplats owned 33% of its operating subsidiary and 12.6% of the holding-company – a substantial portion of incomes alongside a refining offtake-agreement (Amplats 2010).

The faltering BEE progress in PGMs is reflected across other mineral commodity groups. According to Gqubule's (2017) calculations, gross black-ownership of the JSE's top-25 mining companies' South African assets fell from 16% to 12% between December 2014 and December 2016. Other commodities have been worse than PGMs for the emergence of sizeable majority black-owned firms (Gqubule 2017). The arguable exception is coal, where entry-barriers are lower and Eskom's increasing BEE-procurement a crucial enabler for smaller companies. Additionally, Exxaro was a standout BEE success as the largest majority black-owned mining company and one of the big-five coal producers. However, Exxaro lost its majority black-owned status as its BEE-SPV unwound to settle debts (Exxaro 2016), and the emerging black-owned mining companies remain small-scale relative to the five coal-majors which account for 85% of output.⁴

It is important to note in addition that DMR policymakers' focus on BEE asset transfers as the key strategic challenge for mining corresponded with relative neglect of alternative approaches to transformation, such as more progressive fiscal measures or minerals-based industrial policy (see also Zalk, 2017). While mining as a proportion of GDP decreased from close to 20% in the early 1980s to 8% in 2013, mining as a proportion of state tax revenue declined from 29%

to just 2.5% in 2013/14 (IMF 2015; Davis Tax Committee 2015). Corporate income tax rates declined from 50% in the 1980s, to 28% in 2007, while the industry benefits from redemption of almost all capital expenditure against taxable-income (Davis Tax Committee 2015, 58-59). Consequently, the IMF (2015, 9) observed South African mining ‘receives generous tax treatment relative to other sectors’. As such, effective taxation rates remained low, even at the peak of mining sector profitability in 2008 (Table 2).⁵ Since 2010, a royalty has been levied in fulfilment of the MPRDA,⁶ but this was too late to capture the spectacular resource rents of the 2000s boom (ANC 2012, 36-37). Proposals for a resource rent tax by a 2012 ANC study group have not been adopted (*Ibid*). Meanwhile, minerals-based industrial policy initiatives to spurring enterprise development and creating manufacturing employment in mineral value chains have received little serious attention, with key parts of the mining capital goods sector suffering increased import penetration (Morris et al 2012, 180-182; ANC 2012; Jourdan 2014).

Table 2: Effective tax rates by commodity

Source: Davis Tax Committee

Summarising, the first decade of legislated BEE in mining failed to produce the anticipated results. Industry compliance with the Charter produced a patchwork of highly-leveraged minority shareholdings and a handful of smaller companies that have remained closely tied to dominant players, but nothing quite resembling the envisaged patriotic bourgeoisie. The financialised mode of redistribution produced a predominantly fragile form of empowerment that proved vulnerable to the inevitable volatility of the mining industry. As the next section shows, these shortcomings had political ramifications as the government during the latter years of the Zuma presidency sought to adopt a more assertive approach to BEE.

4: Contesting transformation: the politics of reforming the Mining Charter

Alongside the events described in the previous section, the Charter and mining companies' compliance record thereof received escalating criticism. This derived not only from the DMR, but also nationalist ANC factions and elements of the black business community. Besides specific responses to the Charter, this also reflected wider processes of factional and ideological re-alignment during the Zuma administration. Zuma's election as ANC leader drew support from a complex coalition comprising leftist Tripartite Alliance factions and trade unionists seeking a more interventionist economic strategy, alongside African nationalists and black business organisations interests frustrated by the slow pace of transformation (Southall, 2009). As early analysis anticipated, the durability of the gradualist, market-friendly approach to intra-elite redistribution embodied by conventional BEE policy hinged on continued economic growth and employment generation (Freund 2007; Ponte et al 2007; Butler 2011). However, following the collapse of the commodities supercycle, the South African economy entered a prolonged stagnation with rising unemployment. Real-terms GDP per-capita increased just 1% between 2008-2017, while unemployment grew from 23% to 28%, or 36% by its expanded definition.⁷

Mounting popular redistributive pressures this became an increasingly pertinent challenge to ANC hegemony. Mining has featured prominently here at various stages, initially in demands articulated by then-ANC Youth League President, now-Economic Freedom Fighters (EFF) leader, Julius Malema, who called for wholesale mine nationalisation and denigrated existing BEE models as white-controlled (Serino 2009). Nationalisation was ultimately rejected as ANC policy (ANC 2012) with Malema subsequently expelled and the business-friendly 2012 National Development Plan reaffirming, rhetorically, commitment to a liberal economic framework. However, this heralded growing ideological and factional division over the pace

and method of economic transformation which would define the latter years of the Zuma presidency.

With this context in mind, the paper examines in closer detail government's criticism of the Charter and attempts to accelerate transformation through reform. A starting point is the DMR's 2009 Charter review, which highlighted diverging perspectives of big-business and government not simply around measuring BEE, but in questions of what constituted meaningful empowerment. The DMR argued BEE-ownership was 'at best' 9%, below the interim 15% target set for that year. Besides this, however, the DMR criticised companies for 'insidiously' integrating BEE-partners at subsidiary-level, thereby limiting their strategic influence, and for concentrating deals among 'a handful of black beneficiaries' contrary to MC1's 'spirit and aspiration' (DMR 2009, 17-18). High deal leveraging meant, it said, many BEE-partners realised limited tangible benefits as cash-flows were diverted to debt repayment, in the manner outlined in the previous section (*Ibid*).

Subsequent negotiations between the DMR, the CoM, trade unions and South African Mining Development Association (SAMDA) – representing the interests of black-owned junior mining companies – produced a moderately revised 2010 Charter (MC2). This was accompanied by a stakeholder declaration acknowledging the 'unsatisfactory' progress on transformation (DMR 2010a). MC2 advanced ownership requirements, defining 'meaningful economic participation' to include ESOPs and communities, and ensuring a percentage of cash-flows reached BEE-partners before debt repayment (DMR 2010b). Additionally, all BEE-beneficiaries would have full shareholder rights regardless of ownership structure (DMR 2010b). Overall, the reform was incremental, and proved short-lived in terms of its ability to generate consensus.

The DMR's 2015 Charter review re-opened reform disputes. Contrary to the CoM's assessment, the DMR claimed only 79% of companies met BEE ownership requirements.

While weighted (problematically, by employment) average BEE-ownership was 32.5%, only 20% (weighted) of right-holders met the DMR's interpretation of 'meaningful economic participation' (DMR 2015, 13). Calculating 'economic benefit' as share-value minus debt, plus dividends, the DMR argued 64% of right-holders had provided no economic benefit to BEE-partners (*Ibid*, 14). The CoM contested the DMR's figures, though neither fully disclose their methodology. Alongside definitions of 'meaningful' empowerment, disagreement centred on OEAE. With the Charter equivocal enough to support multiple interpretations, while government asserted OEAE for post-2004 deals was void, the CoM argued the opposite.

Applying in 2015 for a High Court declaratory order, the CoM argued removing OEAE 'undermines the sustainability of the sector', since the prospect of repeated re-empowerment deals, with attendant financing costs and dilution of ordinary shareholders, would deter investment (COM 2015b). The resort to legal recourse exemplified deteriorating relations between the state and big-business, which intensified dramatically with the DMRs efforts to produce a third Mining Charter. A first draft was published in April 2016, with a finalised version gazetted in June 2017 (henceforth, MC3-1) only to be suspended following CoM legal challenges. After a further year of fraught negotiation, a final version (henceforth, MC3-2) was published in September 2018. Rather than a technical and legal disputes between mining companies and the DMR over the design of BEE policy, this turbulent, political process reflected widening factional power struggles and ideological fissures in the ruling Tripartite Alliance over transformation.

The DMR's handling of MC3-1 typified a more assertive approach to BEE from government. ANC factions aligned with President Jacob Zuma argued for an acceleration of economic deracialisation, and a more confrontational approach to big-business, as part of a broader critique of the post-apartheid constitutional settlement and earlier BEE policy approaches (Bhorat et al, 2017). Protagonists encapsulated this with the term 'radical economic

transformation'. Adopted after the ANC's 2012 Policy Conference, this denoted a second phase of the NDR in which, having established political control, the Tripartite Alliance should more aggressively pursue economic transformation (Jonas, 2015). The increasingly populist articulation of RET by Zuma and allies comprised a more overtly confrontational use of state power against 'white monopoly capital', in particular through increased preferential procurement by state agencies and amendments to constitutional safeguards on private property around land restitution. Zuma's factional support base also came increasingly to be defined by proximity to the Gupta family, Indian businessmen at the centre of multiple recent corruption scandals involving the subversion of BEE mechanisms and SOE procurement (Bhorat et al, 2017). Given this, critics, including within the ANC, have argued this use of RET functioned as a disingenuous legitimisation narrative for processes of individual enrichment and clientelism that have come to be discussed as 'state capture' (Jonas 2016). However, while entangled with these processes, this adaptation of RET echoed broader grievances (Bhorat et al 2017). Notably, from elements of the black business community frustrated by the perceived lack of opportunities afforded by a highly consolidated private sector, the narrow range of actors benefiting from conventional BEE ownership transfer processes, and the instrumental approaches to BEE compliance from white businesses (von Holdt, 2018; Bell et al, 2018).

MC3-1 exemplified these tendencies. The Charter was promulgated by Mosebenzi Zwane, a controversial 2015 ministerial appointment whose most senior prior-position was the Free State provincial government's executive council as MEC for Agriculture. The appointment drew criticism from industry, opposition parties and some within the ANC (Mail&Guardian 2015). Besides questions over his inexperience, this related to Zwane's links to the Gupta family through the Vrede dairy scandal, a Free State agricultural development project involving multiple financial irregularities relating to Gupta-linked companies (Public Protector 2018). In one of the high-profile 'state capture' scandals, a Public Protector investigation found Zwane

to have improperly facilitated the sale of Glencore's Optimum coal mine to Tegata Resources, a company co-owned by the Guptas and Jacob Zuma's son, Duduzane (Public Protector 2016). Leaked emails revealed Zwane's CV to have been sent to the Guptas prior to his appointment, while his predecessor, Ngoako Ramatlhodi, claimed he was sacked shortly after refusing to cancel Glencore mining licences to expedite the sale (Sole & Comrie 2017).

Zwane's governing style was more confrontational and unilateral in its approach to big business, with his legislative agenda centred on radical reform to the Charter. In contrast with the extensive dialogue – albeit tense and fractious – leading to MC1 and MC2, the MC3-1 draft was published unexpectedly in April 2016, with limited prior industry consultation and a month for submission of responses (DMR 2016). The draft proposed a significant expansion of ownership requirements, most notably by terminating the OEAE principle. It was opposed by industry, and caused considerable alarm among investors and industry analysts (Deloitte 2016). However, the finalised MC3-1, gazetted in June 2017, pushed further. BEE ownership targets were raised to 30%, with mandatory 8% shares for communities and workers (DMR 2017a 7-8). Existing right-holders below the 30% level would have one year to re-empower (*Ibid*, 10), with a requirement that this level be maintained following restructurings or share offerings (*Ibid*, 8). New prospecting rights, meanwhile, would have to be majority black-owned (*Ibid*, 7). Additional measures sought to increase the financial benefits deriving from ownership. Notably, a minimum 1% of revenue would have to be paid 'prior to and over and above' ordinary dividends, alongside write-offs of all outstanding BEE-partner's debt after 10 years. Additionally, BEE-shareholders would take 'direct' control over 'transportation as well as trading and marketing of the proportionate share of the production' (*Ibid*, 9). The Charter, Zwane argued, gave 'practical expression to the meaning of radical economic transformation' (Zwane 2017).

The CoM's response was to pursue immediate legal recourse, precipitating a near unprecedented deterioration in state-business relations in the mining industry as big business mobilised to obstruct the ANC's legislative agenda. A fortnight after the Charter's publication, the CoM lodged an application at the High Court for an urgent interdict preventing the Charter's implementation pending a judicial review. In its founding affidavit, the CoM argued the Charter was 'unlawful' and should be set aside. The reasoning is too complex to outline in the space available here, but relates to Zwane exceeding his powers as minister in the procedures leading to publication, contested interpretations of the MPRDA, and numerous definitional ambiguities around ownership requirements (see *Chamber of Mines vs Minister of Mineral Resources* 2017a). Calling it an 'unmitigated disaster' for employment, the CoM raised the threat that mining companies would effectively freeze investment (*Ibid*). These warnings around investment repercussions were echoed by key international capital market actors, notably credit rating agencies who surmised that 'government is prioritising radical transformation even if this leads to weakening of the business climate' (Fitch, 2017; Moodys 2017).

The DMR's answering affidavit attempted to refute the Chamber's legal arguments, with Zwane calling the interdict 'an attempt to block effective and meaningful participation of black persons in the mining and minerals industry', and claims around economic impacts 'overstated' (*Chamber of Mines vs Minister of Mineral Resources*, 2017b; SAGNA, 2017). This was accompanied by a threat to suspend all mining rights applications, halting new investment in the sector (DMR, 2017a). However, the concessions ultimately came from Zwane, with an agreement in September 2017 to suspend implementation of the new Charter prior to completion of a judicial review, followed by the Chamber withdrawing its interdict. As with other Zuma allies acting as proponents for RET, the confrontational approach taken by Zwane did not reflect a position of strength. As discussed above, when the CoM negotiated the

MPRDA, it faced a broad-based, multi-class ‘empowerment alliance’ (Capps 2012a). For MC3-1, however, no such alliance existed. Instead, to the contrary, the increased factional division and fragmentation of alliances that defined elite politics in the latter years of the Zuma presidency ultimately undermined this bargaining power. A range of groupings within the Tripartite Alliance came to oppose the Zuma-aligned faction’s interpretations of RET at a general ideological level, and in MC3-1 more specifically. This included the more moderate, pro-business elements of the ANC seeking to defend the liberal economic framework and orthodox interpretations of good governance (von Holdt, 2018). In the approach to the ANC’s 2017 elective conference, this faction coalesced around then Deputy President Cyril Ramaphosa and Pravin Gordhan following his sacking as Finance Minister in early 2018, and were joined by COSATU and the SACP as alarm grew over the economic and electoral impact of state capture (*Ibid*).

The Charter dispute became integrated with this intensifying factional and ideological contestation. Zuma and his core ANC allies forcefully supported MC3-1 as non-negotiable, while the Black Business Council called the document ‘effective and practical radical transformation’ (Solomons 2017). However, this was directly contradicted and ultimately undermined by Zuma’s Tripartite Alliance opponents. The Economic Transformation discussion document for the ANC’s 2017 Policy Conference, written by Ramaphosa allies, argued the Charter be re-written to improve investment competitiveness (ANC 2017). Ramaphosa himself subsequently suggested ‘both parties must go back to the drawing board’ to reach a consensus around shared interests (Creamer 2017). Then ANC Secretary General, Gwede Mantashe, circumvented Zwane to speak directly with the CoM about their concerns with MC3 (Marrian 2017). Reflecting the significant differentiation within the black business community over transformation issues, public opposition to MC3-1 also stemmed from prominent black business leaders in the major mining companies constituting the CoM

membership, notably then-CoM President and Exxaro CEO Mxolisi Mgojo, and Steve Phiri, the CoM Vice President and RBPlats CEO. The latter characterised the Charter as transformation ‘at the expense of the downfall of the economy’ with the risk that ‘capital will be chased away’ (Seccombe 2017).

This approach ultimately prevailed following the ascendancy of Ramaphosa to ANC leadership in December 2017 and to the South African presidency in February 2018. Ramaphosa sought to mark a departure from Zuma’s RET with conciliatory overtures to domestic big business and international investors, and one of the first significant moves to this effect was to scrap MC3-1. With Zwane swiftly fired and replaced by Mantashe as Minister of Mines – a move welcomed by big-business – Charter negotiations were re-opened. The re-drafted document released in June 2018 significantly weakened the key ownership provisions of MC3-1 and removed several of its more contentious elements, including restoring the OEAE principle. However, it was rejected by the Minerals Council of South Africa (MCSA) – the rebranding of the CoM which took place in May 2018 – on the basis that key ownership requirements would prove too onerous for its members and repel investment (DMR 2018a, MCSA 2018a). However, responses from other key stakeholder such as the National Union of Mineworkers, mining community representatives and SAMDA were much the opposite, pressing for increased redistribution from industry. Further phases of re-negotiation included complex consultations with a range of community groups and civil society actors to bolster procedural legitimacy. However, these took place in a context of heightened concerns over the severe deterioration of economic conditions, and the financial strains afflicting mining as a result of continued low commodity prices. As shown in Table 2, recent years have seen steady declines in mining employment, with over 70,000 jobs lost since 2012, alongside severe declines in investment.

Table 3: Trends in the South African mining industry

Source: SARB Quarterly Bulletin; DMR.

The outcome in the final published Charter gazetted in September 2018 contained a series of further significant climb-downs from the ownership requirements tabled in MC3-1 and Mantashe's June 2018 draft. OEAE was re-affirmed, with mining right-holders achieving their ownership targets and then subsequently losing empowerment partners still to be recognised as compliant (DMR 2018, 13-16). Albeit, these 'continuing consequences' would no longer be recognised for renewal or transfer of mining rights. BEE ownership levels were retained at 26% for existing mining rights, and raised to 30% only for new mining rights (DMR, 2018, 14). Requirements for majority-BEE ownership in new prospecting rights were dropped, alongside the requirement for 1% revenue (EBITDA in Mantashe's draft) to be paid to BEE beneficiaries prior to over and above ordinary dividends, the requirement for BEE beneficiary debt write off after 10 years, and the requirement for direct control by BEE beneficiaries of the trading and marketing of their attributable shares of production (*Ibid*). These all represented major concessions to industry demands. Nonetheless, MC3-2 did go further than MC2 on ownership in retaining the contentious mandatory percentage shareholdings for workers and communities, albeit lowered from 8% to 5% (DMR, 2018, 14-16). This was as 'carried interest', essentially meaning these BEE partners would not be required to purchase their shares up-front. Furthermore, this level would have to be maintained in any subsequent equity capital raising. This remains at the time of writing the major concern for the mining investors, with negotiations ongoing as to how MC3-2 will be implemented. Both Mantashe and the MCSA have sought to represent the new Charter as an act of compromise and consensus-building which will bring stability to the mining industry. However, with the underlying causes of recent years contestation of BEE in mining largely unresolved, this may prove temporary.

5: Discussion and conclusions

The financialisation of the South African economy (Ashman et al, 2011), the internationalisation of domestic big business, and consequent exposure to international capital market sentiment has shaped and constrains the ability and inclination of the state to pursue radical redistributive measures. Reflecting concerns about the mobility of mining investment, the concessions ultimately wrought from the DMR by the MCSA around the third Mining Charter discussed in the preceding section represent a significant exercise of power by big-business which re-emphasises the saliency of these constraints. Relative to Zwane's proposals, the outcomes represent a more moderate, incremental approach to transformation that implicitly leans towards growth through investment competitiveness. Combined with the adoption of pro-business rhetoric in the earlier phases of the Ramaphosa administration, it is a departure from the late Zuma era's rendering of RET. Nonetheless, this does not necessarily mark a simple return to the state-business relations characterising earlier phases of BEE legislation in the Mbeki era. Instead, unresolved tensions remain over the trajectory of transformations in the mining industry, and indeed across the wider South African economy, both between established big-business and government, and within the Tripartite Alliance, which remains riven with factional fragmentation.

The contestation around MC3 is markedly different to the processes anticipated by earlier political economy literature on BEE discussed in Section 1. This posited an increasing alignment between white economic and black political elites fostering cooperative state-business relations, with a de-racialised elite coalition created by BEE defending the liberal economic framework. As the above analysis shows, however, the relatively coherent empowerment alliance which existed around MC1 has given way to a much more complex fragmentation of competing interests and ideological positions. This fragmentation

corresponds with the emergence of intense factional contest within the Tripartite Alliance and increased differentiation within the black business class, and mounting dissatisfaction over the pace and extent of economic transformation. As has been argued above, this is in part a consequence of the shortcomings of conventional BEE policies as a form of financialised redistribution. Rather than the envisaged ‘patriotic bourgeoisie’ aligning political power with economic control, this has, despite ostensibly large transfers of wealth, predominantly created a fragile patchwork of black business interests in mining, holding highly-leveraged minority stakes in established enterprises, with ultimate redistributive outcomes hinging on volatile equity market returns.

This generated a relatively small group of high-income, politically-connected individuals among those benefitting from opportune timing in the commodity cycle for entry and exit from investments. However, in many instances inclusion of BEE partners has been through a form of adverse incorporation in which formal ownership of mining assets has not translated into meaningful economic empowerment, either in terms of income streams or the ability to exert strategic control of the industry’s trajectory (Gqubule, 2017). Independent black-owned mining enterprises operating at sectorally-significant scale are few in number, notwithstanding some success stories such as RBPlats and ARM. The industry remains characterised by racialised inequalities, with high barriers to entry for prospective entrants. Mining is an extreme case in some regards given the unusual volatility of the industry and the enduring socio-political resonance deriving from its historic role in shaping patterns of inequality, but nor is it entirely unique. Economic and political power remain broadly misaligned here and in other parts of the South African society, and as such the underlying tensions which gave rise to the severe conflicts around MC3 remain unresolved.

Correspondingly, so to do the internal contradictions and ambiguities around the ANC’s overarching approach to transformation of private sector ownership. This has been defined by an

uneasy balance between nationalist imperatives to accelerate deracialisation of private sector ownership in a manner which necessarily involves a degree of confrontation with established economic power, and a growth model predicated on maintaining a favourable investment climate (Tangri and Southall, 2008). As the article has shown, there have been significant swings in this balance during recent years. Nonetheless, the fundamental mechanics of BEE policy have remained as the basis of the state's attempts to reconcile these imperatives. As Zalk (2017) has argued, alternative approaches to economic transformation have been caught in this pincer between narrow nationalist approaches to BEE focused on ownership transfer, and the strictures of an orthodoxly neoliberal economic framework. Attempts to leverage South Africa's still-vast mineral wealth for economic diversification, the development of new industrial capabilities, and labour-intensive re-industrialisation have received scant policy attention relative to attempts to produce new tradable claims in the existing economic base (*Ibid*, Bell et al 2018, Jourdan, 2014).

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¹ Data from Comtrade and SARB Quarterly Bulletin.

² Author's calculations from company annual reports.

³ In alphabetical order: ARM, Atlatla, Eastern Platinum, Glencore, Northam, RBPlats, Sylvania, Sibanye, and Tharisa. Development projects are Platinum Group Metals, Ivanplats, Sedibelo and Wesizwe.

⁴ Author's calculations from DMR data and company reports.

⁵ The ETR is tax liability as a percentage of net pre-tax accounting profit. The difference between it and statutory rates displays the impact of deductions (Davis Tax Committee, 2015: 141).

⁶ With a minimum 0.5% payment on gross sales provides a floor, while depending on the level of profitability companies may pay up to a ceiling of 5% for refined minerals and 7% for unrefined minerals

⁷ Author's calculations from StatsSA data.