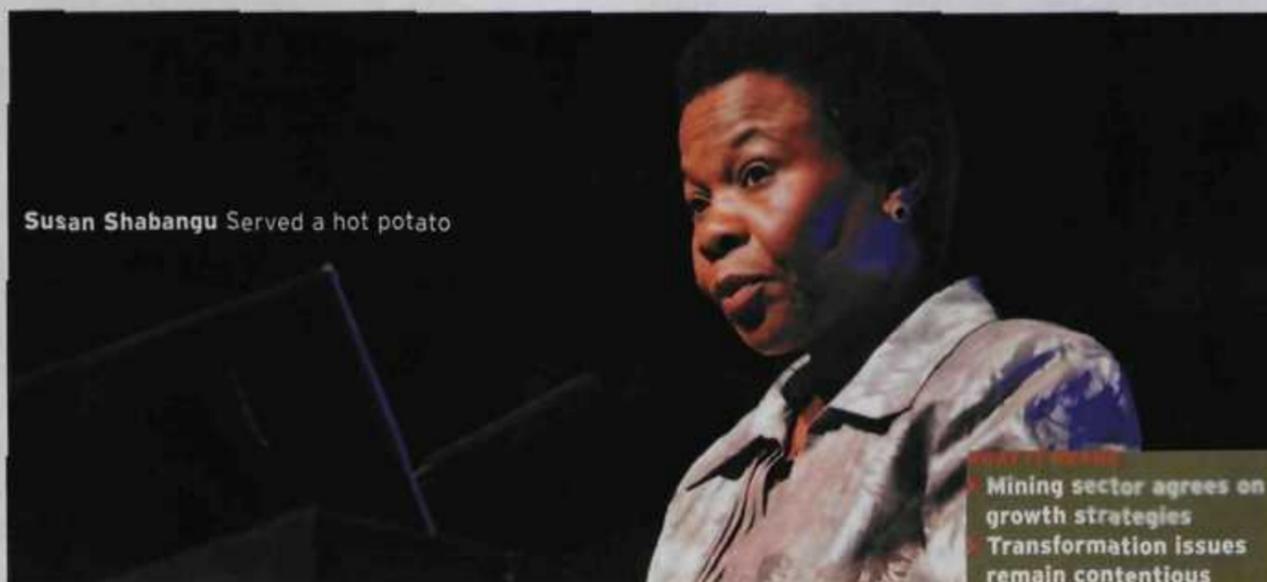


FEATURES

MINING CHARTER

Together for the long haul



Susan Shabangu Served a hot potato

Mining sector agrees on growth strategies
Transformation issues remain contentious

Mining strategy declaration includes some debatable ideas – but the empowerment review's not over

Mining minister Susan Shabangu expresses the desire to improve SA's allure to foreign investors, but her out-of-the-blue statement at a press conference last week – that mining companies will get no credits for empowerment if their black partners sell – provoked a recoil.

Another cause for alarm could be a clause in the "Declaration on Strategy for the Sustainable Growth & Meaningful Transformation of SA's Mining Industry", signed last week by industry, government and labour. It insists black empowerment investors be paid cash flow on their stake, "barring any unfavourable market conditions". It also requires them to have full shareholder rights, irrespective of the legal form of the investors' instruments.

The declaration includes previously aired and less contentious issues like the need jointly to address weaknesses in infrastructure, black representation in management, research, beneficiation and procurement from black companies.

The requirement for mining companies to have 26% black ownership by 2014 remains unchanged.

The JSE's top 20 resources shares shed 0,92% between Wednesday and Friday morning, when they began to recover some ground, compared with a 0,74% loss in the all share index in the same period.

It's hard to say whether commodities share prices were reacting to the release of the updated mining charter though, as many other factors can influence them – from China's growth rate to local currency movements.

The mining charter review to be released in August is likely to largely mirror the contents of this declaration.

SA's review of the regulatory landscape is taking place at a time when the Australian government's proposals to introduce a 40% super-tax on mining companies have caused an outcry.

Its New Labour leadership has scaled down the original suggestion, which

threatened to halt major new coal and iron ore projects.

Though some hoped this would shift the investment focus to Africa, there has also been alarm at the Tanzanian government's increase in the mining royalty rate from 3% to 4% and last month's indication from the Democratic Republic of Congo that it could require a 35% "free carry" on mining projects in future.

Webber Wentzel partner Peter Leon says the declaration is generally good and it is positive that government, labour and industry got together to chart a way forward. This improves foreign investor perceptions, as does the undertaking to amend the Mineral & Petroleum Resources Development Act next year to remove regulatory obstacles.

Chamber of Mines chief economist Roger Baxter says the declaration was the culmination of serious work by government, industry and labour to get the industry to focus on growth. SA's mining industry was smaller in 2009 than it was in 1994.

In a recent reply to a parliamentary question, Shabangu said 100 SA mining companies had closed down in the past five years, and 26 last year.

Leon has serious reservations about

commitment 12 of the declaration, which relates to cash flows continuing to BEE partners irrespective of market conditions, and gives BEE partners full shareholder rights. "The more I read it, the more concerned I am. Clearly, no lawyers or bankers were on the panel that decided this clause. How can you have shareholder rights if you are not a shareholder?"

He says he was "absolutely alarmed" by comments Shabangu made at the press conference relating to the loss of empowerment status if a BEE partner sold its shares.

There is nothing in the mining charter that says a company has to empower itself again and as far as he is aware, the issue was not discussed with industry.

But Nedbank Capital joint head of mining Peter van Kerckhoven doubts foreign investors will be deterred by the minister's comments and clause 12. He says there has never been an assurance, either in legislation or in the mining charter, of "once empowered, always empowered". As long as legislation is clear and applied consistently, he says, investors can factor this in when calculating their expected economic returns.

The declaration's clauses on "meaningful transformation" introduce a new concept and a good one, Van Kerckhoven says, though more detail is needed.

Nedbank Capital has structured deals where BEE participants are, under certain circumstances, paid cash flow throughout the transaction. This is particularly im-

"Many of the best BEE companies emerged because they were able to realise capital at favourable times and reinvest and grow"

- JENNY CARGILL

portant where community development trusts depend on the investment.

In broad-based deals there can be pressure for participants to sell early to realise value, Van Kerckhoven says. Government seems to be envisaging longer lock-up periods, with less instant enrichment from the sale of assets.

Jenny Cargill of Businessmap Investment Strategy Advisers says the declaration deals with issues of ownership of particular sensitivity.

Retaining a 26% minimum empowerment requirement is likely to be a compromise to encourage mining companies to ease up on financing constraints.

"A sore point here is the lack of cash flow or dividends to BEE shareholders while loans are being serviced," she says.

"The declaration makes a principle of what has been happening in practice, at least in some instances that I know of — and that is to make provision for what is often called a 'trickle dividend'.

"Except in unfavourable market conditions, the declaration accepts that 'some cash flow' will be made available to

BEE investors. Of course, there are likely to be varied expectations around what constitutes 'some'.

"The proportion of cash flow channelled to shareholders will have an impact on the length of the funding period — the more cash that is paid out to shareholders, the longer it will take to service their debt and realise the full value of their shareholding. This could stretch financing periods to as long as 15 years and more."

Neither Van Kerckhoven nor Cargill believes it is a problem to grant full shareholder

MINING INDUSTRY TRANSFORMATION OBJECTIVES

- To promote investment, enhance competitiveness and drive transformation objectives
- To mitigate constraints limiting sustainable growth and meaningful transformation
- To emphasise the mutual reinforcement of competitiveness and transformation
- To commit to effective implementation of the strategy

SOURCE: STAKEHOLDERS' DECLARATION ON STRATEGY FOR THE SUSTAINABLE GROWTH AND MEANINGFUL TRANSFORMATION OF SA'S MINING INDUSTRY

rights where the shares have not been paid for in full.

"If people have acquired equity and they are regarded as shareholders, then they should exercise their shareholder rights regardless of how their acquisition is funded," Cargill says.

But there should be an obligation on companies to ensure that shareholders, especially in rural communities, are aware of their rights.

Cargill says Shabangu's indication that black empowerment stakes should be retained into perpetuity is at odds with the BEE codes and is a "political hot potato".

Lock-ins may not facilitate the kind of accumulation of capital by black owners that allows productive BEE businesses to emerge and grow.

"Many of the best BEE companies emerged because they were able to realise capital at favourable times and reinvest and grow in areas they had decided to focus on," she says.

"The minister's statement, together with a declaration that in fact says little about BEE ownership, suggests that there is still much to be negotiated and agreed. How rough that road will be will depend in part on the tempering of the political heat around the sensitive BEE issues."

Charlotte Mathews



Peter Leon The declaration is generally good