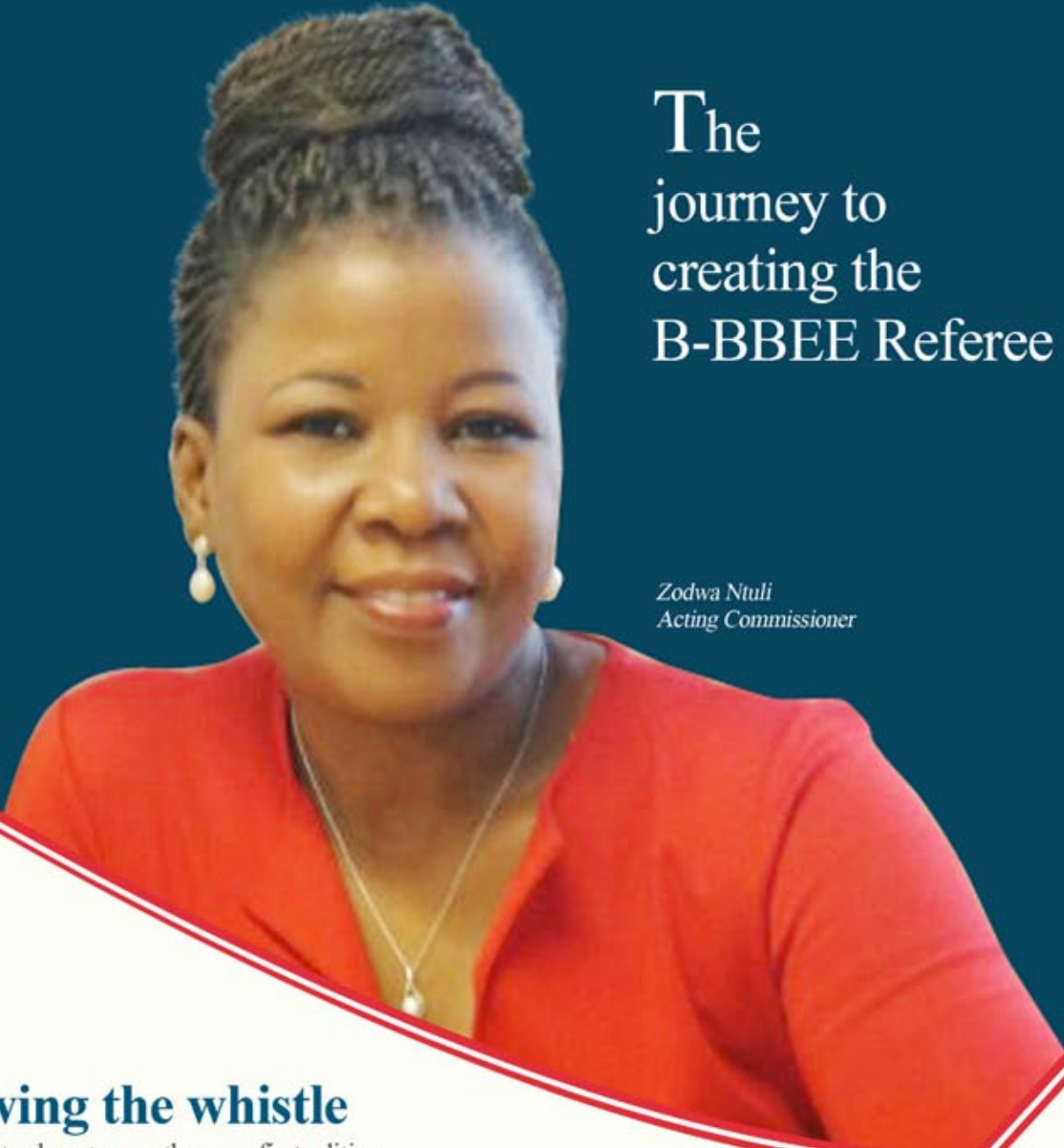




The journey to creating the B-BBEE Referee

Zodwa Ntuli
Acting Commissioner

Blowing the whistle

We introduce to you the very first edition of our quarterly newsletter *The Whistle*, with the aim of getting all of us on the right track.

A whistle is a useful tool for referees to send messages to players during the game, including reminders, warnings and sanctions to ensure that they all adhere to the rules of the game.

Page 01

Contents

Glossary

Blowing the Whistle.....	01
The journey to creating the B-BBEE Referee.....	01
Introducing the role of the B-BBEE Referee	04
The origin and context of the B-BBEE Act	06
B-BBEE, designed to address economic boundaries between black and white people.....	07
Fronting, a threat to real economic transformation in South Africa.....	09
Making B-BBEE part of the strategy could prevent fronting practices	11
Gaps in the verification process expose the economy to fronting	13
How contractual matters could fall foul of the B-BBEE Act	15
Activity Report.....	17
Notices and Updates	19
Events	19
Gallery.....	20

Glossary

In this publication, the words and phrases commonly used refer the following:

B-BBEE	Broad-Based Black Economic Empowerment
B-BBEE Act	Broad-Based Black Economic Empowerment Act 53 of 2003 as amended by Act 46 of 2013
B-BBEE Commission	Broad-Based Black Economic Empowerment Commission established by section 13B
Codes	Generic Codes of Good Practice issued by Minister
Sector Codes	Sector Code gazetted by Minister in terms of section 9(1)
Minister	Minister of Trade and Industry
The dti	Department of Trade and Industry
Entity	Any measured entity, including company, close corporation or trust
EME	Exempted Micro Enterprise
QSE	Qualifying Small Enterprise
NDP	National Development Plan

Blowing the Whistle

We introduce to you the very first edition of our quarterly newsletter **The Whistle**, with the aim of getting all of us on the right track.

A whistle is a useful tool for referees to send messages to players during the game, including reminders, warnings and sanctions to ensure that they all adhere to the rules of the game.

The different tones of the whistle signal the nature of the message sent, with shorter quick sounds signaling a less serious offence. **The Whistle** helps bring players back on the right track. A much harder tone would signal a more serious offence, which could lead to a red card or penalty, or even both.

In communities, a whistle is often used to alert other community members of a criminal act. In the workplace we often refer to blowing a whistle for reporting corruption or fraud, in line with the law that protects such whistle blowers.

We now know that at times black employees who are made shareholders or directors, or black executives who are token appointees find it difficult to come out and report; hence we are creating a hotline for such anonymous tip-offs.

A whistle is a useful tool for referees to send messages to players during the game, including reminders, warnings and sanctions to ensure that they all adhere to the rules of the game.

The Whistle aims to share information on the broad-based black economic empowerment, our activities and events, alerts on emerging bad trends and practices, recognize and share good practices, and provide guidance on the application of the rules.

Contributions in **The Whistle** are done by officials with the aim of enhancing the understanding of the B-BBEE Act and its requirements. Case reports, updates and statistics on our activities are based on information we compile on a quarterly basis.

This edition covers our establishment process, the genesis and context of B-BBEE, fronting practices and flaws in verification processes, as well as the contractual abuse found in the name of empowerment, amongst other things.

We are establishing a permanent editorial committee to focus on **The Whistle** to advance our education, awareness and advocacy strategy. Your views in shaping **The Whistle** are welcome.

We also look forward to hearing from you on the topics covered, or suggested for future editions, to assist us to improve the content to better serve your needs and advance compliance.

Send your views to us on newsletter@beecommission.gov.za



The journey to creating the B-BBEE Referee

Two years after the President signed the amendments to the B-BBEE Act in 2013 one of its main features, the B-BBEE Commission, still had not been established, with fronting continuing to thrive.

Fronting arises out of manipulation of existing rules to create an impression that economic transformation is happening. It is a practice that undermines the objectives of B-BBEE. Without the mechanism to detect, address and prevent fronting, the objectives of B-BBEE are undermined.

On 6 August 2015 the Minister of Trade and Industry, *Dr Rob Davies*, seconded *Ms Zodwa Ntuli*, who is the Deputy Director General for Consumer and Corporate Regulation, to start setting up the B-BBEE Commission. The process started on 1 September 2015 with only the B-BBEE Act and the codes to guide.

The Acting Commissioner immediately created a team of staff members from the Consumer and Corporate Regulation Division of the dti to assist with this process. Given that a long period had lapsed since the B-BBEE Act was signed into law, the process had to be accelerated, so there was no room for error.

The team, carefully selected from hardworking, committed and experienced officials, had to help deliver the B-BBEE Commission in the shortest possible time. Therefore, a project that ordinarily takes 18 months was compressed into six months, if you include December and January.

Ms Busi Ngwenya, Director for Strategy and Special Projects, Nontokozo Nokhwali-Mboyi, the Director for Operational Management, Thembakazi Dondashe, Project Manager, Madidimalo Ramare, Executive Assistant, and Francina Notoane, Advance Team Assistant, were assigned to this team. For policy support, Mr Liso Steto, Acting Chief Director for the BEE Unit of the dti, was co-opted to the team. The team was later joined by two IT support officials, Theto Modjadji and Thomas Mavungu.

The process to establish an entity is guided by the National Treasury prescripts, and this informed the project plan. The team worked around the clock with the aim of bringing the B-BBEE Commission into operation by 4 April 2016.

The team monitored the implementation weekly through meetings, and minutes circulated for each meeting. The Steering Committee was set up, furnished with monthly reports, while the Minister received quarterly written and oral briefings on progress.

It became more of a personal commitment for the team to make South Africa a better place than just a task or job. Although each team member had specific tasks, the team worked on all aspects of the project plan. They were flexible and creative enough to come up with ideas that made the project more enjoyable and inspiring, despite the pressure of tight timelines.

The team did not take most of the December 2015 and January 2016 leave to ensure that the project is delivered on time. This kind of dedication was indeed inspiring and commendable from this team.

Speaking to the members of the team individually, this is what they had to say about the journey:

"Wow, it was fraught with excitement, joy, frustration, anger but above all, a sense of accomplishment. Excitement in starting something new, with lots of lessons. Joy in being part of the team of pioneers led by a visionary, energised and inspired leadership. Frustration caused by internal stumbling blocks, unnecessary but not insurmountable. Anger at the blatant abuse of black people in the guise of B-BBEE. A sense of accomplishment in delivering all that we set to do within extremely tight timelines. Indeed one of the most critical projects ever undertaken by government, and if resourced properly and given the requisite support, this body could unblock transformation bottlenecks in a big way!" Busisiwe Ngwenya, Director for Strategy and Special Projects



Busisiwe Ngwenya

"Where do I start? Quite an interesting journey in that I was exposed to so much as we had to perform a lot of functions (some of which we have never handled before). This kind of moved us from our comfort zones and unleashed talents and skills we never knew we possessed. Challenges were experienced with regards to turnaround times in processing decisions internally as the establishment period was compressed into a very short space of time, but the team effort made it possible to overcome those challenges. I am glad we came out victorious after all in establishing this critical body to accelerate economic transformation." Nontokozo Nokhwali-Mboyi, Director for Operations Management.

"Given the tight timelines to set up the B-BBEE Commission, the journey was challenging while on the other hand it created an opportunity for personal development. For me as much as the project was hectic, it was exciting as I have learned a lot from it, starting from developing an organizational strategy, and it was my first time to be involved in such an exercise. It has improved my communication and writing skills. Moreover it has helped me to better understand the main objectives of B-BBEE and the importance of economic inclusivity, an aspect I never applied my mind to before this project." Thembakazi Dondashe, Project Manager.

"I would say, a great opportunity for learning. I found the journey as a learning curve when it comes to establishing a commission of this nature from scratch. I also learned a lot regarding B-BBEE, an area I had never been exposed to before. I am still learning even now, and can't help but feel grateful and honoured to have been a contributor to such an important structure of our economy. Now I know this entity is long overdue!" Francina Notoane, Advanced Team Assistant

"I can write a book on this. It has been one of the most interesting and exciting tasks in my career. I learnt about establishing an entity that is completely new from nothing, with the highlight being to develop the B-BBEE Commission strategy, organizational design and policies. More importantly, learning about B-BBEE and how it should be applied. The opportunity to work in a team gave me the ability to be more creative, to think outside the box, and to learn from others. I feel particularly blessed to have been selected to be part of this process. This economy indeed needs to be transformed, and the B-BBEE Commission is now in place to facilitate the acceleration of such transformation." Madidimalo Ramare, Executive Assistant



Madidimalo Ramare

“The process has been encouraging and rewarding, bearing in mind the set objectives intended to be achieved with the establishment of the B-BBEE Commission. Further more, the challenges encountered presented insight and awareness which eventually lead to vital knowledge and understanding of what and how the B-BBEE

Commission must achieve its mandate. For me personally I am stimulated and encouraged to be part of this journey, particularly because of the role and responsibilities that I need to perform from the ICT perspective so the B-BBEE Commission can effectively carry out its mandate.” *Theto Modjadji, ICT Business Analyst.*

“I joined the team last, but I think this journey has been well managed so far because under these difficult conditions where there are already expectations from the public, a lot has been initiated and completed internally to operationalise the B-BBEE Commission, while at the same time managing the expectations from the public. From the ICT perspective, challenges are that we may not have enough time for solutions architecture as we may have to depend mostly on external service providers. We are required to constantly review and re-prioritize our deliverables to deliver more speedily. We are however up to the task, and look forward to taking the B-BBEE Commission to the highest operational level as a regulator.” *Thomas Mavungu, ICT Systems Developer.*

Indeed, the team has laid a solid foundation for the B-BBEE Commission to now take its rightful place in the economy as a catalyst for accelerated economic transformation in this country. Although it aimed to operationalise on 04 April 2016, it received the first complaint in September 2015.

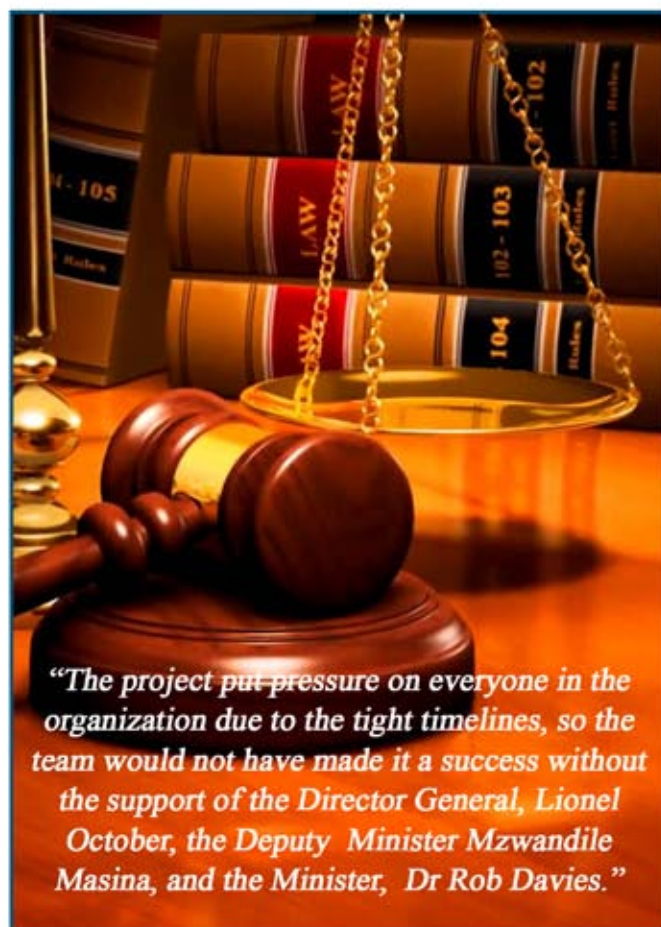
It became clear that the team must attend to matters under the B-BBEE Act even before the B-BBEE Commission was established.

The team also conducted stakeholder engagements during the establishment period to ensure that the role of the B-BBEE Commission is introduced to critical stakeholders. The Minister issued regulations on 6 June 2016, giving effect to the B-BBEE Act provisions which allowed the B-BBEE Commission to receive and investigate complaints.

With the cooperation and contribution of all economic citizens in the public and private sector, the B-BBEE Commission will make significant strides in getting the economy of this country to transform. With the powers given in the B-BBEE Act, and the requisite financial and human resources, it definitely will act against all those that engage in fronting.

This certainly was a rewarding journey for the team. As seen above, the common sentiment expressed by them is that it was a tough but exciting and fulfilling journey. With this foundation, the B-BBEE Commission is set to excel in executing its mandate.

The project put pressure on everyone in the organization due to the tight timelines, so the team would not have made it a success without the support of the Director General, *Lionel October*, the Deputy Minister *Mzwandile Masina*, and the Minister, *Dr Rob Davies*.



“The project put pressure on everyone in the organization due to the tight timelines, so the team would not have made it a success without the support of the Director General, Lionel October, the Deputy Minister Mzwandile Masina, and the Minister, Dr Rob Davies.”



Introducing the role of the B-BBEE Referee

Background

The South African Constitution is hailed as one of the best in the world, with the Bill of Rights in Chapter 2, but South Africa remains one of the most unequal societies in the world. Twenty-two (22) years since we achieved democracy, 19 years since we adopted the *Constitution of South Africa*, 17 years since we passed the *Employment Equity Act*, and 12 years after the passing of the *B-BBEE Act*, statistics still show that we are far from achieving equality. Various transformational efforts were made, but with no significant impact.

The 2003 B-BBEE Act did not provide for the monitoring of how the B-BBEE Act is implemented, so it had no teeth. As a result serious corruption and fraud occurred through fronting, without any legal consequence to the perpetrators.

The amendments in 2013 have created a provision for the B-BBEE Commission as a regulatory body to oversee the implementation to accelerate real economic empowerment. Fronting is on top of the agenda as it has derailed economic transformation.

Mandate

The B-BBEE Commission is created by section 13B with jurisdiction throughout South Africa. It must act impartial and perform its functions without fear, favour or prejudice, in the most cost-effective manner and in accordance with the values and principles of the Constitution.

The funding of the B-BBEE Commission is from money appropriated by Parliament, and lawfully received from any other source. Initially it will operate within the dti. The Auditor-General is mandated to audit its financial records, but initially it will report as part of the dti.

Its mandate in section 13F is monitoring and supervising the implementation of the B-BBEE Act in the interest of the public, which includes investigating violations of the B-BBEE Act and imposing necessary remedies, promoting advocacy and education, researching and analysing reports to produce trends and annual status reports on transformation, registering major B-BBEE transactions, promoting corporate governance

and fostering collaboration between the public and the private sector to advance B-BBEE. Penalties, including up to 10% of the entity's annual turnover and exclusion from doing any business with government for a specified period, can be imposed in cases of violation.

The B-BBEE Commission has work-streams focusing on compliance, investigations and enforcement, research, analysis and reporting, relationship building/stakeholder relations and administration to cover its mandate. The areas identified as requiring urgent interventions are *fronting practices* and *eradicating fraudulent practices* in the verification process.

The B-BBEE Commission aims to ensure the effective, consistent, and properly coordinated application of the Act, and will simplify the requirements, issue clarifications, advice and practice guides, for entities to achieve compliance.

Vision

An inclusive industrialised economy that is globally competitive

Mission

To facilitate the accelerated productive implementation of the Act

Brand Promise

An inclusive economy for all, together

Although it sees its role like that of a referee in a sporting game, it does not take it lightly given the scourge of fraudulent practices in the B-BBEE space. It will act harshly against perpetrators of fronting practices.

B-BBEE Elements

It monitors all the elements of B-BBEE, i.e. *ownership* to increase black equity ownership in existing and new entities, *management control* to increase the number of black people in decision-making and strategic operations of entities, *enterprise and supplier development* to create new black owned enterprises and suppliers across industry value chains for more jobs to be created, *skills development* to develop the required technical, professional and management skills for the economy, and *socio-economic development* which covers any intervention that will enhance empowerment.

The Services Offered

Services offered by the B-BBEE Commission to stakeholders include dealing with complaints, issuing written clarifications within 5 days, issuing an advisory opinion within 30 days, and facilitating referrals for alternative dispute resolution on relevant matters. Stakeholders can make telephone enquiries, and make requests for information sessions, meetings, and presentations on B-BBEE matters, which the B-BBEE Commission aims to respond to speedily. It will endeavor to meet all timelines where stakeholders have provided all the required information.

Core Values

Given practical challenges including lack of proper corporate governance, fronting tendencies, falsification of empowering credentials, misrepresentation of facts to secure contracts and quick fix solutions to empowerment, all of which present a fertile ground for unethical conduct in and outside the public sector, specific values have been adopted to achieve the goal of operating a credible and effective regulatory entity.

Conclusion

The B-BBEE Commission has a team of dedicated officials who will work with stakeholders to implement measures to advance real economic transformation.

This includes monitoring interventions such as the Black Industrialist Programme, a programme to provide funds to real black industrialists, but prone to fronting, as well as the Equity Equivalent Investment Programme, which provides flexibility for multinationals that have policies that make equity sale impossible to comply. It further monitors the application of sector codes for proper alignment to B-BBEE objectives.

Entities can approach the B-BBEE Commission for prior advice on B-BBEE transactions before they are finalized, for guidance and to prevent fronting practices.

Value 1: An inclusive economy is our first consideration

- Our first priority and commitment is our national economic interests
- Our stakeholders are key to us achieving our economic goals

Value 2: Open access and availability to all economic citizens

- We offer swift turnaround times guided by our service standards
- We offer fair and consistent redress within the legislative parameters
- We offer quick responses as we do not own any red tape

Value 3: Impartiality

- We act without favour, fear, bias or prejudice
- We handle all matters objectively in living our purpose
- We respect confidentiality within the law

Value 4: Consistency

- We provide clear directions and reliable guidance
- We provide decisions and advice that is consistent

Value 5: Accountability for all decisions and actions taken by us

- We uphold and respect all decisions and actions taken by our entity
- We trust all staff to serve stakeholders diligently and professionally
- We take responsibility for our actions

Value 6: Zero Tolerance for corruption

- We are committed to proper governance
- We are transparent in all dealings
- We do not tolerate any corruption





Liso Steto

The origin and context of the B-BBEE Act

In giving the origin and context of the B-BBEE Act, we have summarized a presentation made by Mr Liso Steto, the Chief Director for the B-BBEE Unit at the Conference on Fronting held on 29 March 2016.

In his presentation, Mr Steto stated before getting into the overview that those who say the B-BBEE Act is *reverse racism* are wrong, as the basis for this legislation is found on “equality as the full and equal enjoyment of all rights and freedoms” to ensure that the large majority of the country is included in the economy. This is a fundamental principle in section 9 of the Constitution.

Mr Steto shared that the need to include all the people of the country in the economy was identified already in 1998, leading to the drafting of the B-BBEE Act as the legal framework required to achieving economic participation by the black majority. It was recognized further that an independent Advisory Council is required to advise the President, which was appointed by the President, and a Commission to oversee the implementation – a part that has been missing until now.

The amendments in 2013 took note of the mistakes that were made along the way in implementing B-BBEE. The situation in South Africa is quite unique in that B-BBEE aims to empower the majority of the people who have been excluded from participating in the economy. Therefore the instrument is complex, and has been misconstrued by many.

On reflection, it was clear that the initial legislation as a whole was drafted to speak to the good side of the economy, adopting a softer, non-punitive approach to non-compliance. In assessing how the country has fared since 2003, the first Advisory Council recommended some changes to the B-BBEE Act of 2003 to align secondary legislation to the primary legislation. It was also necessary to apply the B-BBEE Act consistently to achieve transformation; and as a result the trumping provision was used to address this aspect, given the fragmentation over the years.

Importantly, the B-BBEE Commission was to be created to oversee and monitor implementation of the legislation, and provision was also made to introduce offences and penalties to deal with the prevalent scourge of fronting and other violations.

Further, amendments introduced the concept of the B-BBEE verification regulator, an important mechanism to ensure that what entities claim in terms of empowerment is indeed correct. There are both good and bad practices to be found, despite assurance statistics being signed off by verification professionals.

The amendments also helped to clarify the Minister’s powers in terms of various provisions and in respect of sector codes. The amendments now make provisions for deviations by state owned entities within the regulatory framework.

Every organ of state must take note of the good practice guidelines governing the implementation of B-BBEE in their general business practices, but should also have a means to ask for approval for deviation should the need arise. This is aimed at creating the transparency and consistency that did not exist before.

Mr Steto emphasized the difference between the sector code and the generic codes and indicated that sector codes must be applied where an entity operates in the sector where there is a sector code. Where there is a sector code, an entity cannot choose to be verified on generic codes.

Sector codes are meant to recognize the unique features and dynamics of a specific sector, in a way allowing for a transparent deviation for the sector to apply generic codes. It must be emphasized though that sector codes are not a license to create sub-standard requirements that undermine the objectives of B-BBEE.

Businesses and organs of state must use these codes in future to report on their B-BBEE status, which must be aligned to financial reporting timelines since B-BBEE forms part of the usual business processes. Misrepresentation or providing false information about B-BBEE status is not allowed, and is viewed as fraud, which is linked to penalties such as fines, imprisonment and exclusion from doing business with government in future.

Mr Steto stressed that B-BBEE cannot be separated from government's initiatives to create skills, create jobs and grow industries locally. Ultimately, it is not necessary only to ensure ownership of businesses, but to realize value from businesses, resulting in money in the pocket for all the country's people. B-BBEE is about ensuring that black people also own the productive assets of the country, and by increased skills development that will lead to increased productivity.

He concluded by saying, "as a country we need to create black businesses; we need to create new enterprises that would be able to participate in the economy of the country. The private and public sector, captains of industry and leaders, should all play a role in this process."

economy to allow the significant involvement of the majority of its citizens, and to create capacity at all levels of the value chain through ownership, management control, skills development, enterprise and supplier development and socio-economic development. This is necessary to create an inclusive economy.

B-BBEE has faced many challenges over the years due to incorrect interpretation of the relevant legislation and emergence of fronting practices. Government continues to develop new methods that will speed up the process of transformation. Acceleration is critical as B-BBEE interventions should not last forever.

The introduction of the 2013 codes, the Black Industrialists Policy and the Equity Equivalent Investment Programme enhances transformation objectives, with provisions to curb fronting within the private and public sectors. The 2013 codes are more stringent compared to the 2007 codes and this is exactly what South Africa needs to drive transformation.

"The 2013 codes are more stringent compared to the 2007 codes and this is exactly what South Africa needs to drive transformation."

B-BBEE, designed to address economic boundaries between black and white people

So what is B-BBEE, is it a tick box exercise for entities to comply to? Is it a gap for the so called *tenderpreneurs* to enter into the market? Or is it a mechanism for private entities to boast about their B-BBEE compliance status? Actually, B-BBEE has a deeper meaning to it which is sometimes interpreted by society in a negative light.

B-BBEE aims to address the boundaries that exist within South Africa for black individuals to partake fairly in the economy. B-BBEE is implemented to transform the South African

The Black Industrialists Policy is a significant part of government's broad industrialisation initiatives to grow the industrial base, and inject new entrepreneurial dynamism into the economy. South Africa needs this policy to broaden the number of black entrepreneurs. The policy aims to unlock the potential that exists within the citizens of South Africa to become proud business owners.

The Black Industrialists Policy covers specific sectors within South Africa, which include ocean economy, oil and gas, clean technology and energy, mineral beneficiation, aerospace, rail and automotive components, industrial infrastructure, information communication technologies, agro-processing, clothing, textiles/leather and footwear, pulp, paper and furniture, chemicals, pharmaceutical and plastics, nuclear, manufacturing-related logistics and designated sectors for localization.



South Africa also needs Foreign Direct Investment to grow the economy and allow for job creation. Attracting new investors from abroad plays a significant role, especially within the tourism industry.

Multinational entities that have global practices preventing such entities from complying with the ownership element under the 2013 codes through the traditional sale of shareholding to black South Africans have the opportunity of entering the Equity Equivalent Investment Programme.

The Equity Equivalent Investment Programme assisted by the 2013 codes provides a flexible mechanism to facilitate foreign direct investment within South Africa utilising aspects of B-BBEE. This programme ensures that multinational entities are not excluded from the application of B-BBEE legislation.

The 2013 codes recognise other meaningful contributions into the South African economy instead of a direct sale of equity, referred to as Equity Equivalent contributions. The equity equivalent contributions count towards the ownership element of B-BBEE made by multinationals.

The value of the equity equivalent contributions is measured against 25% of the value of the multinational's South African operations or against 4% of the total revenue from its South African operations annually over the period of continued measurement.

B-BBEE has come a long way since the 2007 codes and will continue for the years to come until meaningful and measurable transformation is achieved.

It is the dti's mandate to ensure that the B-BBEE legislation is implemented and monitored accurately within South Africa, hence the establishment of the B-BBEE Commission. The B-BBEE Commission will close the gap that many entities have exploited over the years.

*This article was contributed by Yuncal Padayachy
Deputy Director: B-BBEE Procurement, Transformation &
Verification, the dti*



Fronting, a threat to real economic transformation in South Africa

The B-BBEE Commission held its first inaugural Conference on Fronting on 29 March 2016 at the Midrand Conference Centre, Midrand in Gauteng, with the theme 'Do it right and lead from the Front on Empowerment'. The conference is part of the initiatives to improve compliance and change behaviour, and aimed to create awareness of the B-BBEE Act, and specifically the scourge of fronting.

Fronting is one of the practices that have become prevalent in South Africa since the 2003 B-BBEE Act, and has significantly derailed economic transformation. Fronting seems to have become so normal that some people appear to take it as a way of doing business in South Africa. Sadly, it has become another barrier to economic participation by black people. Fronting is fraud, it is illegal, and robs the economy of the potential to create more jobs, alleviate poverty and achieve equality.

"Therefore, there is no policy debate on whether South Africa should transform or not, but rather how policies should be enforced to fundamentally alter the structure of our economy."

The Minister, Dr Rob Davies, and the Deputy Minister, Mzwandile Masina, who are custodians of B-BBEE and Black Industrialist Programme, delivered the keynote address and opening address respectively, with messages of support by Honourable Joan Fubbs: Chairperson of the Portfolio Committee on Trade and Industry, Edward Makue: Chairperson of the Select Committee on Trade and International Relations.

Other speakers were Makibinyane Lefadi: B-BBEE Advisory Council, Mzwanele Manyi: Progressive Professionals Forum, Polo Leteka: Identity Development Fund, Keith Levenstein: EconoServ SA, Sisa Ntshona: Enterprise Development Council of SA, Matshego Ramagaga: Companies Tribunal, Nomkhosi Magwaza: Armscor, Thabo Masombuka: Construction Sector Charter Council, Nomzamo Xaba: Empowerdex, Stuart Bartlett: Independent Development Corporation, Maleka Malesela: Commission for Employment Equity, Lucky Phakeng, Takeover Regulation Panel, Mduduzi Dlamini, National Empowerment Fund, Liso Steto, BEE Unit of the dti, and Malebo Mabitje-Thompson, Incentives Division of the dti.

The conference program had three panel sessions with the first on "Identifying Fronting Practices", the second on "Doing Empowerment the Right Way" and the third on "Lessons Learnt from B-BBEE Gone Wrong". The sessions were focused on practical examples in the application of B-BBEE, with clear highlights of unacceptable practices in implementation of B-BBEE.

Opening address

In his opening address, Deputy-Minister Mzwandile Masina, emphasized that this conference was the start of a campaign to address fronting and that the time has come to lay charges against any entities or parties that are involved in the practice of fronting.



Mzwandile Masina
Deputy Minister of Trade
and Industry

The Constitution guarantees all citizens the right to equality, and gave Parliament the mandate to address this requirement through affirmative action and black economic empowerment.

Reflecting briefly on the history, Masina stated that during the apartheid years, black people were systematically excluded from owning assets that could generate valuable income, and that to date South Africa remains one of the most unequal societies in the world. Therefore, there is no policy debate on whether South Africa should transform or not, but rather how policies should be enforced to fundamentally alter the structure of our economy.

The pace of economic transformation has been too slow, as baseline studies have shown. No significant progress could be identified since 2003. Referring to various studies, he lamented that 2013 reports showed that the percentage of black-owned entities on the JSE is still disappointingly low and that senior and top management positions are still occupied by white people at above 60%, despite that there are more professionally qualified black people.

There was also a decline in the number of black CEOs heading the Top 40 JSE listed entities. The gap between the rich and the poor 22 years into our democracy is just unsustainable.

Fronting contributes to lack of transformation, with some entities finding creative ways to misrepresent their B-BBEE figures. The integrity and credibility of the data that is used to issue B-BBEE certificates will be on the spotlight as one avenue that allows for fronting. B-BBEE deals continue to be structured with no real value flowing to black shareholders or beneficiaries, who are used merely as a front for bidding purposes.

People are invited to become part of ventures at the point of bidding, and after the contract is awarded one sees that their roles change significantly.

Throwing blows at tokenism, Masina stated that where black people have been appointed, it is often to positions that have little strategic involvement in the core operations of entities, denying the opportunity for South Africa to create black industrialists. Industrialists need the know-how and real skills on the operations

markets for black-owned businesses, to support these suppliers and businesses.

Masina concluded by saying B-BBEE is a valuable building block to create an inclusive economy and to eradicate poverty at all levels. It is time for the people managing our entities to move from their top-seats, and begin to connect with the employees in their organisations.

Management structures should invest in the employees that make a contribution to their business value chains, not only for economic and social transformation, but for better economic growth. This conference, he emphasized, should be the beginning of the end of fronting practices.

Dr. Rob Davies
Minister

Keynote address

In his keynote address, the Minister said fronting is one of the most pernicious abuses of B-BBEE.

The reason why an entity might do this is to access some benefit to which it is not entitled, or to create a false perception about itself. The problem is that entities who misrepresent themselves through fronting invariably take some benefit away from those who should benefit

‘We look forward to receiving the report on this conference so that we can root out the ogre of fronting’

and the sector concerned. Although these practices have emerged since the B-BBEE Act was enacted in 2003, the B-BBEE Act did not have sufficient powers to actually do anything about the practice of fronting. The B-BBEE Commission has now been established to monitor the implementation of the Act, and to ensure radical transformation of the economy.

Government’s efforts to achieve B-BBEE have been frustrated to date, but it is necessary to implement a package of solutions that are real and practical to transform the economy.

Industrialization and specifically the creation of more black industrialists throughout the South African economy are necessary mechanisms to create a sustainable economy, which the B-BBEE Commission will also monitor.

Access to markets is another problem that the B-BBEE Commission will address by monitoring parameters set for state-owned entities in the B-BBEE Act to create

from B-BBEE. Often the purported beneficiaries of B-BBEE transactions receive far less than they were supposed to receive when the real benefits of ownership and opportunities for empowerment are not realised.

He stressed that fronting has become more involved and complex over the years. Fronting is being facilitated by a range of consultants, advisors and businesses, despite the fact that it is a form of fraud that is actionable in terms of the laws of the country. the dti has discovered that it is difficult to detect and prosecute people guilty of fronting under the common law. “For this reason, the B-BBEE Act as amended in 2013 established the B-BBEE Commission, which is empowered to work with law enforcement agencies to prosecute fronting. We also appointed an Acting Commissioner, who has set up an office which is already receiving and processing fronting complaints”, added Minister.





He further alluded to the appointment of the ownership advisory task team, which had been looking at a number of issues relating to fronting and abuses of ownership arrangements. This task team has already done considerable work and should be in a position to report in the near future. Their work will inform the work of the B-BBEE Commission as well as further legislative amendments, where necessary.

New codes were published to empower people to become real players in the economy, by addressing issues like skills development and expansion of markets for both small and big entities. The B-BBEE Commission will continue to look out for incidents of fronting arising from the implementation of the codes.

“Broad based empowerment schemes have the advantage of bringing communities and workers into an empowerment relationship, and therefore we have to make sure that the people who should benefit are not disadvantaged through fronting. We continue to provide a facility for multi-national companies to engage in B-BBEE deals through the equity equivalent investment programme; the IBM deal comes to mind. We look forward to receiving the report on this conference so that we can root out the ogre of fronting,” the Minister concluded.

It is expected that conference will be an annual event to complement the B-BBEE Commission’s outreach and awareness programme.

Making B-BBEE part of the strategy could prevent fronting practices

Introduction

One threat to achieving real economic transformation is the hit and run approach to B-BBEE, which focuses on ticking the box. Basically B-BBEE gets attention only when there is an upcoming government project, and forgotten immediately after the contract or concession is awarded.

B-BBEE initiatives have taken a quick fix approach that many consultants have started offering to structure quick, stress-less and less inconveniencing B-BBEE initiatives. If the B-BBEE initiative is conceived merely for a contract, quality will inevitably be compromised, and therefore it will not be sustainable.

B-BBEE must form part of the strategy of the entity and as with all strategies, a SWOT analysis and risk assessment must be performed to ensure that *quality, impact and sustainability* are not compromised. A proper plan for implementing B-BBEE must be produced and monitored.

Accounting officers (CEOs) in entities are accountable to their boards for implementing the strategy and plan. Reports on B-BBEE should therefore be regular. A scorecard is merely a tool to help the entity to measure how it is doing against its plans for B-BBEE, but other entities have only learned to master the scorecard, feeding false figures to achieve a false B-BBEE status, which is illegal.

A proper B-BBEE initiative cannot be achieved if done on the sidelines of the entity strategy, especially if fully outsourced to third parties with no involvement of entity management in the process.

Bad Trends in B-BBEE initiatives

Bad trends that have emerged on B-BBEE initiatives involve merely including black people as directors or shareholders on paper, creating trusts and collective ownership schemes with economic benefits locked for years, funding an unlengthy internship program for black unemployed graduates now that entities can spend on non-employees, or putting money in some off-the-shelf enterprise development scheme with no involvement of the entity.

The same patterns exist, whether the initiative involves black people of high or lower social class or educational level. Black shareholders are stripped of basic minority protection rights; denied access to shareholders or board meetings and financial records, not being paid any dividends but merely salaries where they are lucky, or dismissed from entities for questioning the B-BBEE initiative that they are part of, the list is endless. The common feature in these trends is poor corporate governance and blatant abuse of black people while the entities reap the benefits from contracts awarded using their names.

There are common constraints that make some of these black people vulnerable as well. The inability to raise funds to acquire equity creates the imbalance in the bargaining power, with the majority shareholder dictating terms. In the case of employees, most don't know what it means to be a shareholder, and at times even if they are skeptical, the power imbalance makes it impossible to question the employer for fear of losing their jobs, especially where workers are not organised or there is no effective union.

In schemes relating to enterprise or supplier development, as most black owned entities still battle with market access, they tend to view the scheme as a favour and accept terms and conditions that are not favourable. It also does not help that mostly advisors on B-BBEE initiatives would be those of the entity or majority shareholders.

Therefore, the imbalance in negotiating B-BBEE transactions perpetuates the abuse and fronting. If B-BBEE is strategic to the entity, clearly choosing the right initiative to implement would be a priority over finding the weaker partners to include in the B-BBEE initiative. The least said about community schemes the

"Dumping funds into a scheme that has not been well thought of, that has no link whatsoever to the enterprise or supplier development scheme, undermines the objectives of B-BBEE."

better, as some can't even distinguish between charitable gestures by an entity and being a shareholder as a community trust, creating a perfect platform for abuse.

Creative structuring of B-BBEE initiatives is often with the eye solely on the government contract or concession, not to benefit or empower. After the contract is awarded, many black shareholders somehow exit without even selling their shares, directors are resigned from the entity and some employees get fired, without any economic benefit despite them being used to secure the contracts. Where entities do not succeed to frustrate the black people out of the entity, they keep them in lengthy and tedious legal processes in courts to exhaust them financially towards forced exit.

This is why it is important for the B-BBEE Commission to work with government entities and departments to monitor the status of the entity awarded the contract or concession prior and after the contract or concession. Cancellation clauses in the government contracts must be strengthened to align to the B-BBEE Act, to allow cancellation of these awards where fronting is found.



Entities must really focus on quality initiatives that can be sustainable to make the required impact in the economy. Where an entity has a proper strategy and plan with targets, there is no need to manipulate figures, or to engage in fronting.

Expenditure Dumping

There are entities that plainly do not have a strategy or plan on how they will spend the funds towards skills development, enterprise and supplier development, or for socio-economic development. This leads to what we can refer to as *expenditure dumping*. The funds available in this country for these three areas flowing from the requirements of the codes could change the profile of this country, if used properly.

All elements of B-BBEE are important, and linked to maximize the impact. For instance, skills development must enhance employability, promotions and entrepreneurship, amongst other things, without a proper plan this can't be achieved. Most black graduates remain without jobs even after going through these skills development programs. There are even black matriculants that have no access to technical or higher learning education due to lack of funds.

The same goes for enterprise and supplier development schemes. Many adverts claim to help create these for entities so they can claim full points. Once created obviously funds flow into the scheme, but are likely to end up with intermediaries, with little benefit to black enterprises/suppliers. It is this element that should develop entrepreneurs to be viable suppliers, and create jobs. With the recent unemployment statistics sitting at 26.7% according to StatsSA, these new suppliers could absorb many of these unemployed young people.

Dumping funds into a scheme that has not been well thought of, that has no link whatsoever to the enterprise or supplier development scheme, undermines the objectives of B-BBEE.

Conclusion

The B-BBEE Commission aims to provide the necessary guidance but will monitor B-BBEE initiatives through the register of transactions it will keep, and where not on the register, through cooperation with government entities, to ensure that B-BBEE initiatives do not trivialise the objectives of B-BBEE.

Further, the B-BBEE Commission will advocate for a more strategic deployment of the available financial resources towards the intended objectives to make an impact.

The country has less than 15 years to achieve the 2030 vision in the NDP, and it is time that the implementation of B-BBEE is done with these goals in mind.



Gaps in the verification process expose the economy to fronting

In the complaints received by the B-BBEE Commission, fronting and fraudulent practices in the verification process comprise the highest number, together accounting for over 70% of the complaints received. Information from the market also indicates the apparent manipulation of the verification process in the issuing of B-BBEE certificates.

It is worrying that at times one entity is issued with two different verification certificates, with different levels for the same measured period, sometimes exactly the same points and levels for different periods. Others are issued to entities without the actual verification, which includes interviews. These are certificates submitted to various government entities for bidding, concessions or licensing processes.

This makes one to question how many tenders, licences or concessions have been awarded based on these false B-BBEE certificates. The B-BBEE Commission will soon be able to answer this question as it has a mandate to investigate these kinds of practices.

Given its concern about the integrity of the verification process, the B-BBEE Commission organised a seminar to engage with the verification industry. The B-BBEE Commission also sought to introduce itself to the market, and clearly outline its role as the regulator for B-BBEE.

The seminar for Verification Professionals was held on 28 June 2016, at Birchwood Hotel and Conference Centre in Boksburg and was attended by almost two hundred (200) B-BBEE practitioners, which included verification professionals, consultants and advisors.

The integrity of the verification process is directly linked to the practice of fronting in that the verification process should ideally assist to detect and report fronting to the B-BBEE Commission.

The verification process ought to give assurance to all that claims made by entities regarding their B-BBEE status are indeed

correct. It is however compromised by unscrupulous professionals who cut corners.

Verification professionals are currently regulated through IRBA for

approved auditors and through SANAS for non-auditors. Some professionals are registered under both IRBA and SANAS.

There are processes that verification professionals should follow to ensure that the verification is conducted properly. For instance, it is common cause that before black shareholding is recognised, specific questions must be asked to confirm if indeed the black person owns such shareholding, the extent of the debt, if any in relations to the shares, amongst others.

“...fronting and fraudulent practices in the verification process comprise the highest number, together accounting for over 70% of the complaints received.”



Complaints received however point to possible flaws in the verification process, which are a major risk for economic transformation as it appears fronting is allowed to occur under the watch of verification professionals.

Most black shareholders and employees in the fronting complaints received allege that they have never been questioned or interviewed by the verification professional, despite the entities being issued with verification certificates. What is even scary is the allegation that employees had been made shareholders without their knowledge, with the entity being recognised for such shareholding in black hands, albeit on paper. The question is again, who verified the entity, and why have they never confirmed with these so-called black shareholders?

In the stakeholder engagements the B-BBEE Commission held with organs of state and public entities, most echoed the same concern in that they are unable to confidently rely on the B-BBEE certificates they receive during bidding, licensing or concession processes.

It is also alleged that there are even people that are not accredited verification professionals who issue B-BBEE certificates, hence the need to urgently intervene to curb this fraud. This means government departments and public entities may be making decisions based on false information, which in a way could render the contracts concluded invalid. The B-BBEE Commission aims to pursue cancellation of contracts found to have been awarded on false information or misrepresentation.

The B-BBEE certificate issued by a registered verification professional must be reliable, and worth the paper it is written on. The information in the B-BBEE certificates is critical as it is used by the country to measure the level of transformation. If it is incorrect and false, so is the transformation picture of the country. It is against the B-BBEE Act for verification professionals to issue certificates based on false information, and certainly where they fail to follow steps in verifying such information.

It is also illegal for any verification professional to issue B-BBEE certificates based on generic codes where the entity measured operates within the sector that has a sector code gazetted by the Minister for implementation. This kind of manipulation of the application of codes allows for issuance of false certificates, which is fronting.

Awarding points to entities without conducting the actual verification, but merely confirming the claims made by the entity defeats the purpose for independent verification of claims, and suggests that there is no point in having this process as it provides no assurance at all in such cases.

Instances have been noted where some verification professionals issue B-BBEE certificates to Exempted Micro Enterprises when the codes clearly state that only an affidavit is required for these entities, unless they choose to be measured using the Qualifying Small Enterprise Score Card to maximize their points and move to a higher recognition level. The continuation of this practice undermines the spirit and purpose of the Act and should cease with immediate effect. The policy rationale for exempting smaller enterprises is to reduce the cost of compliance and regulatory burden on their part, and the codes must be implemented accordingly.

Other verification professionals have argued that some government entities and public entities refuse to accept the affidavits, thus disadvantaging the exempted entities concerned, basically arguing that's the reason they issue B-BBEE certificates to these exempted entities. The Office of the Chief Procurement Officer in the National Treasury has issued specific instructions in this regard. Therefore any person alleging that government entities reject affidavits must report such to the B-BBEE Commission for intervention. Continuing to issue B-BBEE certificates to exempted entities clearly undermines the codes, and gives the impression that the affidavits provided for in the codes are sub-standard, and not acceptable.

Fronting practices are sometimes difficult to identify without the necessary inquiries that should be made by a verification professional in respect of each aspect of B-BBEE claimed by the entity. The verification stage is the first point of identifying and stopping fronting, and if compromised, renders the process futile and unnecessary.

Verification professionals have the obligation to report fronting practices to the B-BBEE Commission, which has the power to investigate the practices. Further, where verification professionals have failed to report fronting practices, or have aided entities to circumvent the Act, the B-BBEE Commission will on its own initiate investigation against them. This is the part of the functions of the B-BBEE Commission that should see unscrupulous verification professionals being de-registered, prosecuted and not allowed to practice in this space ever.

“The policy rationale for exempting smaller enterprises is to reduce the cost of compliance and regulatory burden on their part, and the codes must be implemented accordingly.”

Verification professionals highlighted the need for clarifications on the codes, certainty regarding the process given the imminent exit of IRBA, and appealed for the introduction of a single standard for the verification process. These are matters that the dti responded to and that the Minister will provide guidance on in due course. The industry expressed the need to ensure integrity in the verification process to advance transformation.

The B-BBEE Commission aims to continue engaging with verification professionals in order to identify fronting practices earlier and eradicate them.

As indicated, the investigative resources of the B-BBEE Commission will focus more on rooting out fronting, and ensuring that the flaws in the verification process do not continue to create the fertile ground for fronting.

The B-BBEE Commission appreciated the level of engagements with the industry, and looks forward to working with them in enhancing the integrity.

How contractual matters could fall foul of the B-BBEE Act

Section 13B of the B-BBEE Act establishes the B-BBEE Commission to oversee, monitor and ensure compliance with the legislation. The main aim of the legislation is to ensure advancement and promotion of economic transformation of black people through the five (5) B-BBEE elements which are ownership, management control, skills development, enterprise and supplier development and socio-economic development.

Typically entities who want a quick way out would target own employees and help them to set up their own businesses or identify existing black businesses that could be groomed to supply goods or services required for points under enterprise or supplier development.

“The fact that these contracts are concluded fraudulently or under duress will also fall foul of the basic elements for a valid contract.”

Some entities would make their employees shareholders and allocate a number of shares to them for purposes of gaining points under the ownership element.

Under normal business trading conditions a supplier and recipient/ procurer of goods or services will enter into a service level agreement or contract to agree on terms and conditions, like payment, quantity and type of goods to be delivered, delivery schedule, contract duration, etc.

Similarly for shares, a shareholders' contract would be entered into to articulate the details such as the number of shares, the rights attached to the shares, the price for the shares, the frequency of dividends, nomination of members to the board, etc.

These terms will guide the relationship and would assist in providing recourse when a party is no longer able to deliver or contravenes the contract terms.

The legal dictionary defines a contractual agreement as “an agreement with specific terms between two or more persons or entities in which there is a promise to do something in return for a valuable benefit known as consideration. Since the law of contracts is at the heart of most business dealings, it is one of the three or four most significant areas of legal concern and can involve variations on circumstances and complexities. The existence of a contract requires finding the following factual elements: a) an offer; b) an acceptance of that offer which results in a meeting of the minds; c) a promise to perform; d) a valuable consideration (which can be a promise or payment in some form); e) a time or event when performance must be made (meet commitments); f) terms and conditions for performance, including fulfilling promises; g) performance.” ([http://legal-dictionary.thefreedictionary.com/Contractual agreement](http://legal-dictionary.thefreedictionary.com/Contractual+agreement)).

Competent parties are encouraged to enter into contracts that are equitable, valid and enforceable where they would be bound by terms to which they have agreed to, and should ensure that these contracts are not entered to through duress, fraud or undue influence.

Sadly most contracts that have been sent to the B-BBEE Commission by complainants seem devoid of the important elements for a valid contract.



Busisiwe Ngwenya

CONTRACT

This Contract is entered into by and between _____
The term of this Agreement shall begin on _____
termination date of _____

This Contract may not be modified in any _____
Parties. This document and any attachments _____
the Parties. This Contract shall be binding _____
assigns and shall be enforced under _____
In consideration of the mutual _____
agrees that it shall _____

Contracts entered into fraudulently exist where signatures are obtained fraudulently or where the purpose of obtaining the signature was not explained properly. A typical example is the employer and employee situation where the employee is illiterate or semi-illiterate and his/her signature is obtained under false pretenses, and the employee ends up being registered as director or shareholder of the entity for B-BBEE compliance without the corresponding economic benefits such as dividends. In some instances employees are misled to believe that they will be assisted to create an enterprise that will be a beneficiary of the entity's enterprise development programme, and they end up being strategically 'retrenched'.

Duress occurs, for instance, in circumstances where an employee is threatened with termination of service, demotion or withholding of salaries, knowing well that he/she is desperate and cannot afford to lose the jobs, and where threats and/or intimidation are the order of the day in the workplace. In practice such employees would be required to sign documents that are not explained to them, with no advice or protection at all, especially in entities where workers are not unionised. These employees are often made shareholders of the entity for the entity to get higher equity points for B-BBEE.

These types of contracts would fall foul of the B-BBEE legislation as they are intended to mislead, falsify and obtain high levels of B-BBEE scores illegally without providing benefits to the B-BBEE beneficiaries, and for using the black employees for fronting purposes and not the advancement of B-BBEE. The fact that these contracts are concluded fraudulently or under duress will also fall foul of the basic elements for a valid contract.

Some contracts would include exclusivity, such as barring the supplier from dealing with another competitor while the contract is still running. While the contract may have all the elements for a valid contract, with mutually beneficial goals, depending on the nature of the market some of these contracts could fall foul of the Competition Act 89 of 1999, as amended.

The Competition Act establishes Competition Commission to investigate, control and evaluate restrictive practices and abuse of dominance. Chapter 2 of the Competition Act stipulates specifically the types of agreements and conduct that could be deemed to be anti-competitive.

Section 5(1) of the Competition Act prohibits agreements between firms in a vertical relationship if that agreement would have the effect of substantially preventing or lessening competition in a market. Further, section 8 of the Competition Act prohibits the practice of exclusive dealings by a dominant firm.

Typically, an empowered entity might enter into an exclusive dealing arrangement with a black owned entity to the exclusion of its other competitors. This would assist the empowered entity to increase or improve its B-BBEE standing whilst also providing a platform to a black owned entity to enter markets that might have been inaccessible before.

However, when entering into this exclusive dealing arrangement both entities (empowered and black owned) must ensure that their conduct would not cause harm to competition and should be for a limited duration until the black entity is able to compete on its own having acquired or opened up other markets.

These contracts would have a duration and termination date, which may or may not be renewed. Where a contract is not renewed, this cannot be said to be in contravention of the B-BBEE Act, unless there is clear indication that the benefits due to the black owned entity were not received during the duration of the contract, whilst the empowered entity benefited from higher B-BBEE levels for dealing/contracting with a black owned entity.

Thus, before approaching the B-BBEE Commission with possible contravention of the B-BBEE Act, you need to ascertain whether a matter is merely a contractual dispute or whether it has a bearing on any of the five elements of B-BBEE. Also, when entering into any contract, ensure that while advancing B-BBEE the contract does not affect competition negatively without any acceptable justification.

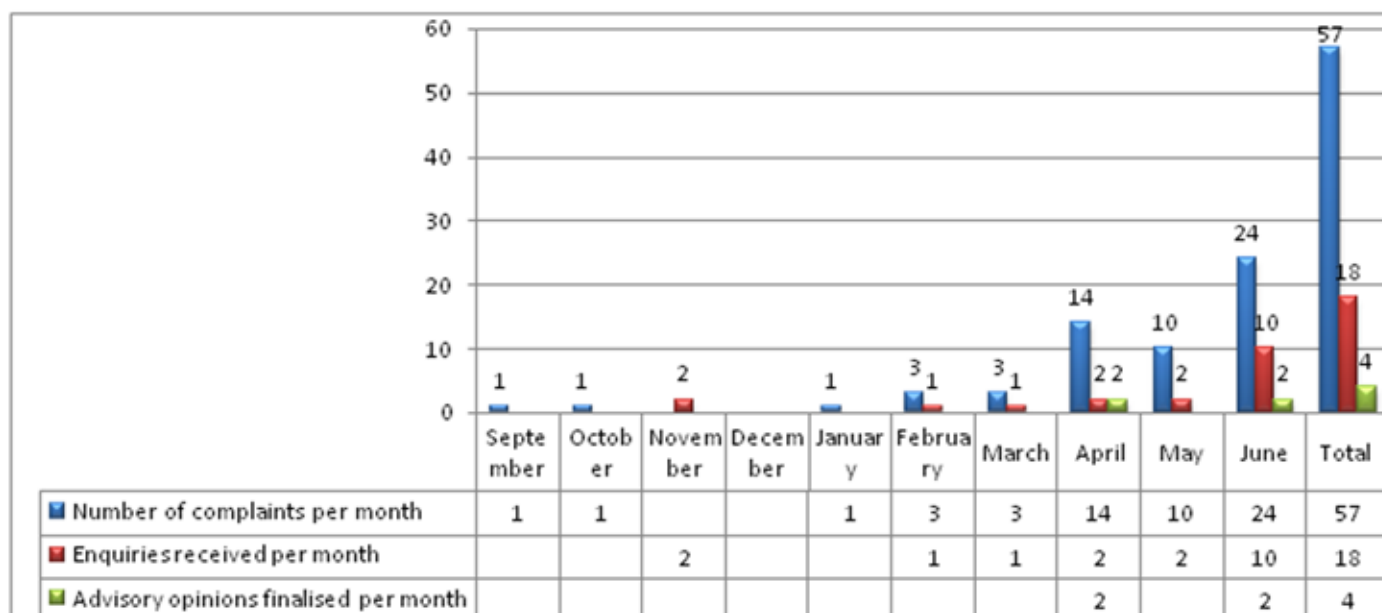
Also note that getting employees to put their signatures for equity or enterprise/supplier development contracts under false pretenses, duress, or undue influence will affect the validity of the contract, and will be in violation of the B-BBEE Act.

This article was contributed by Busisiwe Ngwenya of the Compliance Division of the B-BBEE Commission

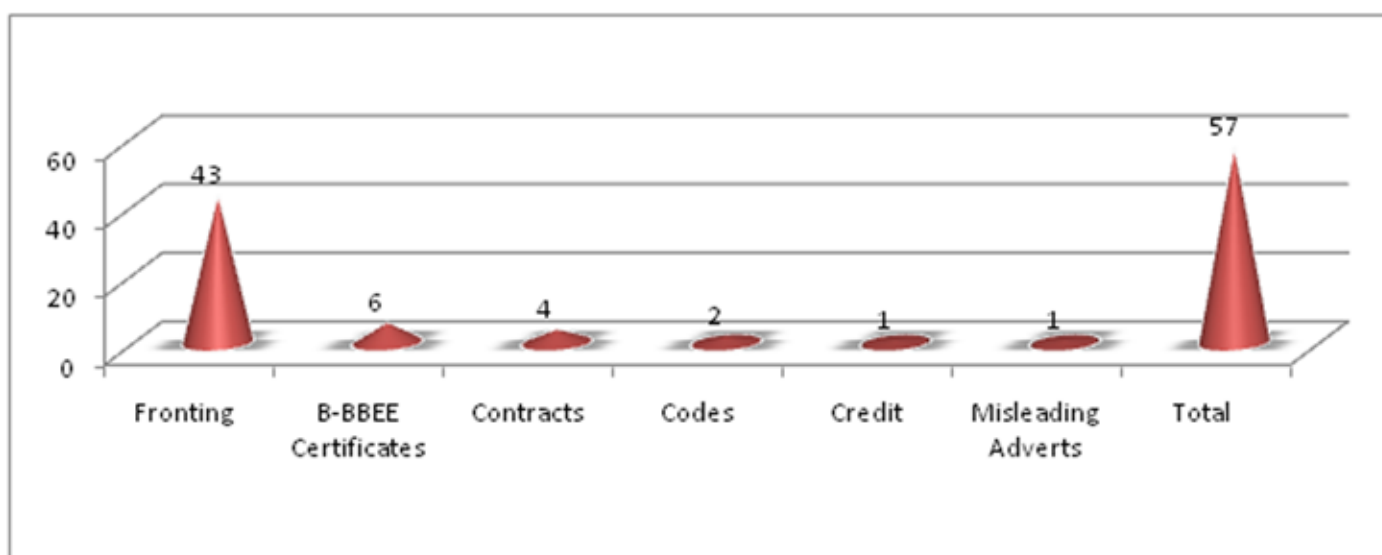
Activity Report

As indicated, the B-BBEE Commission started receiving requests for information, advice, clarification, meetings, as well as complaints to consider under the B-BBEE Act, before it was even established. The regulations to guide the process for handling and investigation of complaints had not yet been prescribed by the Minister, so the powers were limited in respect of dealing with complaints.

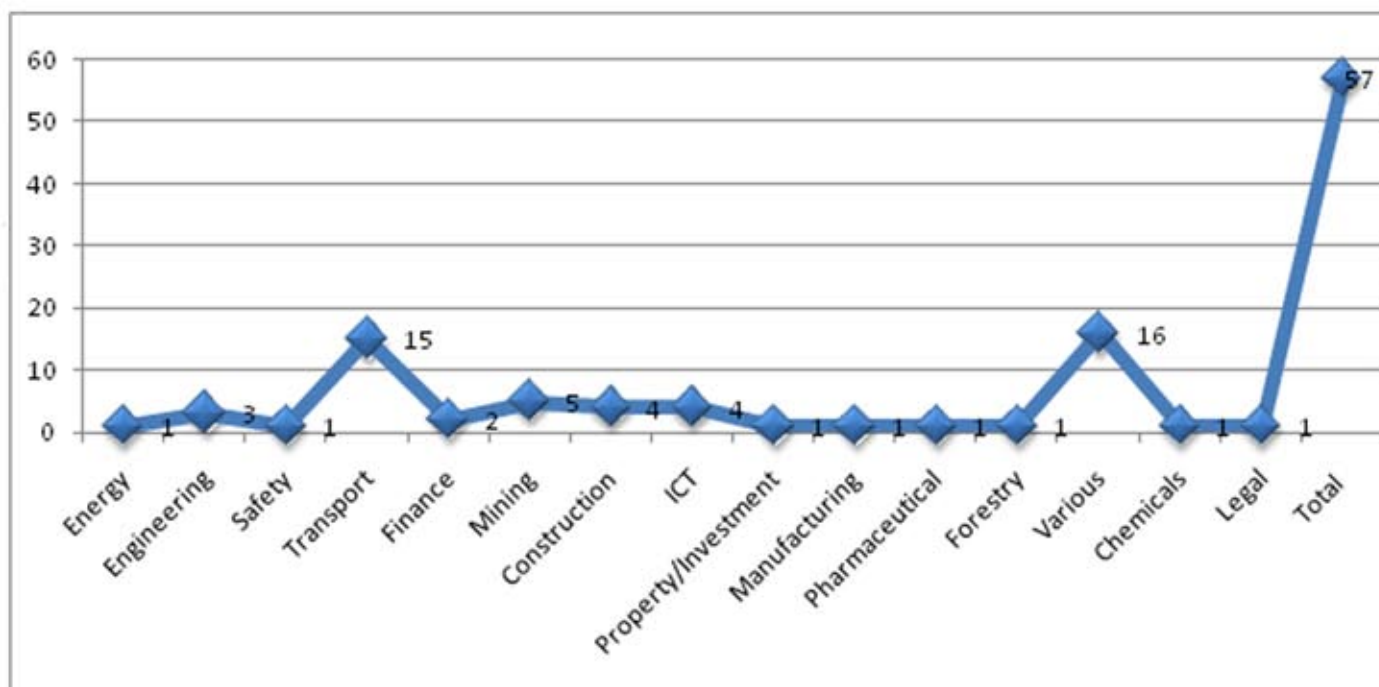
The Minister has since issued regulations which came into effect on 6 June 2016, and all complaints received are now under consideration in terms of the procedure outlined. The following graphs provide a summary of the activities of the B-BBEE Commission for the period ending 30 June 2016. Once decisions are made on complaints, such will be summarized and featured in the form of articles in this publication to better inform our stakeholders.



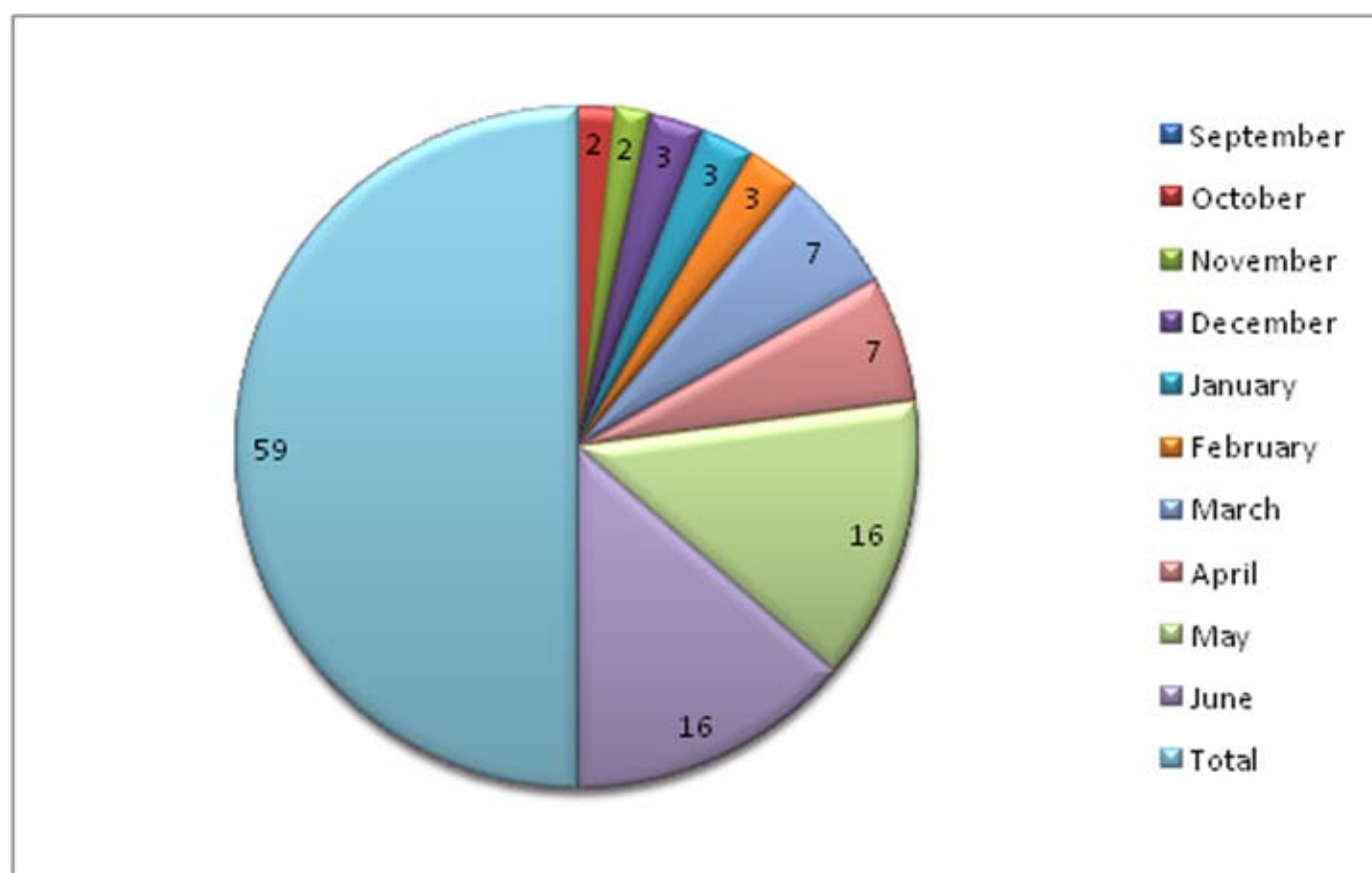
Graph 1: Complaints, written clarifications and advisory opinions (source: B-BBEE Commission)



Graph 2: Complaints per type (source: B-BBEE Commission)



Graph 3: Complaints per sector (source: B-BBEE Commission)



Graph 4: Meetings held with stakeholders (source: B-BBEE Commission)

Notices and Updates

The Minister published regulations which came into effect on 6 June 2016 under Government Gazette Number 40053. The regulations outline processes for complaints, exemptions, deviations, filing of documents, submitting reports, amongst other things.

Events

The B-BBEE Commission held the following activities, and the full details can be obtained on the website:

29 March 2016 - Conference on Fronting at Midrand Conference Centre, Gauteng.

28 June 2016 - Seminar for Verification Professionals at Birchwood Hotel & Conference Centre, Gauteng.



Gallery

Delegates of conference on fronting



Honourable Joan Fubbs
Chairperson of the Portfolio Committee on Trade and Industry



Dr Ria Nonyana-Mokabane
Chief Director Legislative Drafting of the dti.

Delegates of conference on fronting



Gallery



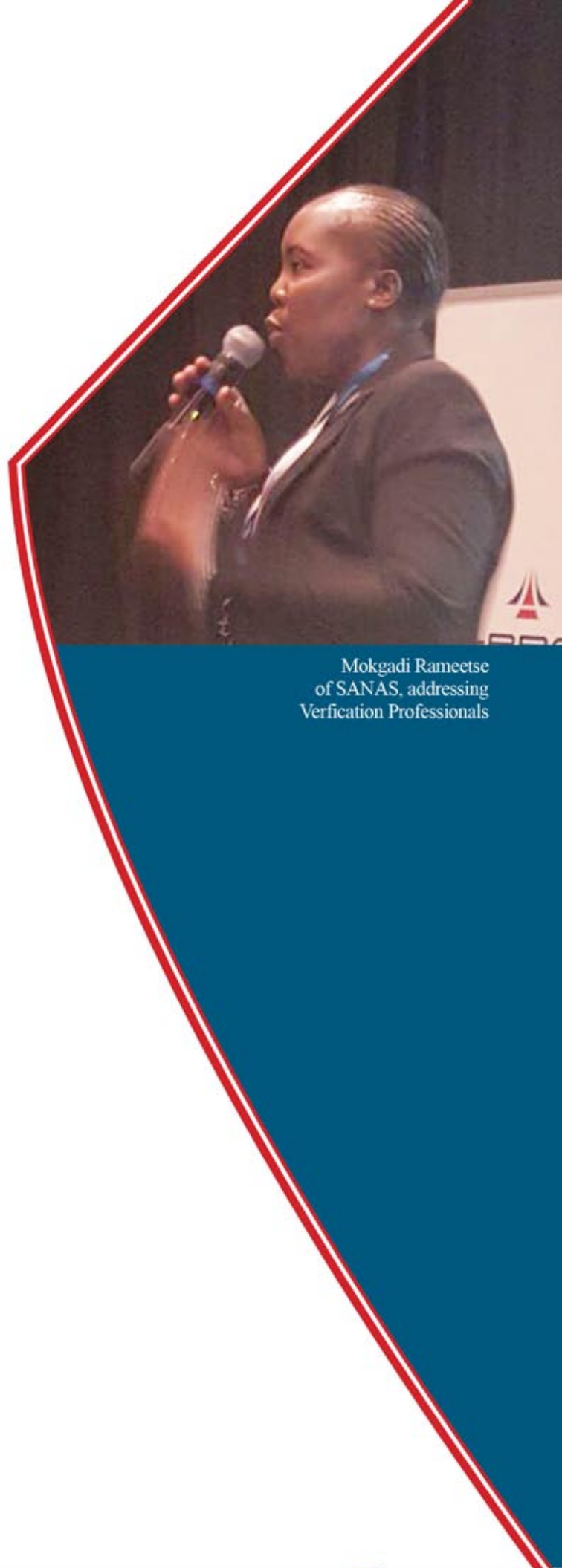
Seminar for Verification Professionals



Seminar for Verification Professionals



Seminar for Verification Professionals



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