



The *'Once Empowered, Always Empowered'* has no place in a transforming South Africa

It is extremely difficult to find a place for the so-called *'once empowered always empowered'* in the situation where 20 years after the adoption of the Constitution in South Africa, so much disparity and economic divide exists.

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GLOSSARY

In *The Whistle*, the phrases and words commonly used have the following meaning, unless specified otherwise:

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
B-BBEE Regulations	Regulations issued by the Minister in terms of section 14 of the B-BBEE Act
Codes	Generic Codes of Good Practice issued by Minister
DFI	Development Finance Institution
EME	Exempted Micro Enterprise
Entity	Any measured entity, including company, close corporation or trust
ESD	Enterprise and Supplier Development
IRBA	Independent Regulatory Board for Auditors
JSE	Johannesburg Stock Exchange
Minister	Minister of Trade and Industry
QSE	Qualifying Small Enterprise
Sector Codes	Sector Codes gazetted by Minister in terms of section 9(1)
SED	Socio-Economic Development
SANAS	South African National Accreditation Systems
the dti	Department of Trade and Industry

EDITORIAL NOTE

Welcome again to *The Whistle*, we hope you found our first edition stimulating. This edition focuses on the responsibilities of organs of state and public entities in realising the full benefits of B-BBEE.

Most people say B-BBEE is for a few politically connected individuals and elites because ordinary South Africans are yet to see the benefits. We see black people being taken for a ride in mining communities, employee share schemes and ownership trusts by entities that do business with government. Why is this happening?

We explore some of the gaps and challenges, and make recommendations in how government must follow its own rules for the benefit of the majority. In complaints received some complainants have approached government departments who have awarded contracts to entities that clearly appear to practice fronting, but no action has been taken. In fact in most instances these departments have turned a blind eye.

It is said that South Africa has very good policies but battles at implementation level. How B-BBEE was applied in the past is exactly a true example of this statement. It is difficult to defend the notion that it is for elites and politically connected if we judge by what happened since 2003.

On the positive side, we do have an opportunity now to turn a new page, and make it real for everyone. In doing so, we must be very clear and direct in our resolve, and not be apologetic.

Ordinary citizens in South Africa have not seen the benefit of this policy, despite its broad based sentiments. We must instil confidence by safeguarding its objectives, and facilitate that ordinary South Africans benefit. The few black individuals that go around deceiving communities by creating community structures that purport to be B-BBEE initiatives must be brought to the fore and punished. These are people that take the benefits intended for ordinary citizens.

Further, government arms that undermine B-BBEE must also be exposed, including those who manipulate processes to

benefit their friends. Commitment to drive B-BBEE must come from the top in each organ of state and public entity. The implementation of the trumping provision must prevail with immediate effect if we are to benefit black people in a meaningful way.

We also share the statistics (unaudited) and activities for quarter 2 as usual to give you a feel of our daily activities, as well as trends that we are picking up.

We thank you for the feedback you sent to us on the first edition, and we undertake to continuously improve this publication for your benefit.

*An inclusive economy for
all, together!*

*Happy
reading!*



Ms Zodwa Ntuli
Acting Commissioner

The 'Once Empowered, Always Empowered' has no place in a transforming South Africa

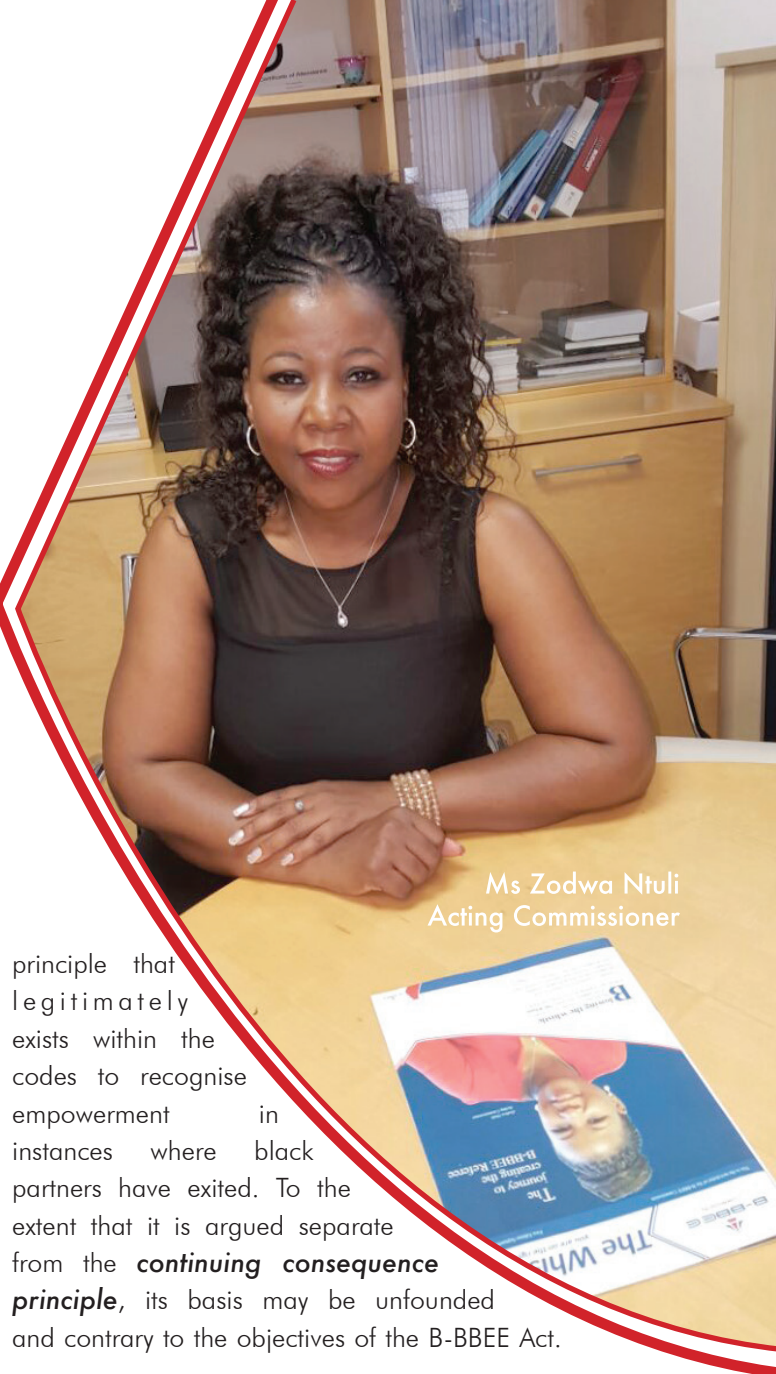
It is extremely difficult to find a place for the so-called '**once empowered always empowered**' in the situation where 20 years after the adoption of the Constitution in South Africa, so much disparity and economic divide exists. Further, this occurs where South Africans bemoan the pace of transformation and the unintended consequence of B-BBEE benefiting a few elites and politically connected individuals.

The various reports on the progress and the state of economic transformation show a very bleak picture and outlook in South Africa. For instance, the National Empowerment Fund stated that black equity on the JSE was only 3% while the Commission of Employment Equity Report showed that white people continue to occupy about 60% and 70% of senior management and top management positions respectively.

Further, black businesses continue to face the binding constraints such as lack of access to finance and markets, high barriers to entry and unfair competition, which inhibits their full participation in the economy. This means that even where there are black entities entering the market, most struggle to survive or be profitable due to these challenges. These were identified by government already in its 10 year review, and the subsequent 20 year review.

As the B-BBEE Commission, we have carefully considered the arguments relating to the '**once empowered, always empowered**' against the purpose and objectives of the B-BBEE Act, and are of the opinion that such an attitude to empowerment is counter-productive. We use the word attitude because one of the synonyms given on thesaurus for 'principle' is 'attitude', which is befitting. Other words given such as 'value', 'belief' or 'norm' could mislead to give the impression that we regard the '**once empowered, always empowered**' as sacred and acceptable.

We believe that the '**once empowered, always empowered**' attitude may be arising from the incorrect extension of the application of the **continuing consequence principle**, a



Ms. Zodwa Ntuli
Acting Commissioner

principle that legitimately exists within the codes to recognise empowerment in instances where black partners have exited. To the extent that it is argued separate from the **continuing consequence principle**, its basis may be unfounded and contrary to the objectives of the B-BBEE Act.

We base our opinion on the assessment of numerous complaints lodged with the B-BBEE Commission since its operation, the lack of real change in the ownership patterns of the South African economy, and the contents of the various draft sector codes that seem to have different and inconsistent approaches. This bearing in mind that ownership is one of the priority elements with the revision of the codes, aimed at accelerating empowerment of black people.

B-BBEE is an integrated coherent framework that seeks to advance the economic transformation of South Africa and bring about significant increase in the number of black people that manage, own and control the country's economy. This can be facilitated through creation of new black owned or managed enterprises as well as acquisition of stake in existing enterprises that are not currently owned or managed by black people. The form in which economic transformation

is realised is guided by the B-BBEE Act with the codes guiding the implementation to achieve the outcome, not to aid measured entities to circumvent the B-BBEE Act.

The five elements of B-BBEE adopted in the codes each have a specific purpose and together provide an integrated intervention to empower black people as envisaged in the B-BBEE Act. The purpose of the ownership element is to ensure that black people own and/or control enterprises and productive assets in a manner that is sustainable and promotes and preserve corporate governance principle that underpin the Companies Act, 2008 (Act No. 71 of 2008) as amended. The enterprise development component of the codes seeks to complement the aspect of ownership by black people by requiring measured entities to support and invest in creation of black owned enterprises.

B-BBEE ownership element in the codes emphasises three important measures, namely excisable voting rights, economic interest and net value in the hands of black people as a result of direct participation in the measured entity. The measured entity will on an annual basis recognise points for as long as the black shareholders still hold rights of ownership in the entity. It is the responsibility of the measured entity to submit appropriate information during the verification process to enable the assessor to carry out a factual valuation to determine a B-BBEE ownership score. This assessment aims to determine both factual (de facto) and legal (de jure) ownership aspects.

In addition, the ownership scorecard for practical reasons permits the measured entity to continue recognising a portion of black ownership after the black shareholders have exited through loss or sale of shares, for a specific period. To the best of our knowledge, the ex post facto recognition of ownership points was intended to serve as a transitional arrangement for the measured entity to enter into a new B-BBEE ownership transaction. For this reason, the **continuing consequence principle** has rules attached to how this recognition should be applied in order to comply with the code. Therefore, not every instance of exit by black people from a transaction will benefit from this recognition.

Code Series 100 of the codes set out the following requirements, which must be applied for the continued recognition of ownership points:

- the black participants must have held the shares for a minimum period of three years;
- net value based on the Time Based Graduation Factor as per Annexure 100E must have been created in the

hands of black people;

- transformation must have taken place within the measured entity using the B-BBEE recognition level from the period of entry of black participants to the exiting period; and
- the continued recognition cannot contribute more than 40% of the score on the ownership scorecard.

These requirements are intended to safeguard the objectives of B-BBEE as outlined in section 2 of the B-BBEE Act in line with our view on the purpose of the **continued consequence principle**. Real black economic empowerment can only be achieved if ownership is acquired and maintained in the hands of black people, and recognising such ownership even when the black shareholders have exited for a period longer than a mere transitional period would amount to undermining the objectives of the B-BBEE Act.

Previous principles such as the one that was contained in the ICT Sector Code of 2012 recognising transactions of R7.5 billion in the sector to be deemed ownership perpetuated the incorrect application of B-BBEE, and in a way trivialise the real objectives of the ownership element. The '**once empowered, always empowered**' attitude is no different from this approach.

Despite the legislative prescripts for continuing recognition, the absence of a sunset clause is an inherent risk and may result in misstatements during verification and consequently undermining the B-BBEE Act. At this point, this allows for deliberate misinterpretation of the B-BBEE Act to put forward an argument to recognise the '**once empowered, always empowered**' within the B-BBEE framework in respect of ownership.



In the assessment of complaints lodged with the B-BBEE Commission, it has become evident that some of the measured entities may have realised ownership points as a result of the continuing consequence formula, irrespective of whether or not the initial ownership transaction had met the requirements of the B-BBEE Act. These are some of the observations:

- No benefit flow in the hands of black people – some of the B-BBEE certificates submitted in support of the complaint reflect high ownership points that the measured entity achieved even when the black participants exited for reasons other than loss or sale of shares, and without true value being realised.
- Restrictive shareholders agreements – clauses in the shareholders' agreements are too restrictive, and limit the black participants from exercising any voting rights in relation to the measured entity. In such a case, the black participants are merely treated as beneficiaries and not shareholders.
- Window dressing - the black participants are granted 51% ownership in order to benefit from the automatic B-BBEE recognition levels granted to black controlled and owned EMEs and QSEs, with no substantial participation in the core operation and activities of the measured entity, and determining the ratio for the flow of benefits. Such structures place all the operational control with the 49% partner, including sole responsibility of appointing the managing director, overseeing business opportunities, and sole signatory to the bank accounts.
- Intermediary structures – the measured entity establishes an opportunistic intermediary that is 51% black controlled to ensure that any entity that procures goods and services benefit preferential procurement points based on its B-BBEE status, whilst the true supplier is a third party owned by the 49% partner of the measured entity. Upon receipt of payments, the monies are transferred from the intermediary to the third party. This practice is contrary to the objectives of B-BBEE and subjects B-BBEE to a tick box exercise.

Further, the results of the two research reports commissioned by **the dti** in 2008 and 2013 indicate clearly that the state of transformation has not changed but rather that entities have merely moved from level 8 in 2008 to a level 6 in 2013. This is despite having a proliferation of measured entities claiming to have achieved a B-BBEE recognition level 1 and

2, without any meaningful impact on the structural ownership of the economy.

If the above pattern and observations continue, as we suspect it would if not addressed directly, the ownership patterns of the South African economy will remain the same, with no real empowerment of black people who comprise the majority. This is so as it appears that most ownership transactions are already flawed if our observations are to be used as a guide, and recognising these through the incorrect application of the **continuing consequence principle** merely perpetuates the fallacy of black ownership.

There are many structural challenges linked to the implementation of the ownership scorecard, and the prescribed verification methodologies have not been adequate in detecting such. Thus, it would be prejudicial to the transformation agenda for any measured entity to benefit from the **continuing consequence principle** where the black ownership is defective from onset. With this in mind, one should already imagine the negative implications that come with the **'once empowered, always empowered'** approach amid the possible abuse of the already legitimate **continuing consequence principle**.

If one has regard to the policy objectives and the intended purpose of the B-BBEE Act, there should be no room for any entity, sector, or industry to argue for the **'once empowered, always empowered'** to be legitimised as it goes against the objectives of the B-BBEE Act, and continues to trivialise the need for B-BBEE and its acceleration. **'Once empowered, always empowered'** is unjustifiable and will result in regression or stagnation in the transformation agenda.

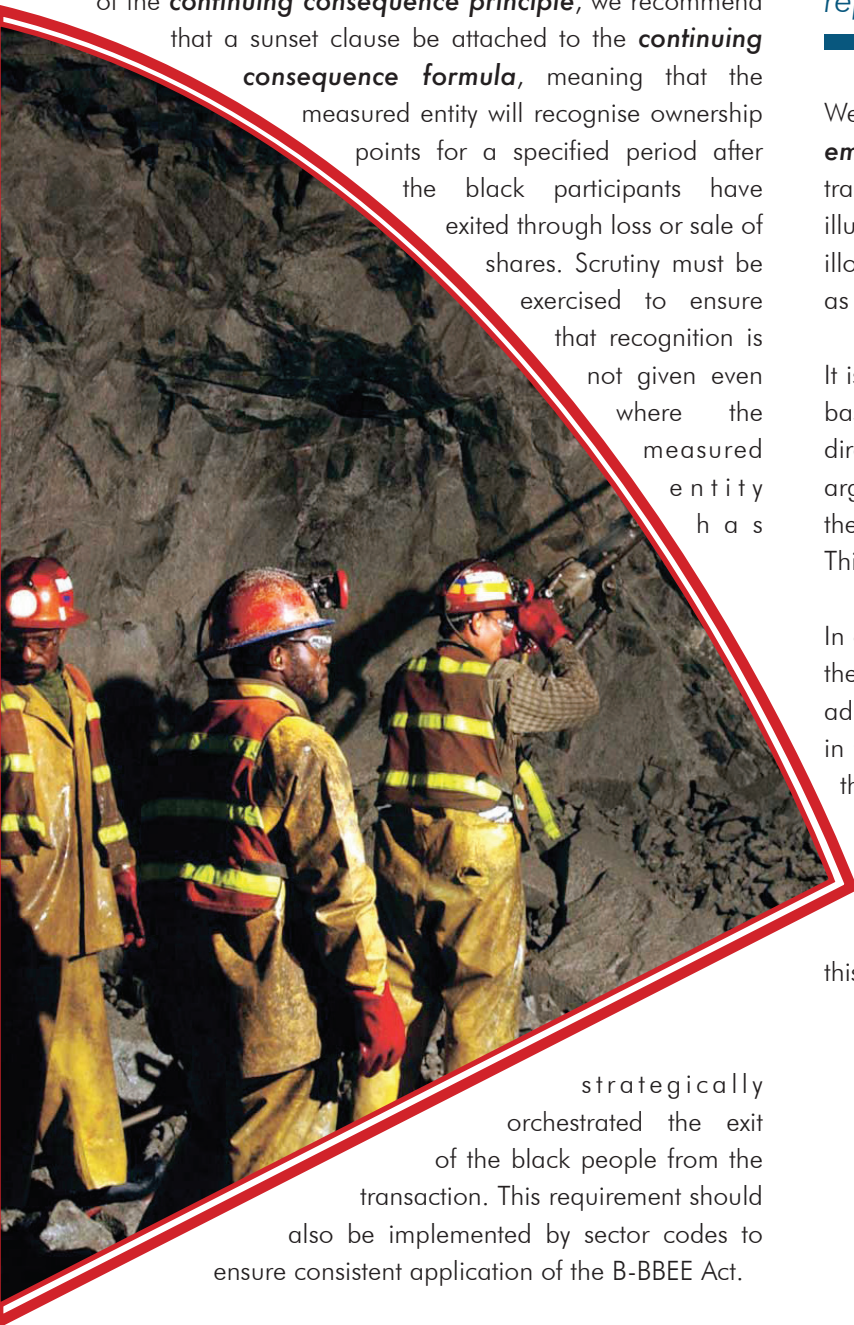
The B-BBEE Commission does not support the **'once empowered, always empowered'** and proposes that clear direction be provided to the players in the market that this is inconsistent with the objectives of the B-BBEE Act. It is also our view that sector codes should also not be allowed to include the **'once empowered, always empowered'** as this is contrary to the B-BBEE Act. Sector codes are not meant to be an avenue to circumvent the B-BBEE Act, but merely to recognise unique sectoral dynamics in the interest of advancing B-BBEE.

There is, however, merit in discussing the practical implications of the exit by black shareholders or partners to the extent that the discussions relate to a transitional period within which the measured entity should be able to replace such shareholders or partners. This must be discussed within the context that

measured entities are expected to have plans to sustain the B-BBEE status on a continuous basis. Sadly most approach such transactions as once-off stunts aimed at achieving or meeting the requirement for a particular licence or tender.

The space for discussions relating to transitional arrangements already exists within the provisions dealing with the **continuing consequence principle**, and if applied to a B-BBEE transaction that was correct from the onset, the principle will achieve the intended purpose. It is therefore our view that while transactions may differ, it should not take longer than **one year** for B-BBEE shareholders or partners to be replaced by a measured entity, especially where the will to do so exists.

In light of the above and to close the opportunity for abuse of the **continuing consequence principle**, we recommend that a sunset clause be attached to the **continuing consequence formula**, meaning that the measured entity will recognise ownership points for a specified period after the black participants have exited through loss or sale of shares. Scrutiny must be exercised to ensure that recognition is not given even where the measured entity has



strategically orchestrated the exit of the black people from the transaction. This requirement should also be implemented by sector codes to ensure consistent application of the B-BBEE Act.

The measured entity should use the sunset clause window as a transitional period to identify and conclude a new B-BBEE ownership transaction, which we believe would have been part of its contingency plan for such eventualities in any way. Further, it must be clearly stated that the measured entity can only benefit from the **continuing consequence principle** where the initial transaction fully met the requirements of the ownership scorecard, in which case it will be applied as is in the codes.

There is, however, merit in discussing the practical implications of the exit by black shareholders or partners to the extent that the discussions relate to a transitional period within which the measured entity should be able to replace such shareholders or partners.

We therefore reject the argument for embracing the **'once empowered, always empowered'** as this is counter transformation and aims to reverse the gains by creating the illusion of economic transformation where there is none. It is illogical to seek to pass off 'non-existent black shareholders' as real and active shareholders.

It is even difficult to comprehend how such can be justified, basically meaning that an entity that had appointed black directors on its board, who subsequently resigned, can also argue that it must be recognised for those appointments as if the black people that were appointed are still on that board. This is unimaginable.

In continuing to safeguard the objectives of the B-BBEE Act, the B-BBEE Commission will continue to oversee and promote adherence to the Act, including initiation of investigations in terms of section 13J of the B-BBEE Act which empowers the B-BBEE Commission on its own to initiate or on receipt of a complaint to investigate any matter arising from the application of the B-BBEE Act and to refer such matter for prosecution where applicable. We therefore appeal to the Minister not to approve sector codes that pursue this attitude to empowerment.



President Jacob Zuma

Why government entities may be a danger to real black economic empowerment

Transformation of entities in South Africa is crucial to close the gap that exists between the rich and poor, and to include the majority of South Africans in the mainstream economy. One of the constraints identified towards achieving this goal is the organs of state and public entities failing to effectively apply the B-BBEE Act. This results in non-compliant entities unduly benefitting from government tenders, licences and other authorisations.

There is little, if any, due diligence and monitoring of conditions in contracts, licences and other authorisations awarded by organs of state and public entities. Basically, some awards are made without verifying the B-BBEE credentials of the entity, and no conditions attached for maintenance of the B-BBEE status. Even where conditions are included, there is no monitoring to ensure that the entity maintains or improves on its B-BBEE status. It is easy for entities to submit B-BBEE credentials that seem to meet the requirements, but change them completely immediately after the award.

Consistent with our mandate in the B-BBEE Act, we wrote letters to organs of state and public entities bringing to their attention provisions of the B-BBEE Act, pointing to the need to immediately implement the B-BBEE Act. The next step is to initiate investigations against organs of state and public entities that seem to undermine these requirements so that there are consequences for the officials and heads of these entities.

This article summarises the obligations contained in the B-BBEE Act for organs of state and public entities for them to successfully implement B-BBEE. The following are the specific areas that we highlighted to public entities and organs of state in our correspondence to them:

Requirements to apply the codes of good practice

In terms of section 10(1) of the B-BBEE Act, every organ of state and public entity **must** apply the relevant code of good practice issued by the Minister in accordance with

section 9 of the B-BBEE Act in 1) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law; 2) developing and implementing a preferential procurement policy; 3) determining qualification criteria for the sale of state owned enterprises; 4) developing criteria for entering into partnerships with the private sector; and 5) determining criteria for the awarding **of incentives, grants and investment schemes** in support of B-BBEE.

Each organ of state or public entity must consistently adhere to these requirements. This includes adjusting templates used for processes relating to activities outlined in section 10(1), such as bidding documents. The generic codes are applicable to all sectors, and in sectors where there is an approved sector code, these requirements must be aligned to the relevant sector code. We must bear in mind that the targets in the generic codes and sector codes are bare minimum, and where necessary, organs of state and public entities may set higher targets to accelerate economic transformation.

Some argue that monopolies or entities that are sole providers of a particular product or service need not comply to B-BBEE requirements as the state has no option but to deal with such entities anyway. This is incorrect because organs of state and public entities are required to place conditions such as sub-contracting and twinning to start creating black enterprises that can compete in providing such goods and services in the future.

Obtaining approval for a deviation, exemption or permission to exceed the minimum requirements

Section 10 (2) (a)-(b) of the B-BBEE Act provides that the Minister, may after consultation with an organ of state or public entity, grant an exemption or allow for a deviation from section 10(1) if there **are objectively verifiable facts or circumstances justifying** such an exemption or deviation. The process to obtain an exemption or deviation from section 10(1) is clearly stipulated in Part 7 Regulation 20 of the B-BBEE Regulations issued by the Minister in accordance with section 14 of the B-BBEE Act.

Section 9(6) allows the Minister by notice in the Gazette to permit an organ of state or public entity to specify



Dr. Rob Davies
Minister of Trade and Industry

qualification criteria for procurement and other economic activities which exceed those set by the Minister in the codes of good practice. This means that organs of state or public entities may exceed the requirements set in the approved sector code or the generic codes to advance B-BBEE. The process for obtaining this permission is outlined in Part 6 Regulation 19 of the B-BBEE Regulations.

Even after the award is made, it is the responsibility of organs of state and public entities to ensure that entities awarded continue to adhere to the B-BBEE requirements.

The above-mentioned deviation, exemption or permission to exceed must be published in the Government Gazette once granted by the Minister. This is intended to ensure transparency and enhance compliance by entities that operate within the sector or industry of the said organ of state or public entity. Any organ of state or public entity that does not comply with the provisions of section 10(2) and 9(6) would be acting contrary to the provisions of the B-BBEE Act.

We have noted that there are inconsistencies in how public entities or organs of state set requirements, especially in relation to the ownership requirement. In the interest of transparency and consistency, each player in the market

must be able to know what is expected from them for certainty. It is not appropriate for entities to be ambushed with requirements in tenders or licensing processes as this allows for manipulation, thus creating a fertile ground for corruption to occur.

Reporting duties for organs of state and public entities

Section 13G(1) of the B-BBEE Act now requires that all spheres of government, public entities and organs of state to report their compliance with B-BBEE in their audited financial annual statements and annual reports, and the process for this is outlined in Part 2 Regulation 12 of the B-BBEE Regulations. They must ensure that there are internal mechanisms to comply with these reporting duties. At the end of the 2016/2017 financial year these reports must be submitted to the B-BBEE Commission as prescribed. This includes all Sectoral Education and Training Authorities (SETAs).

Obligation to report fronting practices or misrepresentation of B-BBEE status

Organs of state and public entities receive applications for tenders, concessions, licences or other authorisation on a regular basis, for which they must ensure adherence to the B-BBEE requirements. It is in these processes that entities may submit false information or misrepresent the B-BBEE credentials or status in order to be awarded a tender, licence, concession or authorisation.

Also, it is in these processes that fronting practices take place, which include the granting of black people ownership without corresponding economic benefits, entering into a legal relationship with a black owned entity only for the purpose of enhancing the B-BBEE status, or submitting structures with fictitious names of black people purported to be shareholders of the entity.

In terms of section 13O (2) of the B-BBEE Act, it is a requirement for a procurement officer or any other official of an organ of state or public entity who becomes aware of the commission of fronting practices, misrepresentation of B-BBEE status, or submission of false information relevant to assessing B-BBEE status, to report such to the B-BBEE Commission immediately. This however can be



Mr Lionel October
Director General the dti

picked up only if the necessary due diligence is conducted during these processes. Further, failure to report is an offence. Even after the award is made, it is the responsibility of organs of state and public entities to ensure that entities awarded continue to adhere to the B-BBEE requirements.

Requirement to assist the B-BBEE Commission

In terms of section 13B (5) of the B-BBEE Act, each organ of state must assist the B-BBEE Commission to exercise its authority and perform its functions effectively. Our investigation process may include request for information as may be required in a specific complaint being investigated, as well as the issuance of summons to any person to appear before the B-BBEE Commission to be questioned or to deliver or produce specific documents in accordance with section 13K of the B-BBEE Act, as well as the holding of a formal hearing in accordance with section 13J (2) of the B-BBEE Act. Where the conduct involves the commission of a criminal offence, the B-BBEE Commission is required by section 13J (5) to refer such to the National Prosecution Authority or the appropriate division of the South African Police Services.

In this regard, we may request information from any person or issue summons for documentation or require an official to appear before the B-BBEE Commission to

answer questions as part of the investigation. Given the nature of our investigations and timelines attached to them, speedy cooperation is required.

Some government departments delay submission of information, especially relating to licences. Government officials must note that our request for information is not an opportunity to attempt to now conduct their own investigation, or to contact entities that are under investigation for any reason. Their job is to submit the information to allow the B-BBEE Commission to do its job.

In terms of section 13N (3) (a) (c) and (f) of the B-BBEE Act, it is an offence for any person to hinder or obstruct the B-BBEE Commission in exercising a power or performing a duty in terms of the B-BBEE Act; to knowingly provide false information to the B-BBEE Commission, or to refuse to attend when summoned, or when attending refuse to answer questions or produce documents required by the summons. Where delays or lack of cooperation exists, the B-BBEE Commission will be compelled to invoke the relevant provisions. Further, we will report such to Parliament and Cabinet for further action to be taken against the relevant organs of state and public entities.

Authority for organs of state or public entities to cancel awards

In terms of section 13A, any contract or authorisation awarded on account of false information knowingly furnished by or on behalf of an entity in respect of its B-BBEE status, may be cancelled by an organ of state or public entity without prejudice to any other remedies that the organ of state or public entity may have. Further, section 13P provides that any person convicted of an offence in terms of the B-BBEE Act may not contract or transact business with any organ of state or public entity, and must for that purpose be entered into the register of tender defaulters which the National Treasury may maintain for that purpose.

The above is a powerful deterrent and organs of state and public entities must have this requirement in the bidding documents to give it full force. They must implement measures to facilitate the smooth implementation of these sanctions, including revision of contract clauses and conditions for awards to specifically state that if fronting,

misrepresentation or provision of false information is found, the award will be revoked or contract cancelled.

For instance, B-BBEE certificates submitted by entities must be scrutinised and not accepted at face value as we picked up that some are not worth the paper they are written on. Some government departments accept invalid or expired B-BBEE certificates. Also, basic due diligence must be conducted, including checking the register for tender defaulters before any award is made to prevent making awards to blacklisted entities.

Penalty provisions

Section 13O (3) (a) of the B-BBEE Act provides that any person convicted of an offence in terms of the B-BBEE Act is inter alia liable to a fine or imprisonment for a period not exceeding 10 years or both a fine and such imprisonment, or if the convicted person is not a natural person, to fine not exceeding 10% of entity's annual turnover. The penalty provisions are aimed at deterring and preventing further violations of the B-BBEE Act, and organs of state or public entities must help the B-BBEE Commission to achieve this.

These include the sanctions relating to cancellation of contracts and exclusion from doing business as a consequence of conviction. Where the above mentioned sanctions have been imposed, the B-BBEE Commission will require full implementation of the sanctions, especially exclusions and cancellations.

In conclusion, it is the duty of government to help drive B-BBEE, and anything to the contrary must have consequences for the heads of these entities. For as long as non-compliant entities receive state contracts, they will continue to undermine and trivialise the need to transform. And for as long as government officials fail to conduct due diligence and monitoring of conditions relating to B-BBEE, more fronting practices will occur to the detriment of the economy.



Time for government to champion coordination of B-BBEE

Introduction

This article covers the mandate of the B-BBEE Commission, the mandate of the B-BBEE Advisory Council, as well as the need for coordination to maximise the implementation of B-BBEE. This makes the case for a specific structure or department within government to champion coordination to accelerate the much needed economic parity. It is a summary of our inputs to the B-BBEE Advisory Council.

The Mandate of the B-BBEE Commission

Section 13F outlines the functions of the B-BBEE Commission as 1) to oversee, supervise and promote adherence in the interest of the public; 2) strengthen collaboration between public and private sector to promote and safeguard the objectives of the Act; 3) receive complaints and/or investigate complaints in terms of this Act; 4) promote advocacy, access to opportunities and educational programmes and initiatives; 5) maintain a register of major B-BBEE transactions (above threshold); 6) receive and analyse prescribed reports on compliance; 7) promote good corporate governance and accountability by creating an effective and efficient environment; 8) increase knowledge and public awareness through educating, guiding, declaratory orders, and researching; and 9) exercise any powers conferred by the Minister in writing.

Section 13F (1) (c)-(d) and 13J of the B-BBEE Act confer powers to the B-BBEE Commission to receive complaints and conduct investigations, either on its initiative or in response to complaints received in the prescribed form, relating to any matter arising from the application of the B-BBEE Act, including any B-BBEE initiative or category of B-BBEE initiatives. The processes for these powers are outlined in the B-BBEE Regulations.

Important to note in the mandate of the B-BBEE Commission is that, while there are consequences for practices that undermine the objectives of the B-BBEE Act by measured entities under offences, there is a limitation in respect of consequences against organs of state and public entities that fail to implement B-BBEE in accordance with the B-BBEE Act from a criminal perspective.

Specifically, none of the offences in section 130 and 13N can be adequately applied to organs of state and public entities. The only exception is where a procurement official, or any official of government, has failed to report an offence or attempt to commit an offence. Important to note further is that there are no administrative penalties provided for in the B-BBEE Act against the organ of state. It is acknowledged though that to the extent that an organ of state or public

entity engages in a fronting practice in the course of business, the provisions of the B-BBEE Act would apply to such a practice, including the penalty provisions.

For B-BBEE objectives to be achieved, organs of state and public entities must implement the B-BBEE Act properly and consistently. This means there is a need for a measure to proactively drive compliance by organs of state and public entities, and to compel implementation of the B-BBEE Commission findings and recommendations against an organ of state or public entity, other than through the court process provided for in section 13J.

It is not desirable for the B-BBEE Commission, nor is it cost effective, to pursue court processes to compel organs of state or public entities to fully and effectively comply with the B-BBEE Act. The B-BBEE Commission should never be put in a position where it must invoke such action against government itself, but will do so when the situation warrants that such be done.

The B-BBEE Commission can monitor compliance with these requirements, but government must have its own mechanism of ensuring that organs of state and public entities, which include all municipalities, actually comply with these requirements. The B-BBEE Commission will investigate violations by organs of state and public entities, and issue findings and recommendations to remedy non-compliance.

In the same way that the coordination of infrastructure projects occurs in South Africa, government itself must coordinate its actions for radical transformation to be achieved. Without this mechanism, untransformed entities will continue to do business and benefit from significant government contracts or awards, undermining the transformation imperatives.

The B-BBEE Commission has the powers to implement advocacy measures, and to this end it will seek to influence all government processes that should accelerate economic empowerment of black people, including advocating for streamlining of financing practices of DFIs and traditional financing institutions to facilitate funding of black people to advance B-BBEE. This mandate is limited and there is no power for the B-BBEE Commission to intervene beyond this.



Further, in terms of the research mandate, the B-BBEE Commission will monitor developments and trends, and issue reports to show progress and influence change where necessary. This research could include assessment of to whom government support is directed, and the extent to which black people are directly targeted for such support, including incentives.

This makes the case for a specific structure or department within government to champion coordination to accelerate the much needed economic parity.

While government itself must drive the streamlining of financial support to black owned or managed entities, on implementation the B-BBEE Commission will assist in proactively assessing the control and management structures of these entities pre and post award to ensure that the entities supported are not being merely fronted to benefit the wrong people. Therefore, government must come in to coordinate the implementation of the part of the B-BBEE strategy that relates to streamlining of support for black businesses.

The Role of the B-BBEE Advisory Council

Section 4 of the B-BBEE Act establishes the B-BBEE Advisory Council, with its mandate outlined in section 5 being to



implementation of the Public Finance Management Act (PFMA) and the Preferential Procurement Policy Framework Act (PPPFA) and issues instructions to all government entities. Also, the Presidency is the driver for the government infrastructure projects through the coordination committee to ensure that objectives are achieved. Lastly, monitoring and evaluation and government planning is driven from the Presidency, with directives to all government entities to comply. It seems therefore that there is no such champion to coordinate the implementation of B-BBEE.

The Current Gaps with Implementing B-BBEE

advise government on B-BBEE; review progress in achieving B-BBEE; advise on draft codes of good practice; advise on the development, amendment or replacement of the B-BBEE strategy; advise on sector charters, if requested to do so; and facilitate partnerships between organs of state and the private sector to advance the objectives of the B-BBEE Act.

On a practical level, the role of the B-BBEE Advisory Council is more high level, but strategically placed to directly advise government, the President, and the Minister on B-BBEE. In tracking the progress of the implementation, the B-BBEE Advisory Council may identify gaps and recommend interventions to close the gaps identified. Although advisory in nature, the role of the B-BBEE Advisory Council in influencing how government should in all its structures implement B-BBEE is crucial, especially in light of its composition and the fact that it is chaired by the President.

The B-BBEE Advisory Council in its deliberations identified the need for a champion for B-BBEE within government to accelerate implementation. Specifically, the B-BBEE Advisory Council alluded to the fact that it is not clear which department within government is the driver of B-BBEE in a sense that it can ensure its consistent, integrated and coordinated implementation to achieve the objectives of B-BBEE.

For instance, the National Treasury is the driver for

In the outline of the mandate of the B-BBEE Commission, we addressed some of the limitations that exist in the legislation which may inhibit the achievement of the objectives of B-BBEE. Further, in outlining the role of the B-BBEE Advisory Council, we have also alluded to its advisory role, which limits its ability to enforce any recommendations that are crucial to advance the achievement of B-BBEE.

In the same way that the coordination of infrastructure projects occurs in South Africa, government itself must coordinate its actions for radical transformation to be achieved.

The outline of the mandate assists with the gap analysis to identify the aspects in the B-BBEE strategy that require a driver or champion. B-BBEE seems to be sold as a policy intervention of **the dti**, but with little if any, power to intervene where government itself is not implementing B-BBEE properly. There is a need to drive B-BBEE as a government policy, and if **the dti** is the driver, as it should, it must be given more powers to compel and instruct government entities for consistent application and adherence.

The challenges currently facing the implementation of B-BBEE in our observation include the following:

- Buy-in - Lack of buy-in from some of the organs of state and public entities towards vigorous implementation of B-BBEE, primarily at leadership level;

- Alignment - Lack of alignment of legislation across sectors, despite the introduction of the trumping provision in section 3(2);
- Inconsistencies – Continued implementation of processes that deviate from the codes of good practice without approval resulting in continued fragmented ad hoc application of B-BBEE;
- Coordination and integration - Lack of coordination and integration in measures and programmes implemented by government to advance B-BBEE, including pooling of available financial resources to provide access to finance in a manner that can make meaningful impact;
- Compliance framework - Lack of a single government compliance framework for monitoring compliance by all spheres of government, basically there is no specific department empowered to perform this task in order to drive effective implementation;
- Targeted support - Current support measures identified in the B-BBEE strategy to fully realize the benefits of B-BBEE, such as set asides, funding and incentives, still have not been streamlined to effectively enhance black people;
- No consequence – No real consequence for government departments who do not implement B-BBEE, thus resulting in measured entities stalling empowerment as they know that they still get contracts or licenses from government anyway; and
- Due diligence – Some organs of state and public entities still do not have mechanisms in place to perform any due diligence before awarding the contract, licences or concessions to prevent misrepresentation and fronting, or to deliberately advance B-BBEE, including mere verification of whether an entity is legit.

This is in addition to binding constraints that exist in various sectors of the economy, including barriers to entry, difficulties in penetrating market and access to capital required to be competitive in the market. As most priority sectors have incentives from government, it is important to monitor the extent to which these incentives are directed towards the advancement of ownership and management control by black people, what percentage of these incentives on a yearly

basis is set aside towards black people, and to what extent the entities who receive incentives are transforming.

While the B-BBEE Commission to a certain extent has powers to monitor some of the aspects, the B-BBEE Act does not confer enough powers to fully and effectively coordinate the implementation of all elements of the B-BBEE strategy, other than the legislative ones, i.e. the ones included in the B-BBEE Act and the codes of good practice. The gap in the implementation of the other (non-legislative) elements of the B-BBEE strategy severely compromises the realisation of the B-BBEE objectives.

It is saddening and demoralizing for black people to see untransformed entities continuing to be supported by government through incentives, contracts and other awards. As it appears, the PPPFA continues to hinder the full implementation of B-BBEE as the framework entrenches the 80/20 and 90/10 principle, despite the trumping provision in section 3(2). There is no reason at this point why government is not implementing the trumping provision to override the PPPFA or use the appropriate exemption provision in the PPPFA to grant organs of state and public entities the power to drive real economic empowerment, and implement set asides.

*Coordination within government will ensure that line departments and **the dti** reject sector codes that pay lip service to economic transformation.*

Further, the fact that sector codes continue to be used as an avenue to neutralize the importance of all entities to comply with B-BBEE is perpetuating this. Some sector codes still propose principles that are anti-transformation, such as the once empowered always empowered, and awarding of points for normal course transactions. Coordination within government will ensure that line departments and **the dti** reject sector codes that pay lip service to economic transformation.

The proposal for a Government Champion to accelerate B-BBEE

Having highlighted the mandate of both the B-BBEE Commission and the B-BBEE Advisory Council as part of the institutional framework for implementation of B-BBEE Act, it is important that this mandate is not confused with the role of the government champion that is discussed here.

It is our view that the champion for B-BBEE should proactively drive integrated coordination and uniform application of B-BBEE by organs of state and public entities, and stimulate real partnerships with the private sector, non-governmental organisations, local communities and other stakeholders to drive B-BBEE. This should extend to instructions and guides in terms of how government funding, and investment decisions such as those made by the likes of Public Investment Corporation, should be channeled.

It is also important to consider the current role of *the dti*, and the extent to which it may or may not be limited to execute this role. It seems at this point that *the dti* has no powers to champion government coordination, and to fulfill the government champion role, it needs more muscles. It makes sense for *the dti* to be given these powers as they currently are a custodian of B-BBEE.

If we are to consider the model similar to the Malaysian one, this is possible and such a structure could also be appointed within the Presidency to drive the aspects outlined in section 11(2) (a)-(b). This ordinarily will comprise of a team of not more than 10 high level persons with expertise in driving and coordinating implementation, more like the function currently performed by the infrastructure coordination committee that is chaired by the President.

This should essentially be a structure in the Presidency, with the powers to instruct organs of state and public entities in the implementation of the B-BBEE policy. This will significantly complement the role of the B-BBEE Commission in ensuring adherence in accordance with the B-BBEE Act.

Alternatively, the Department of Planning, Monitoring and Evaluation in the Presidency can be mandated to play the role of the champion for implementation of B-BBEE by government, and ensure that it is implemented in a manner that is consistent to contribute to achievement of Outcome 4 for creation of inclusive economy and decent jobs.

Conclusion

It is our view that while there are challenges in the B-BBEE framework, a number of useful interventions have occurred. This includes the amendments in 2013 to the B-BBEE Act to close fronting opportunities and monitor effective compliance. Further, the Black Industrialist Program provides funding for creation of black industrialists, an area that previously did not have dedicated attention. Also, various incentive schemes

are being revised to introduce requirements towards B-BBEE.

However, for as long as the coordination gap exists within government itself, B-BBEE will remain a dream. In sectors where there are no black owned businesses offering the services or goods required by government, a coordinated strategy must make a mandatory requirement that conditions to advance B-BBEE through sub-contracting, twinning or enterprise development are set.

Such conditions must also be an upfront requirement for granting of government incentives or grants, where entities don't have acceptable B-BBEE level prior to the grant or incentive being awarded. At this point, this is not implemented as the PPPFA gives a different instruction based on the 80/20 and 90/10 rule.

Government challenges are known to be in the area of implementation, and where implementation does occur, it is inconsistent and fragmented, thus denying government the opportunity to make the real impact.

Therefore, the missing element is the integrated coordinated and uniform application. If government implements B-BBEE effectively, the private sector will have little choice but to follow swiftly as no government entity or department will deal with them. Government challenges are known to be in the area of implementation, and where implementation does occur, it is inconsistent and fragmented, thus denying government the opportunity to make the real impact. This is exacerbated by the so called silo approach in implementation of government policies.

It is therefore about time that government itself takes B-BBEE seriously, and this should be evident in how it deals with entities that clearly do not embrace or buy into B-BBEE. Continuing to support or deal with these untransformed entities denies black people the opportunity to grow economically. Government must simply close the tap for such contracts to non-compliant entities, and where it must deal with them, concrete conditions for economic transformation must be imposed.



Government departments and entities must accept sworn affidavits from EMEs

Small and medium size entities face lots of challenges, including high costs of doing business and red tape. Since these entities account for a significant number of jobs worldwide, it is the responsibility of government to reduce the regulatory burden, red tape and costs for these entities. In keeping with this, the revised codes removed the need for EMEs and (51%&100%) black owned QSEs from being subjected to a verification process, and gave them automatic recognition levels.

As the practice of verifying smaller entities existed before, temptation exists on the part of the market and certain government entities to demanding verification certificates from these entities. Given this problem, the B-BBEE Commission issued a Practice Guide to guide the market and put a stop to this abusive practice. This is issued to assist with the interpretation for consistency in the application of the B-BBEE Act.

Section 9 (1) of the B-BBEE Act empowers the Minister to issue the codes to promote the purpose of the B-BBEE Act. The codes are underpinned by the need to drive inclusive economy, and must at all times be interpreted and applied in a manner that is consistent with the objectives and purposes of the B-BBEE Act, and in compliance with the Constitution. Code Series 000 states that an EME is only required to obtain

a sworn affidavit or Companies and Intellectual Property Commission ("CIPC") certificate on an annual basis.

The EME is merely required on an annual basis to state under oath its B-BBEE credentials or obtain a CIPC Certificate to that effect for as long as the annual turnover is below R10 million. However, should the empowerment status of the entity change at any time after it has made such an affidavit or obtaining the certificate from CIPC, the entity must disclose that fact when submitting its B-BBEE status to any person, organ of state or public entity, and must desist from knowingly submitting an affidavit or CIPC certificate with incorrect or false information as that would amount to non-compliance with the B-BBEE Act, and perjury.

The sworn affidavit must be signed by the Commissioner of Oaths as per the requirements in the Justices of Peace and Commissioners of Oaths Act, 1963 (Act No. 61 of 1963). Thus, a verification professional has the responsibility and duty to provide entities with proper advice, and guide these EMEs to the correct channels to obtain the CIPC certificate, or to use the template provided by **the dti** on its website for sworn affidavits.

Thus, EMEs should not be subjected to a verification process that may attract costs that legislative prescripts sought to



prevent
and avoid.

Further, the National Treasury issued a directive to all organs of state advising them not to require B-BBEE certificates from EMEs. Accounting Officers and verification professionals are no longer allowed to issue B-BBEE certificates to EMEs and QSEs as it was the case under the 2007 codes. Similarly, in Para 5.3 of amended Code Series 000, 51% and 100% black controlled and owned QSEs are only required to obtain a sworn affidavit. A template of the sworn affidavit has also been made available on **the dti** website.

Also, in keeping with this principle, **the dti** issued a communique to all verification professionals through SANAS and IRBA advising that no verification professional is authorised to issue B-BBEE certificates to EMEs or black controlled and owned QSEs.

This argument is flawed, and perpetuates illegal conduct that continues to create barriers for smaller entities to participate in markets that are already difficult to penetrate.

Thus, all organs of state must adhere to this requirement and comply with the legislation prescripts. Organs of state must desist from undermining the intent and spirit of the legislation and align their procurement processes, including economic activities which require entities to submit a B-BBEE certificate, with those of the B-BBEE Act.

However, in terms of section 6.4 in Code Series 000, enterprises would be required to submit generic scorecards for contracts of R50 million or more. It is only under such circumstances though such a requirement would apply in terms of the legislation.

It is not proper for any verification professional or accounting officer to argue that the certificates are issued at no cost or at the minimal amount. Also, the argument that a certificate looks more professional than an affidavit is illogical and

unacceptable as it continues to trivialise the sworn affidavit as a legitimate document. Moreover, this creates the unnecessary confusion that impedes the proper implementation of the provisions of the B-BBEE Act.

Others have argued that entities that deal with these EMEs and QSEs demand certificates instead of the sworn affidavit because they believe there is possible fronting with the sworn affidavits. This argument is flawed, and perpetuates illegal conduct that continues to create barriers for smaller entities to participate in markets that are already difficult to penetrate.

These are subtle practices that continue to make small and medium size business less competitive and unable to grow. A document itself, whether sworn affidavit or certificate, does not prevent fronting. It is the due diligence that is required on the part of measured entities and government departments alike that would help identify and root out fronting.

Further, should any verification professional continue to issue certificates to EMEs and QSEs contrary to the B-BBEE Act, the B-BBEE Commission will pursue the matter to the extent of having the accreditation of the verification professional withdrawn or cancelled, so that he or she cannot practice as a verification professional in future. Further, an order to refund all EMEs and QSEs that have been made to pay for such unnecessary certificates will be sought, as of the effective date of the Codes, and with interest where applicable.

The B-BBEE Commission has already issued letters to various verification professionals and accounting officers to desist from this practice as part of its compliance approach, but it will now be implementing more stringent and harsh interventions as some practitioners seem to undermine the B-BBEE Act deliberately.

Entities whose sworn affidavits are rejected by government entities and other measured entities must report such practices so that the B-BBEE Commission can intervene. Also, where government entities still demand or require certificates for EMEs and QSEs in their tender documents, these must be reported.

We also note that there are a number of advertisements online that still offer such certificates to EMEs and QSEs, worse in a matter of an hour at the most, and action will be taken in this regard. It is clear that if a certificate can be issued in less than an hour, it certainly is not necessary, and merely a practice of scamming money from poor small businesses.

Practitioners must uphold ethical standards and not attempt to make a quick buck from entities that are deliberately exempted by legislation from incurring any costs, or go through a red tape that is unnecessary.

B-BBEE is not about chasing the highest level on the certificate

2016 marks 20 years since the Constitution of the Republic of South Africa was enacted and implementation of economic transformation is still a challenge both in the public and private sector. Section 9 (2) of the Constitution of the Republic of South Africa allows for the introduction of special measures to promote the interest of those previously disadvantaged. The codes were introduced flowing from the B-BBEE Act to facilitate the state of equality. However, to date, we are required to justify why B-BBEE requirements exist, and others lament them to be onerous.

The introduction of the codes created a dimensional shift from the original objectives of economic transformation. This can be attributed to, amongst others, the desire by corporate to achieve a higher B-BBEE Status Level, because a certificate is seen as a currency to trade. Fixation with obtaining either a level 1 or 2 has seen implementation of the codes result in negative impact on the overall objectives of B-BBEE. This is evidenced by the increasing number of fronting complaints lodged and fraudulent certificates reported to the B-BBEE Commission.

A level on the certificate is the outcome of a strategy and plan properly executed, not the manipulation of figures or misrepresentation of facts.

In chasing a B-BBEE level that is higher than that of a competitor, quality is often compromised. Also, seeking a higher level without implementing a corresponding plan to achieve such a level is unethical and illegal. A level on the certificate is the outcome of a strategy and plan properly executed, not the manipulation of figures or misrepresentation of facts. This obsession about the B-BBEE level continues to compromise governance, and creates the illusion of empowerment.

The absence of effective monitoring tool was said to have led to slow economic transformation. However, it has become evident that the slow pace of transformation is not totally due to lack of B-BBEE police, but rather failure to transform the mind of corporate South Africa and to promote a culture of real economic transformation, and not merely attainment of a B-BBEE certificate. The complete outsourcing of B-BBEE compliance by entities also perpetuates this as entities have an arms-length relationship with the B-BBEE requirements.

Most entities in both the public and the private sector rely heavily on B-BBEE certificates and not actual performance towards B-BBEE and impact on the targeted beneficiaries. This is one of the reasons some verification professionals end up relaxing the verification methodologies to accommodate the request for a higher B-BBEE status. Such behaviour is illegal and undermines transformation and the spirit of the Constitution. The B-BBEE Commission will not hesitate to impose penalties set in the B-BBEE Act.

On a daily basis B-BBEE transactions or initiatives are being introduced and announced, with minimal flow of benefits in the hands of black people. Lengthy lock in provisions are included, as well as share performance linked benefits that are unrealistic and unlikely to be achievable, all merely being a strategy to deny black people of the economic benefit in these transactions.

Lack of clarification on the interpretation of the codes, is often cited as a reason for various interpretations despite the general rule of "substance takes precedence over legal form", which means that entities continue to create a reason for deliberate incorrect application. We implore entities to do the right thing and implement real B-BBEE initiatives, and facilitate the flow of benefits to black people as required.

Derailing this process hampers the opportunity for South Africa to achieve the required economic growth and undermines the spirit of the Constitution. It should never be about the B-BBEE level, but about real implementation. Let your deeds translate to the required level. If you performed well, the results will indeed show that on the score card. We can't expect to reap what we did not sow.

This article is contributed by Adv. Lindiwe Madonsela of the Compliance Division



Ms Lindiwe Madonsela

Why black people are taken for a ride in fronting

The B-BBEE Act describes fronting as ‘a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act or the implementation of any of the provisions of the Act’. Simply explained, fronting is any practice, conduct, act or initiative entered into in violation of the objectives of the B-BBEE Act.

The introduction of the 2011 Preferential Procurement Regulations introduced a migration from the 80/20 and 90/10 bid evaluation criterion, 20 and 10 points being the Historically Disadvantaged Individual (HDI), to 80/20 and 90/10 where 20 and 10 points became B-BBEE points. Entities had to work hard to put measures in place to earn those B-BBEE points, in order for them to get opportunities/contracts in government departments or public entities. This migration however did not bring about the necessary change to fully align with the objectives of the B-BBEE Act as the majority of points, which is 80 and 90, remain price oriented.

Even with this little requirement for B-BBEE points being introduced, entities continued to view this as a burden somehow. This is evident from the prevalence of fronting practices aimed at fooling government in procurement processes. Clearly some were not willing to do what is right to get the B-BBEE points that would place them on certain B-BBEE levels, instead they became so ‘desperate’ and came up with ways to manipulate their B-BBEE scorecards. Unfortunately the real beneficiaries of the black economic empowerment were exploited in the process, as they were used as tokens to get those B-BBEE levels, with measured entities ultimately securing those lucrative contracts, with no corresponding economic benefits for black people.

It is true that fronting comes in many forms and shapes, and at times results from people who willingly participated in the

fronting practice and some being tricked into the fronting practice. One can have mercy for the black people that were tricked, but there should be no justification for those that willingly participated.

Ms Nontokozi Nokhwali-Mboyi

Willing participants in the fronting practice

These are people who really take our country backwards by reversing the gains. They always have excuses for their wrongdoing. You’d hear them saying; ‘we are living in poverty, government does not create jobs and these companies pay us for doing nothing’. Truth is, these people are depriving themselves of the economic freedom they could have if they were to get rid of the mentality of living on hand-outs and other people’s crumbs. For instance, an entity would front someone and secure a big contract amounting to R100 million but only pay the ‘frontee’ a mere R20 000.00 or worse promise to pay and never do after the contract is awarded.

Another sad example of the willing participants is where black people are occupying executive or senior management positions in an entity, but have no strategic decision making powers at all. Instead, someone else is making such decisions behind the scenes. What is sad about this is the fact that these people know about these situations but do not bother to report them, mostly as the financial benefit is bigger for their current situation. Question is; how does one wake up in the morning and go to work knowing well that his or her job title is just on paper or maybe in terms of salary scale,



but someone else is making decisions on his or her behalf when he or she must make such decisions? Another example of the willing 'frontee' would be that of a black owned entity that is constantly on the lookout for government contracts and bids, applies and gets them, but then let the non-black owned entity do all the work under that contract, with a small fee to the black owned entity. This is what is referred to as *tenderpreneurship*, a practice that continues to reduce black people to nothing.

Tricked into fronting practice

Unfortunately, this happens to both literate and illiterate people, including seasoned business people. In some instances, black people are approached to be partners in entities or to form joint ventures where all the necessary documents are completed. However once the entity starts benefiting from the B-BBEE level obtained through the presence of black people as partners, black people start being useless to the entity, they start mistreating them, denying them access to financial records, not involving them in the running of the entity, and excluding them from economic benefits or giving them benefits that are far less than what other partner/s receive. Alternatively they are told they will start benefiting after a certain period, ordinarily linked to debt repayment or profitability of the entity, while the non-black partners are drawing benefits disguised under salaries and bonuses.

It is time that black people take a firm stand and say 'no to fronting'. They need to realise that opportunities in South Africa are available for everyone; they need to be confident in their abilities, and believe that whatever is done and achieved by others, they can do it too. People should go out there and get information about available opportunities, how to register business entities, where and how to access funding or non-financial support, and where to complain when scammed by the unscrupulous entities. Black executives or senior managers need to start demanding that they perform duties in line with their job descriptions and make decisions aligned to their portfolios.

Black-owned entities must also correctly use opportunities given to them to render the required standard of services, and where the task is huge for them, a proper subcontracting arrangement is allowed but it must be within the right parameters.

In light of the deliberate attempts made by entities to circumvent the B-BBEE Act, people are encouraged to seek advice of the B-BBEE Commission, or even to attend the B-BBEE education

and awareness sessions being conducted by the B-BBEE Commission nationally. People are also encouraged to approach the B-BBEE Commission before entering into any business agreements/transactions to safeguard their interests upfront. The public needs to report any fronting practices they are aware of or give tip-offs regarding fronting practices to the B-BBEE Commission.

Black people must take pride in B-BBEE and take advantage of it fully as it is designed to facilitate full participation in the mainstream economy. Those willing frontees must think about the opportunity they are taking away from people that are real entrepreneurs just waiting for such opportunity to make a break that can lead to serious job creation. *Tenderpreneurship* only benefits the pocket in the short term, but the power remains in the hands of the non-black entities that are a party to that fronting practice.

The B-BBEE Commission will start exposing these people when it publishes its findings in respect of the complaints it has, and we hope this will start sending the message that, poverty or no poverty, crime is not justifiable, and fronting is a crime.

Government must also move fast in implementing the trumping provision to bring about real transformation as the criteria in the PPPFA continues to frustrate the achievement of black economic empowerment. Government must not speak in two tongues when it comes to transformation.

This article is contributed by Ms Nontokozi Nokhwali-Mboyi of the Operations Division.



Ms Lindiwe Madonsela and Ms Nontokozi Nokhwali-Mboyi

Making the public aware of the B-BBEE, its benefits and obligations

At the inception of the B-BBEE Commission we identified stakeholder engagement and development of the communication strategy as part of our key priorities. Reports on transformation indicate lack of verifiable research information or data, possible regression, lack of buy-in, disillusionment as only the elite and politically connected seem to benefit from transformation interventions, and the gains not being realised by black beneficiaries marketed in a number of B-BBEE deals.

In our engagement with business associations, media and state owned entities, they highlighted amongst other things, the perception that B-BBEE certificates could not be relied on, that fronting practices were on the rise and becoming more sophisticated, that corporate governance is flaunted with impunity and that non-alignment or harmonisation with other legislation such as PPPFA hinders progress, as well as inconsistencies in interpretation and lack of monitoring.

In order to raise awareness of the B-BBEE requirements to both the public sector and the private sector, including the general public, we launched our outreach programme with inaugural conference on fronting on 29 March 2016 at the Midrand Conference Centre. It became clear that there is a need for a nationwide rollout to ensure a wider reach to ensure proper implementation of B-BBEE in line with section 13F (1) (b) and (e) of the legislation.

In August 2016 we embarked on the rollout of the information sessions focusing on communities regarding the B-BBEE benefits to society, the role and functions of the B-BBEE Commission and to guide stakeholders on ways to prevent fronting practices. Our focus is also on how entities can structure B-BBEE initiatives across the five elements in a manner that brings real benefit to black people, and broaden the impact especially in ownership, skills development and enterprise development priority elements. This can be achieved if B-BBEE is fully integrated in business strategies and plans, which can be easily measured and monitored.

So far, we conducted sessions in Gauteng, Western Cape, North West and Kwa-Zulu Natal

with other provinces to follow. Some sessions were through collaboration with institutions such as Chambers of Commerce, Verification Professionals Associations and government departments, with 895 delegates reached directly and more indirectly through newspapers, radio and television interviews directly linked to the sessions.

Audiences have been receptive and appreciative of the opportunity to interact with the B-BBEE Commission and have also raised concerns regarding the interpretation and application of the legislation. Issues raised consistently related to verification professionals continuing to issue EME certificates, some state departments still requiring B-BBEE certificates from EMEs, clarification in terms of the application of skills development and - SED (the different sub-elements and their application), future of IRBA in the verification process, perceived resistance by some entities to buy-in to the process of transformation and implementation of B-BBEE being seen as complex and not easy to apply or conform (these being in the minority).

From these sessions, it seems that there is a need to simplify the B-BBEE Act and the codes by issuing interpretation/clarification guides for ESD, skills development and ownership schemes, which are currently misinterpreted or incorrectly applied. One of the audience members interviewed at the Kwa-Zulu Natal session said *"the information I received has been very helpful and although some of it will not be utilised by me at the moment, it will benefit others that I know."*

Raising awareness of the basics of B-BBEE and how it affects individuals will go a long way to prevent incorrect and bad



Ms Busisiwe Ngwenya

practices. While the B-BBEE Commission deals with existing problems, it is important to also ensure that we prevent more from occurring in the future.

These sessions are providing the necessary tools to stakeholders on how to comply and implement the legislation correctly, and also how not to be taken for a ride. We hope

people will start being careful of what they attach their signatures to, and ensure that they do not participate in fraudulent schemes.

This article is contributed by Ms Busisiwe Ngwenya of the Compliance Division.

Compliance Alerts



Commission puts breaks on the Fronting Seminar

The B-BBEE Commission resolved that the organisers of the Fronting Seminar with the title **"FRONTING HAS A LEGAL ZONE. LET US SHOW YOU WHERE IT IS"** which was planned for 26 October 2016 at the Centurion Lake Hotel in Gauteng, must cancel the seminar, and immediately refund all individuals that have registered for the seminar. Fronting is a criminal offence, and no person should purport to teach people how to practice it legally. The organisers Axidex and Innoven acted accordingly, and refunded all registrants. They further issued a public apology on the website.

ABP retracts the misleading statement about its role in the verification process

The B-BBEE Commission instructed the Association of B-BBEE Professionals (ABP) to publicly retract the statement it issued suggesting that it is a regulatory body for verification professionals in South Africa, which is misleading and untrue. The statement was carried in various media published on 13 September 2016. The statement gave the impression that ABP is now the regulator for B-BBEE verification professionals as envisaged in the B-BBEE Act. The statement further suggested that all verification professionals must, as a pre-requisite,

be members of ABP for them to be accredited to operate. ABP is merely a voluntary association of professionals, and professionals may choose to join the association, it is not compulsory. ABP did retract the statement as instructed.

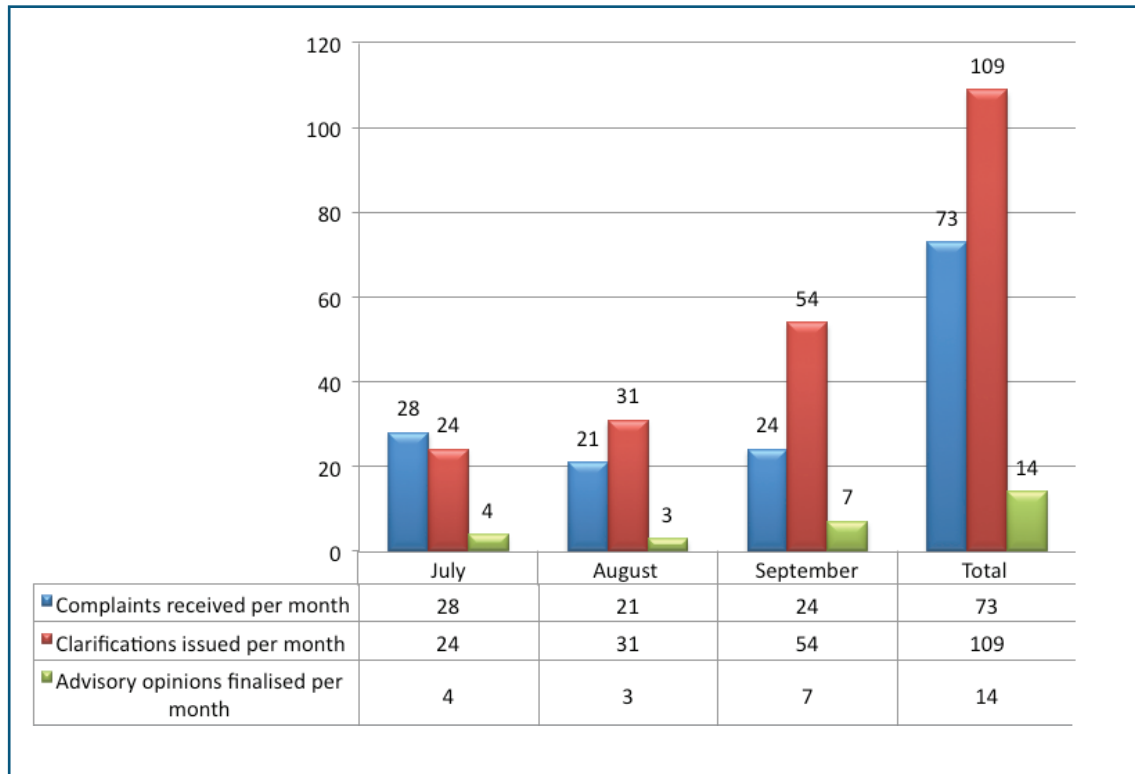
Net Value Holdings instructed to cancel information sessions in Gauteng and Cape Town

The B-BBEE Commission instructed Net Value Holdings, the organiser of the B-BBEE sessions with the title **"B-BBEE PARTNERSHIP TAILORED TO YOUR BUSINESS"** that were planned for 22 September 2016 in Johannesburg, and 6 October 2016 in Cape Town, to cancel the sessions with immediate effect.

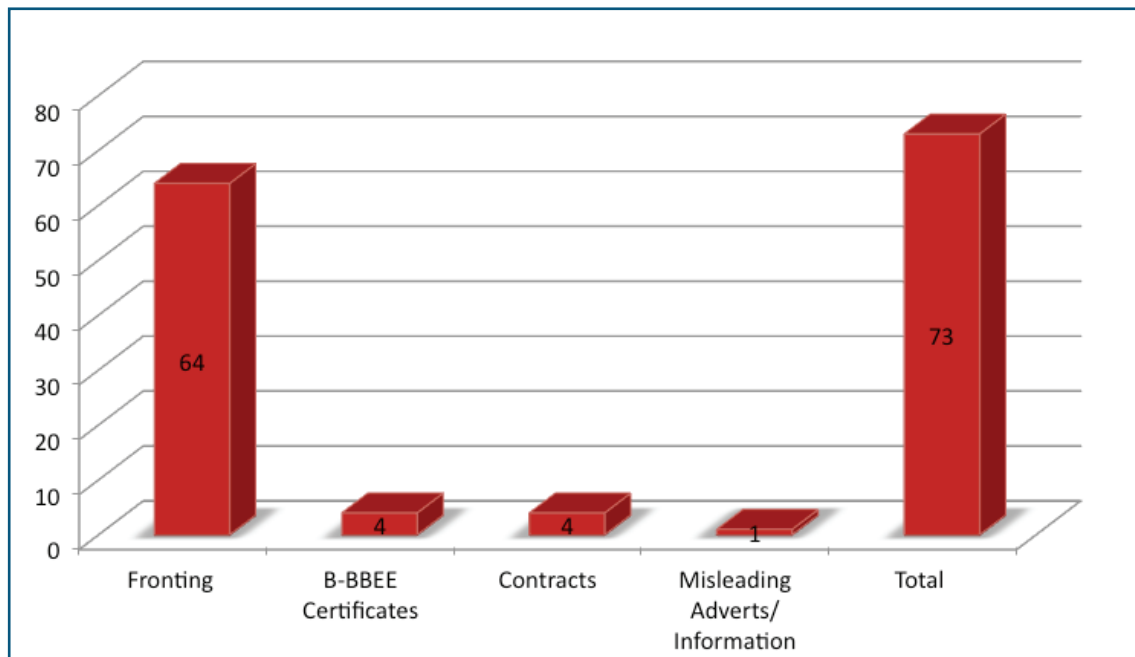
The sessions were advertised promising to provide primary benefits to any entity that will partner with Net Value Holdings on how to retain full operational control of their business, be rewarded for the equity value it brings to the table as well as empower the black individuals contributing to the businesses. In the view of the B-BBEE Commission, these sessions were advertising B-BBEE partnership opportunities that are contrary to the objectives of the B-BBEE Act.

Activity Report

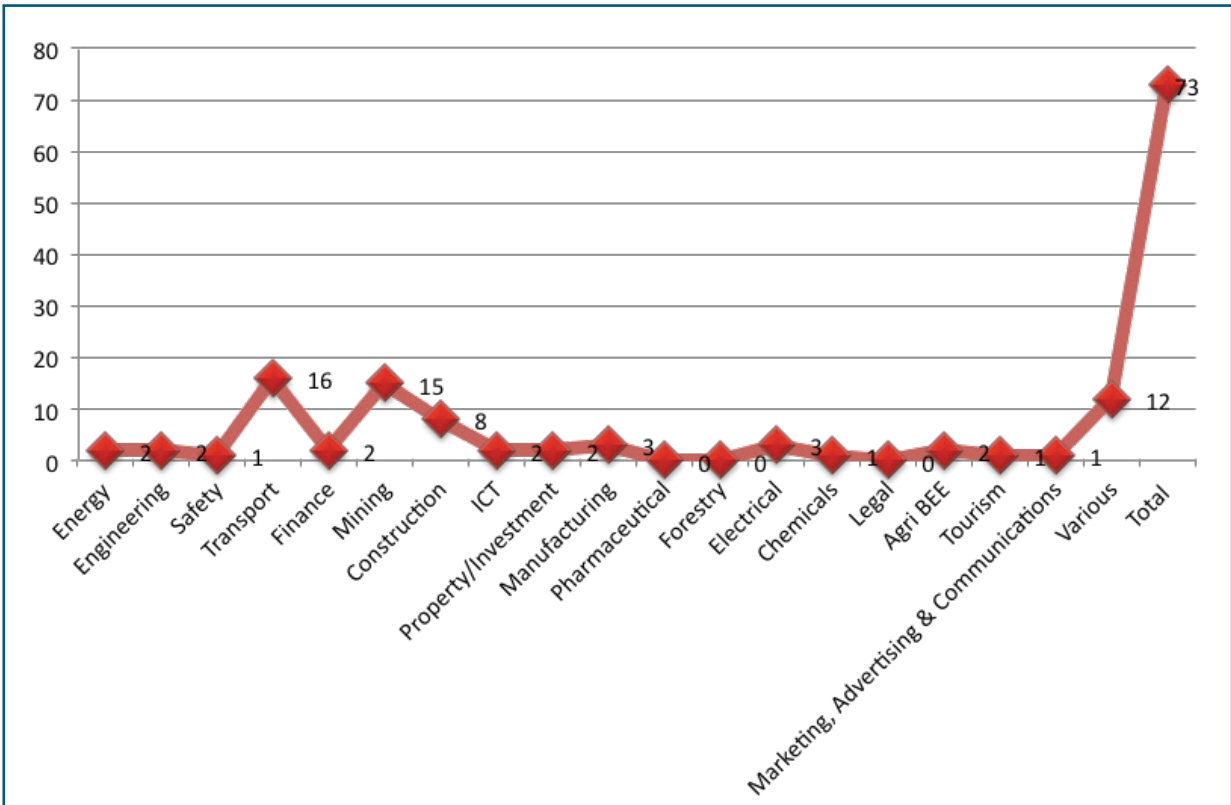
The graphs below show the complaints, advisory opinions, clarifications and meeting request received by us from July-September 2016.



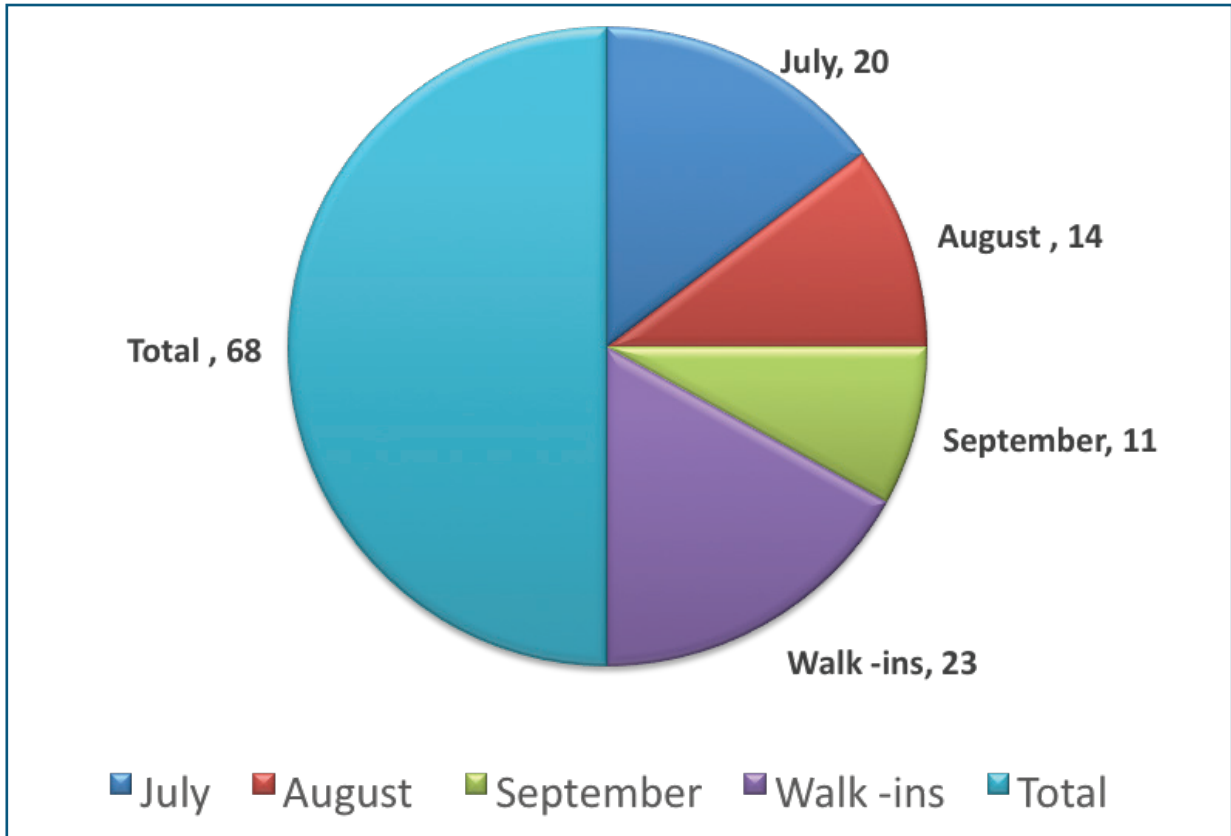
Graph 1: Complaints, clarification and advisory opinions July-September 2016



Graph 2: Complaints per type July-September 2016



Graph 3: Complaints per sector July-September 2016



Graph 4: Meetings held in July-September 2016



Notices and Updates

We published the following to provide clarity and guidance on the B-BBEE Act, and the procedures of the B-BBEE Commission:

Date Issued	Guideline No.	Description of the Guideline
29 July 2016	Explanatory Notice 1 of 2016	Procedure for requesting non-binding advisory opinions
29 July 2016	Practice Guide 01 of 2016	Recognition of third party procurement
29 August 2016	Practice Guide 02 of 2016	B-BBEE Certificates with regard to EMEs and QSEs

Events

Information Sessions

The B-BBEE Commission held the following information sessions to raise awareness on the B-BBEE Act:

Date	Venue	Attendees	Partnership
21 July	Durban, KZN	50	None
16 August	Daveyton, Gauteng	45	None
19 August	Durban, KZN	20	None
23 August	Bellville, WC	150	None
24 August	Midrand Conference Centre	150	SANAS
25-26 August	Freedom Park, Pretoria	200	None
6 September	Rustenburg	30	None
29 September	ACFE	50	ACFE
30 September	Mayville, KZN	200	KZN Edtea

GALLERY



B-BBEE Advocacy, education and awareness session in KZN



B-BBEE Advocacy, education and awareness session in Daveyton, Gauteng



B-BBEE Advocacy, Education and Awareness session in Esikhawini



B-BBEE Advocacy, education and awareness session in Pongola



Busisiwe Ngwenya, Mokgadi Rameetse and Lindiwe Madonsela



B-BBEE Advocacy, education and awareness session in North West



Busisiwe Ngwenya during the TV interview at Daveyton, Gauteng

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