



Zodwa Ntuli
Acting Commissioner

The journey continues: a reflection of the founding team, a year later!

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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
CEE	Commission for Employment Equity
CIPC	Companies and Intellectual Property Commission
Codes	Generic Codes of Good Practice issued by Minister
Sector Codes	Sector Codes 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
NGB	National Gambling Board
NLA	National Liquor Authority
QSE	Qualifying Small Enterprise
SIU	Special Investigating Unit

Editors Note

In this edition we share a synopsis of how our year 2016/2017 has been, as well as our achievements and areas of improvement, and grave concerns for economic transformation. We did not anticipate some of the things we come across in this field but are glad we laid a solid foundation and are now busy putting the building blocks, demonstrating positive steps to transform our economy.

We are proud that we managed to achieve 90.94% of our planned deliverables, with a significant increase in the take up of our advisory services, and we have produced a number of final reports for comment by respondents in investigations, with signs that more cases will be resolved in the financial year 2017/2018.

Our investigations show fronting tendencies dating back from as far as 2003, with no participation rights or economic benefits flowing to so-called black shareholders. While it is important to address these legacy matters, our main goal is to ensure that deals and initiatives concluded from going forward are rid of these tendencies. We also picked up that employees seem to be easy target for fronting schemes.

We continue to encourage constructive resolution of cases or disputes between parties, but we note the tendency of entities to offer a financial settlement with complainants in exchange for the complainants withdrawing the complaint. This does not automatically take the complaint away; our mandate is bigger than a mere financial benefit to a complainant.

To prevent fake and make-believe schemes, it has become clear that we must focus on the quality, the impact and the sustainability of the B-BBEE initiatives, with strong and unapologetic action towards defiant entities.

Finally, we are excited about the B-BBEE Certificate Portal that we created and we look forward to its effective implementation as the first step to eradicating fake and fraudulent certificates in the market. The portal will be accessible to every person online to check the validity of any certificate in due course.

Oh, and yes, we have new offices, and the new atmosphere has rejuvenated the energy of the team. Despite the move, we continue to ensure that our services are accessible to ordinary citizens no matter where they are.

Wow, I can't believe we have come this far; thanks to our stakeholders for helping us shape this transformation agenda.



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The journey continues: A reflection of the founding team, a year later!

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In the first edition of *The Whistle* we reflected on the start of the journey with the founding team, which was the establishment phase, now we reflect on the implementation phase. Now that they have tasted the core of the business, they now reflect on the journey so far.

"It is quite unbelievable that we have completed a whole year with the B-BBEE Commission as the saying goes time flies when you are having fun." This journey has been filled with exciting experiences of briefing the Portfolio Committee on Trade and Industry about the B-BBEE Commission reservations regarding the Financial Services Charter, presenting our strategic and annual performance plan outlining our achievements, priorities and challenges, which included lack of offices, financial constraints, lack of corporate governance in this space and blatant fronting.

The B-BBEE narrative is always filled with negative reporting of invalid certificates, lack of accountability and the tick-box exercise by measured entities lacking sustainable B-BBEE strategies, and fronting. However, it is important to counter-balance this narrative with the good that responsible

corporate and public entities are doing to ensure transformation and meaningful value they are adding to ensure adherence to the legislation in terms of reporting fronting practices, invalid certificates, voluntarily registering major B-BBEE transactions, submission of compliance reports, and complying with the B-BBEE Commission's directives and even going as far as requesting guidance on ways of implementing correctly. We see you and salute and trust that others will follow suit." **Busisiwe Ngwenya - Compliance Division**

Busisiwe Ngwenya





Theto Modjadi

“What a privilege again to have been part of the team that laid the foundation of this organisation! I was appointed as ICT Business Analyst - one will accept that this is all about system and user requirements, feasibility studies and all other ICT-related work. Things turned out to be quite interesting, ‘B-BBEE Regulations, Codes of Good Practice, B-BBEE Act, Communication Strategy, Webmaster, B-BBEE Forms, Compliance Reports, Major B-BBEE Transactions’ all became part of me and my vocabulary.

I have never managed a website before in my career, let alone acquiring any knowledge on B-BBEE legislative prescript in my previous employment or studies - however, with the B-BBEE Commission, I became empowered in areas I never dreamt of - I am a webmaster, I now understand the B-BBEE prescripts, I am part of pre-screening of B-BBEE related cases, and paying attention to detail is now part of my DNA.

I can now confidently converse and assert myself on what the B-BBEE Commission is mandated to do for this country. Thanks to the creativity, diversity and skills of officials within the team, and the many other members that have since joined. I can already see the impact our job has on businesses and the lives of people of this country and will continue to do so for many years to come. I can safely say, we are ready for any challenges and obstacles that may lie ahead.” -

Theto Modjadi, Operations Division

“At the start of the journey we made sure that we develop organisational strategy, communication strategy, structures and processes that were aligned to support the development of the desired principles. It was tough I must say, but experiential. Personally, I am proud and satisfied to be part of building a productive entity alongside a team of experienced managers and personnel, building a brand, reaching out to the public to offer valuable services and building lasting business relationships. I have no doubt that the B-BBEE Commission is taking its values and culture seriously to make South Africa a better place.

There is a noticeable buy-in and positive support in the compliance driven initiatives as the B-BBEE Commission continues with educational awareness campaigns. On the other hand, we still get disappointed when some black people continue to willingly front themselves, which is one of the biggest challenges towards real economic transformation. With the limited resources the B-BBEE Commission stands by its vision of an inclusive industrialised economy that is globally competitive, and I am happy to be the guardian of this part of the work!”

Thembakazi Dondashe, Compliance Division



Thembakazi Dondashe



Thomas Mavungu

"The B-BBEE Commission started its operations within the dti and using the ICT Infrastructure of the dti for its operations as it was still located at the dti campus. End of April 2017, the B-BBEE Commission moved to new office space in Centurion where new ICT Infrastructure was to be developed. Considering the importance of the services the B-BBEE Commission offers to the public, ICT Infrastructure had to be up and running just like a Calf. With all challenges involved in putting together a stable ICT Infrastructure environment that was expected from the ICT unit, today, we look back with a smile for having achieved one of our objectives, to have a stable and reliable ICT Infrastructure environment."

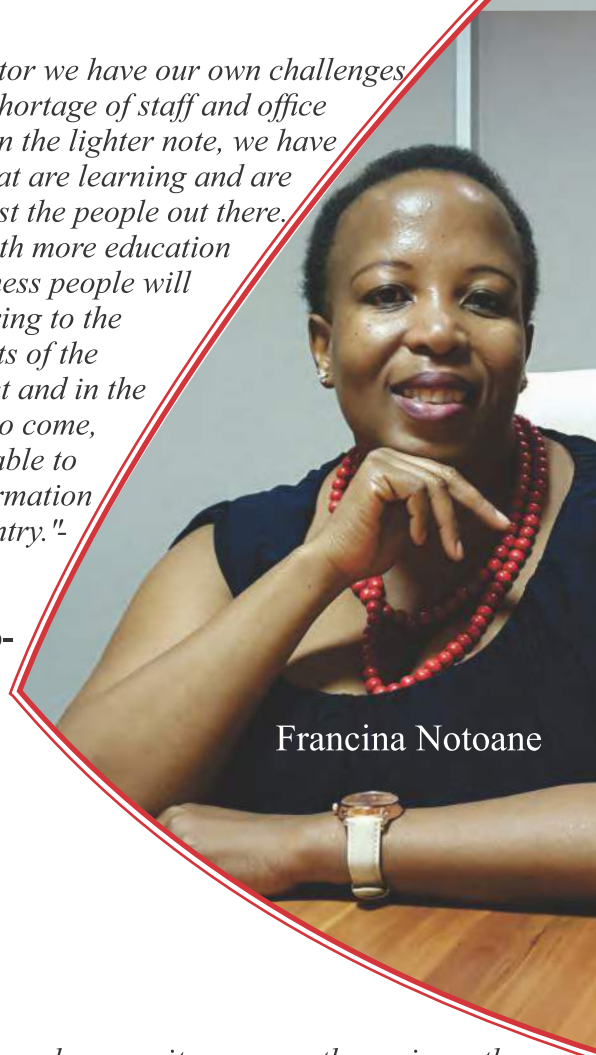
We made a promise that, we were up to the task to take the B-BBEE Commission to the highest operational level as a regulator, and today, I look back with a smile because looking where we started as compared to date, in less than five (5) months, we have built and maintained one of the reliable and stable ICT Infrastructure environment." - **Thomas Mavungu, Operations Division**

"Looking back to when we started so much has happened. It shows that the B-BBEE Commission was long overdue and the country needed this kind of regulator. With cases that we have, and some still coming through, it shows that many people were suffering and had nowhere to go for help. There are cases where you find that white owned companies are using black employees for B-BBEE points and not paying what is due to them or even enabling them to learn how to run the business, while they get tenders and get richer."

I have noticed that at times some of black people knowingly agree to be used as window dresser and don't care about transformation of the country. There are cases where black people front another black person, which is very disturbing. We need the support of the government and private sector to comply with requirements of B-BBEE Act so that we can move the country forward."

As a regulator we have our own challenges regarding shortage of staff and office space but on the lighter note, we have trainees that are learning and are able to assist the people out there. I believe with more education and awareness people will start adhering to the requirements of the B-BBEE Act and in the few years to come, we will be able to see transformation in our country."

Francina Notoane, Commissioner's Office



Francina Notoane

"Wow it has been quite a marathon since the establishment of this regulator. Being part of the establishment team was tough but exciting, but being responsible for the central point of entry to our organisation is even more exciting and even bigger responsibility, this means I am responsible for all stakeholders of the organisation. Being given this responsibility is for me an achievement on its own. As far as the acceleration of economic empowerment, I think we are on the right track..."

Interacting with different B-BBEE stakeholders on a daily basis opened my mind and has made me to be more proactive and understanding in dealing with client queries, which shows that we learn on a daily basis and are never too old to learn. We committed to quick turnaround times, and it is my duty to make sure this is achieved and maintained. It is also my duty to make sure the clients of the organisation understand our processes and timelines, keep them updated as far as possible, and provide responses speedily."



**Madidimalo
Ramare**

As we continue assisting stakeholders to implement the B-BBEE Act accordingly and correctly, I am also equipping myself and gaining more knowledge in my area of work. I am humbled by the feedback we receive from our stakeholders, even more by the willingness to know and do the right thing. There is indeed hope for B-BBEE and what it can achieve for this country. I am looking forward to the challenge ahead, but I have now learnt that nothing is impossible. We can already see the signs of acceleration of transformation and I definitely think we are on the right track." - **Madidimalo Ramare, Operations Division**

"Having passed the establishment phase of the B-BBEE Commission and looking at the milestones achieved so far in relation to the implementation of the B-BBEE legislation and the positive feedback received from stakeholders, one can safely say that South Africans are really appreciative that Government deemed it fit to establish this kind of a regulator. The visibility of the B-BBEE Commission is remarkable and if I didn't know any better, I would say this entity was established a number of years ago.

From the interactions with stakeholders it is evident that most have now started to be serious about the implementation of the B-BBEE Act, and this is confirmed by the number of requests for advisory opinions and clarifications received to date. It shows entities out there are keen to correctly interpret and implement the B-BBEE Act, although there are still those that the B-BBEE Commission needs to be firm on, as they are determined to undermine the B-BBEE Act, thus taking our country backwards.

Government should also not just talk about B-BBEE being the national priority, but should also start treating it as such and ensure that the institution driving the B-BBEE legislation is adequately resourced in order to be able to fully execute its mandate. Without resources, no matter what good strategies an institution has, it is destined to fail". - **Nontokozo Nokhwali-Mboyi, Operations Division**

Based on this reflection, it clearly shows that the narrative on B-BBEE is about to change significantly with entities and government doing the right thing, and consistently so. The level of willingness we see in our stakeholders tells us the page is indeed about to turn, and for the better. We have had so much negativity about B-BBEE; it is about time we get some positive narrative. It is not perfect, but it is workable.

What we can say is, it was and still is a blessing that we were part of this big project for South Africa, and are still part of the implementation now that the entity is up and alive. One day, sitting on our rocking chairs, we will look back with pride and say, that fully black-owned and run factory was made possible by our intervention. That is what B-BBEE is about, real power to the people, not mere passive shareholding. Yes, we are allowed to dream, some dreams do come true if there is a will.



**Nontokozo
Nokhwali - Mboyi**

Overview of our activities for the past year - Are we meeting our objectives?

In our first strategic planning session it was difficult to visualise how some of the things we spoke about would manifest in real life, but we had to be objective and come up with interventions that will best serve the objectives of B-BBEE. We then agreed to pursue *compliance and corrective enforcement, strategic partnerships and research, trend analysis and reporting* as our main focus areas while building our capability and competencies to deliver as a regulator.

In the financial year 2016/2017, we embarked on activities outlined in our annual performance plan, noting that we started handling cases on 6 June 2016. The activities are summarised below.

Guiding on compliance

Our compliance strategy includes providing advisory services through non-binding *advisory opinions* on specific set of facts presented to us, *clarifications* on how we approach a particular provision, its application and interpretation, *practice guides* giving wider information about matters that emanate from advices given in opinions and clarifications to assist the implementation, and *explanatory notices* to explain procedures or requirements relating to certain procedures.

In 2016/2017 we issued forty-eight (48) advisory opinions and three hundred and ninety one (391) clarifications; complemented by one (1) explanatory notice on the procedure for requesting advisory opinions, and two (2) practice guides, one (1) on third party procurement and one (1) on certificates for EMEs. We received a few come backs with some entities seeking further clarity on the application of the practice guides, which we responded to timely.

Issues arising from advisory opinions and clarifications include the definition of 'black people', whether trust models created for ownership schemes meet the requirements, as well as structuring of enterprise and supplier development schemes.

One client asked if the measured entity can recognise the wife of a black male shareholder for its female/women ownership by virtue of the black shareholder and the wife being married in community of property. The other one asked if a child born out of a white father and a coloured mother can be classified as black for the purposes of recognition and benefit under the B-BBEE Act.

The questions and responses in the process of advisory opinions and clarifications also inform our list of frequently asked questions and our practice guides, which we do our best to update more regularly so that measured entities with similar queries can have guidance.

As part of our monitoring we reviewed forty- eight (48) B-BBEE certificates issued to measured entities and found them to be inconsistent with the objectives and prescripts of B-BBEE Act, and we issued instruction letters for entities to desist from using them or to withdraw them, as the case may be, with immediate effect.



Lesetja Mashao and Fikile Ledwaba

Verification professionals that were involved in issuing these certificates contrary to the prescripts have also been instructed to discontinue the practice, failing which formal investigations will be pursued. These included certificates issued based on wrong codes, at times generic codes were used instead of sector codes, but more often certificates issued to entities that ought to obtain a sworn affidavit only.

Our telephone enquiries continue to increase, which means that we must expedite the development and implementation of our full service contact centre to ensure that our clients get real time access and advice. We hope to launch the full service contact centre in the 2017/2018 financial year, and will announce when we do so.

Complaints handling and corrective measures

We received a total of two hundred and twenty two (222) complaints with a hundred and eighty seven (187) of them alleging fronting practices. Mining, transport and construction sectors continued to dominate. Most concerns in mining relate to allocation of shares to employees, normally 26% as required in the mining charter, without any participation or economic benefits by the so-called black shareholders. Most of these transactions are done through a trust model.

In the transport sector, owner-driver schemes took centre stage, some of which seem more like strategic retrenchment of employees, resulting in the impoverishment of black people under the guise of B-BBEE. The construction sector seems to be the god of joint ventures that are alleged to be mere opportunistic intermediaries than real empowerment, and most of these complaints seem like mere contractual disputes at face value.

Most alleged fronting practices date back as far as 2003 wherein the black owners allege that no economic benefits have accrued, that no participation in decision-making or operational involvement has occurred and that no value landed in the black hands through the said initiatives.

The conduct of directors of companies and members of close corporations in some of the complaints raise a lot of concerns regarding corporate governance as part of the duties of these people under the Companies Act and the Close Corporations Act. Often entities cannot produce minutes or notices of meetings or resolutions, and in most instances such meetings don't occur at all, which begs the question as to how decisions are taken in these measured entities.



We also encourage amicable resolution of disputes but are concerned about the tendency to offer a quick financial settlement to the complainant in exchange for withdrawal of a complaint. Regulation 15 (11) of the B-BBEE Regulations allows us to facilitate alternative dispute resolution of complaints, which we approach by taking into account redress to the complainant or prejudiced party, the need to address the apparent violation of the B-BBEE Act and the required measures to prevent such violations in the future by the measured entity.

In some instances where complainants had succumbed to the pressure to accept a financial settlement and withdraw a complaint, we continued to investigate in terms of regulation 16(2) which permits us to continue with the investigation as if we had initiated it ourselves if we believe it is justifiable to do so. So entities are advised to do a proper settlement within the framework of the B-BBEE Act, and not try to take short cuts.

We anticipate 2017/2018 to be a year where we deliver most of our findings from these investigations, noting that other entities under investigation have tendered proposals to remedy the concerns raised in complaints without us making adverse findings yet. Other entities have already responded to adverse findings, and we are in the process of formulating final findings. We must say though that most entities we investigate are very cooperative, we have not had to issue a summons to anyone yet, which is a good sign for compliance in the future.



B-BBEE Commission Team



Strategic Partnerships with other regulators

We commenced negotiations and have prepared draft memoranda of understanding with a number of regulators, including the CIPC, SIU, Competition Commission, CEE and NLA, and the one with the NGB has been concluded. B-BBEE matters are cross cutting, and due to the need for successful prosecutions, we will create and strengthen good relations with the NPA, SIU, AFU and the Hawks.

We have also explored possible partnerships for purposes of creating a reward and incentive system for entities that are consistent in compliance with B-BBEE and those that implement real B-BBEE. This is meant to encourage voluntary compliance by entities as part of our compliance strategy. We want to raise the flag for those that do well in empowering black people, and those that heed to our courtesy letters of instruction to change behaviour. We are encouraged that entities contact us to check validity of certificates on a daily basis and to alert us on structures they suspect may not be fully compliant.

We also extended a hand to state owned entities and government departments by writing to them, advising on the requirements of the B-BBEE Act, and offering a meeting or presentation to their executives and boards. Very few have come back to take up the opportunity, and only a handful bothered to acknowledge receipt. As government is the biggest partner in transforming the economy, we are still hopeful, but may have to take out the stick where they clearly disregard B-BBEE requirements.

We will publish all the memoranda of understanding with the other regulators and we trust that the synergies will result in effective regulation of the markets we oversee. We are already seeing benefits for the cooperation we have with CIPC, albeit limited to system access, which helps us with quick access to information on directorships, annual turnover and shareholding in entities. We are also beginning to refer some matters to CIPC, especially where directors allege fraudulent removal from entities.

Research, trend analysis and reporting

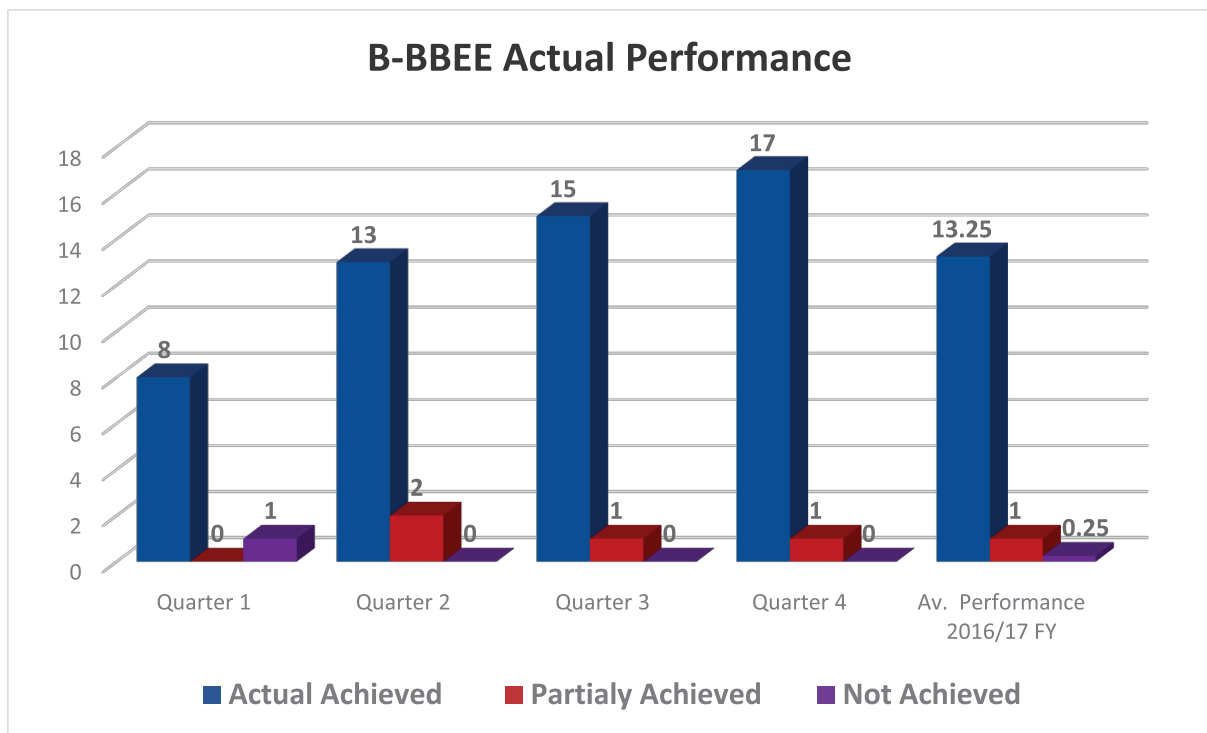
We commissioned two studies, one by Who Owns Whom on the national state of transformation and the other one by Mthenthe Consulting benchmarking effective implementation of economic transformation policies in BRICS countries, and two other jurisdictions. The studies are used to guide our interventions and also form part of our basis for decision making where necessary. While we use external service providers for our research, we are developing our own research division, which will have a senior economist heading it to ensure that we are always ahead on matters relating to B-BBEE.

General performance of the B-BBEE Commission

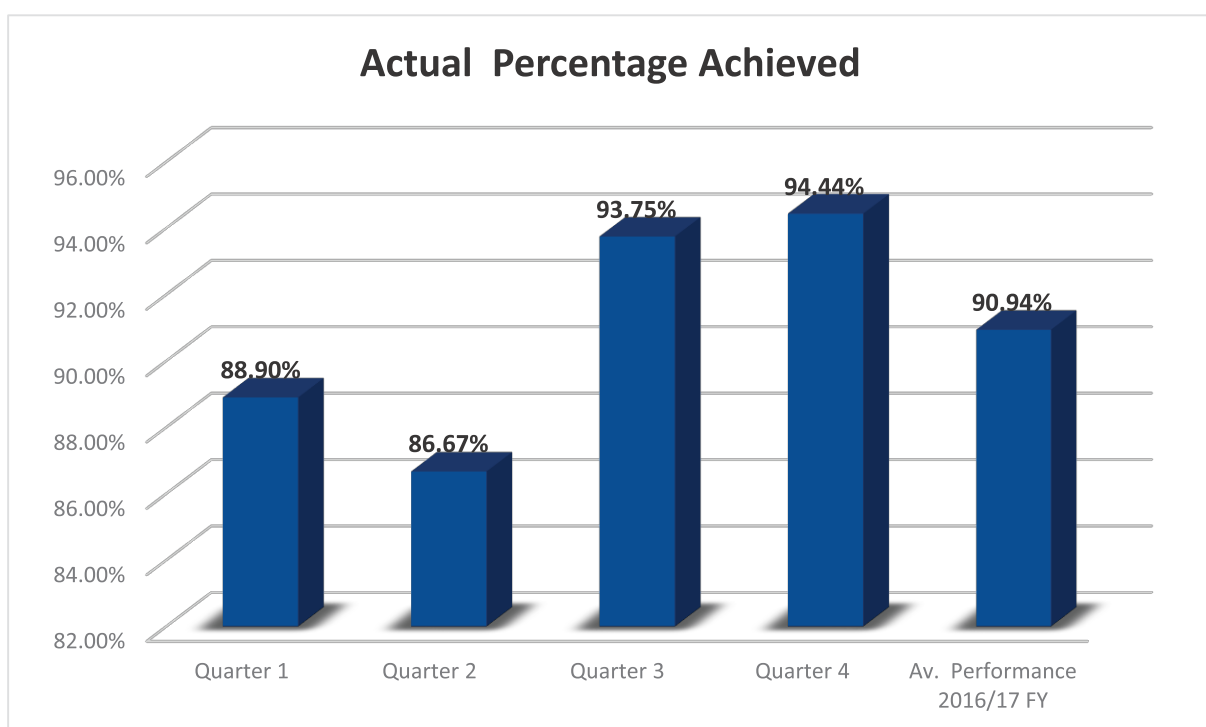
Of the total of twenty-three (23) annual measurable objectives identified for the financial year 2016/17, the B-BBEE Commission's average percentage performance for this financial year is 90.94%. This is a commendable achievement for the B-BBEE Commission taking into account the limited resources and the fact that it started formal operations from 6 June 2016 pursuant to the publication of the Regulations.

The following graphs show our performance for the financial year 2016/2017, and stakeholders must be reminded that we report as part of **the dti** until such time that we are listed as a public entity.

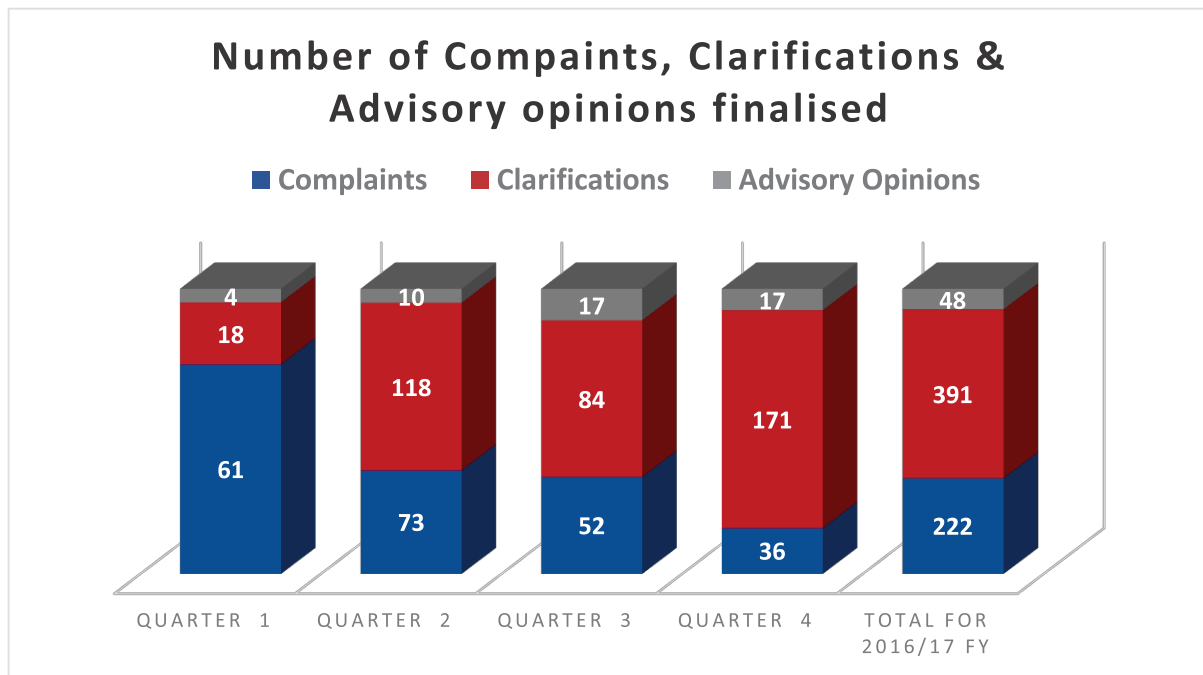
Graph 1: B-BBEE Commission actual performance against planned activities



Graph 2: B-BBEE Commission Actual Performance in Percentages



Graph 3: Illustrates number of complaints, clarifications and advisory opinions received



Concluding sentiments

The targets we did not meet related to constraints that were not within our control, such as the registration of major B-BBEE transactions which could not commence as the Minister still had not issued the threshold to trigger such registration.

Further, the extended consultation with stakeholders relating to the impact assessment study as well as operational challenges that the service provider faced delayed the finalisation of the study. Appropriate interventions were done on our part and this would not be a challenge going forward.

We continue to face challenges to our operational success as we still do not have proper office space, and we await the Department of Public Works and the dti to finalise the procurement process. We also still cannot recruit additional staff as we await the approval once the consultation process on the structure and remuneration between the dti and the National Treasury is completed. On funding, the dti still has not committed to the funding outlined and in our strategy and annual performance plans submitted and we trust that this will be expedited.

Despite the challenges above, we do our best to ensure that we are accessible to clients, especially to complainants who are often anxious regarding their complaints, and we will better our services every day. When we started, most things were uncertain as we had no funds, people and office space, but the team has shown the necessary dedication, commitment and resilience in serving the public, and our plans are becoming a reality every day.

We have grown the organisation from nothing to a regulator comparable to others, and soon we can be subjected to peer-review to measure the effectiveness, efficiencies and the impact of our work. We wish to thank the team of the B-BBEE Commission for the achievements thus far, as well as our stakeholders for the support. This has made us realise that where there is a will, there is always a way.

How far is South Africa in changing the ownership patterns?

In the State of the National Address on 9 February 2017, our President Jacob Zuma emphasised radical economic transformation, which specifically refers to *"...fundamental change in the structure, systems, institutions and patterns of ownership, management and control of in favour of all South Africans, especially the poor, the majority of whom are African and female...."*

Revising the B-BBEE Act in 2013 was a one of the positive steps towards economic transformation, which also created a regulator that commenced its role effectively on 6 June 2016. This will help drive economic transformation going forward, but are we anywhere close to achieving what is intended since these amendments in 2013?

The work of the B-BBEE Commission must be supported and informed by reliable data on the economic transformation process, and research, analysis and reporting on the state of transformation is one of the key focus areas. As part of our mandate, we will be issuing an annual report on the state of transformation, covering all the five elements of B-BBEE.

This annual report will be based on the (1) reports we receive in terms of section 13G from JSE Listed companies, SETAs, and organs of state and public entities, (2) the major B-BBEE transactions registered in terms of section 13F (1) (f), (3) the B-BBEE Certificates issued annually as captured on the B-BBEE Certificate Portal as well as (4) sector reports that will be submitted by sector councils to the Minister. It is, however, our concern that most sector councils seem to have a challenge in getting entities to report to them, which often delays their reports.

This annual report will be the first B-BBEE status report that is based on actual reports, and not surveys and/or speculations, and will help us devise appropriate interventions to accelerate economic transformation where gaps are identified. The first such report will only be published in the second part of 2017/2018 financial year because Regulations were issued only on 6 June 2016 and the threshold for major B-BBEE transactions has not been issued by the Minister.





To provide a baseline for the annual report, we commissioned Who Owns Whom to conduct a study to look at the levels of progress in B-BBEE covering the two year period from 1 April 2014 to 31 March 2016, and the report is available on www.bbbeeecommission.co.za.

On 24 March 2017 we released the results of the study at the Breakfast Session held at the Development Bank of SA and the observations and findings include the following:

- White South Africans still hold about 55% of Executive/Directorship positions, while black South Africans hold 30% with the remaining 15% represented by foreign nationals on the JSE listed companies;
- There is a certain level of reluctance to transform and businesses rely on their tried and tested methods they had implemented before, at the same time wanting to capitalise on the achievement of B-BBEE levels by recruiting token black people into strategic positions;
- 60.09% of the sampled entities achieved B-BBEE Level 4 rating, which is relatively higher compared to the 58.52% of the previous year, despite the revision in the codes to introduce priority elements;
- While performance on all B-BBEE elements, that is management control, skills development, enterprise and supplier development and socio-

economic development, have slightly increased year on year, black ownership has regrettably decreased;

- According to statistics analysis at industry level black female ownership remains below 20% for all industry classification while black ownership reflects at most 40% and below; and
- Black people continue to face serious barriers such as lack of access to finance and capital and access to markets.

The results are consistent with those of the Commission for Employment Equity Commission Report in 2014/2015, especially in relation to the increase in recruitment of black foreign nationals on senior and top management positions in addition to the existing domination by white people. Further, the sector reports show that there is little progress in advancing black persons in the private sector compared to the public sector.

It was strange to see that there is an increase in the number of entities with B-BBEE Level 4 despite the revised Codes of Good Practice of 2013 that introduced priority elements and the discounting effect where targets are not met for priority elements. Priority elements are ownership, skills development and enterprise and supplier development, which carry the 40% sub-minimum rule.



Our assessment of possible reasons for most entities not immediately dropping levels include the application of the transitional period, that some of the B-BBEE certificates were still valid during this assessment based on the old 2007 Codes of Good Practice, that some entities may have incorrectly extended the validity of their 2014/2015 certificates by re-verifying themselves earlier using the old 2007 Codes of Good Practice, and that the glaring gaps in the verification processes may have resulted in allocation of incorrect B-BBEE levels to measured entities. We hope to see a better and more realistic reflection in the annual state of transformation report in 2017/2018.

It is of great concern that we have regressed on the ownership element as it suggests that the fundamental change in the structure of the economy and ownership patterns will remain a dream for the majority of South Africans, who were not only dispossessed but denied opportunities to participate in the economy in the past. If we consider that some of the existing ownership points are based on modified flow through and the continuing consequence principles, there is actually little real ownership in black hands. Also,

what appears on the certificate in terms of ownership may not be a real reflection of how the measured entity looks like in reality.

Real economic transformation cannot be achieved unless there is willingness to transform, reduce artificial barriers to entry and appoint effective black people in measured entities' decision-making structures, and not merely ticking the box, to effectively transform the patterns of ownership and influence the strategic direction in the interest of the majority of the South African citizens.

The results of the study were a bit demoralising but we are hopeful that now that there is a regulator, there will be better compliance, quality verification and less manipulation of B-BBEE credentials. There is definitely a need to jerk up the pace of economic transformation, the majority of the people have expressed anger and their level of impatience can be seen through protests and other similar actions.

Are employees the easy target for fronting schemes under the guise of employee share ownership schemes?

Based on deals we have seen to date, it is clear that our strategy to focus on the quality, impact and sustainability of these deals is more critical for the success of B-BBEE in this country. We have noted that focus is on ticking the box as opposed to getting into a real empowerment deals, because some deals are done under pressure chasing upcoming government procurement opportunities or to get approval for a licence, amongst other things. Some deals appear legit when you tick the box, but when you assess the effect in practice, they are devoid of any empowerment to black people.

To illustrate this, let us zoom into employee share ownership schemes as an example, which is meant to be one of the most progressive models to broaden empowerment. Important to note upfront is the power imbalance that inherently exists in an employer-employees relationship; hence there are trade unions and other employee structures in various sectors to advance the rights of employees. B-BBEE deals, including financial benefits flowing from them, are not ordinarily aspects that fall within the bargaining space, and measured entities often engage employees directly. Just here, lies the window for possible abuse.

So a typical employee share ownership scheme would take this form. A measured entity seeks to improve or increase its black ownership, it structures a deal

through its advisors, and makes an offer to employees to acquire shares in the entity, often structured using the employee trust that would be created by the measured entity. In essence, black employees would be indirect shareholders, holding shares through the trust, but are often treated as mere beneficiaries of a discretionary trust. There will also be a lock-in period, say five years.

For the acquisition of the shares, the measured entity facilitates a loan in the name of employees or vendor financing at terms not discussed or negotiated with the employees, purported to be agreed upon with employees, which loan or vendor finance would be repaid by the employees using the dividends that would be paid in future, and now we know most never get to see a dividend. Not to mention call options and other complications not communicated to these employees.

Communication to employees for the allocation of the shares would give the impression the shares are given for free based on reasons such as loyalty, retention or long service. So employees would be forever grateful to the measured entity for the favour in allocating them a stake in the measured entity, when in fact the employees are buying the stake, it is not a gift.



Once all agreements are concluded, the measured entity would continue business in the ordinary course with no change in its boardroom or governance structures to show the existence of a new shareholder, except a now improved B-BBEE Contributor Level on the certificate. However, the trust deed would get all the ticks as it recites all the requirements set in Statement 100 for measuring ownership, but not in practice.

So, how does a structure like this persist unnoticed? Human resources units are often (ab)used to facilitate signatures from employees on forms or contracts relating to such deals. Moreover, employees find it difficult to distinguish between the B-BBEE and employee-related issues, but the measured entity would be quick to point this distinction when the unions ask a question relating to the B-BBEE deal. The nature of the relationship as employees makes it difficult for employees to ask the employer questions about the deal.

If you ask for forms or contracts signed by employees, these would be available but more often than not the said employees had no clue what they signed for. In some instances employees sign to be shareholders but can be removed anytime for any reason by the measured entity with no claim whatsoever regarding the shareholding. Again, bear in mind these are not free shares because there is a loan or vendor financing that the employees are repaying for the said shares.

Some of the employees we spoke to indicate that they signed documents and forms at the instruction of the measured entity, and as they are scared of being dismissed, they oblige to avoid a fuss as they have families to feed. Further, employees are normally told that if they don't sign they will lose the financial benefit that signing these documents would come with, which in a way puts employees under undue pressure.

So why are verifiers not picking up some of the flaws in these ownership deals? Come verification time, we are told employees are informed of the interview to be done by the verification professional and are advised on what to say to the verifier. In one instance, employees indicated that the human resources unit would organise a session with them where an external person will coach them on the questions that they will be asked and what to say. Where the interview is through a video link or skype, the coach or human resources officer sits not far to listen in on the questions and how employees answer. Note that here we are talking about the verification professional that is doing the job properly but is being misled by the 'coached responses' of employees.



Partnership Agreement

AGREEMENT is made on _____

Address: _____

Signature _____

the day of _____



So, the verification professional will have the answers that meet the tick-box perfectly, but this is through intimidation of the highest order behind the scene taking advantage of the vulnerability of the employees, and of course as there would be no record of this, it is the employees' word against the employer. At times the divide-and-rule approach would make other employees to deny that they were told how to respond and they would further sign affidavits to that effect in defence of the employer.

As shareholders through a trust, employees are entitled to dividends when and if declared, but this would be at the discretion of the measured entity board and/or shareholders, and employees in practice would have no ability to influence the decision to declare or not to declare dividends. So in essence, no dividends would be issued, and therefore no loan or vendor financing repayment would occur, making a dream of being the owner of a stake in the measured entity exactly what it is, a dream.

So for the duration of the lock-in period, employees would receive nothing financially and will not participate in any decision-making or strategic operation of the measured entity. At times, just to pacify them, they would pay them some money as part of or during bonus time, and no explanation as to which portion is the bonus and which portion is the distribution from dividends. In one instance, employees informed us that when they asked what the money is for, they were told the measured entity is thanking them for the good work that year.

Then comes the time just before the end of the lock-in period, when the shares actually must vest in the employees as owners, the measured entity would inform employees that the scheme is 'under water' or that the share price is not good and that the measured entity has to abandon the scheme. The employees would be made to sign forms circulated, often by the human resources unit, and employees would then be paid certain amounts without any detail of what the amounts are for and how they were calculated. The information asymmetry and literacy levels within the workforce vary and this adds to the complexities. The measured entity essentially would buy back the shares from the employees for almost nothing, and close the scheme, but lo and behold, a new employee scheme or another broad-based ownership scheme would be initiated by the measured entity, and yes for another five years.

Now you may be asking yourself why there is little reference to the trustees that are meant to serve the interest of the trust, which is a vehicle through which employees hold these shares. More often the trustees have been appointed by the measured entity as founding trustees, their level of understanding of B-BBEE to even be able to distinguish between a discretionary trust and the B-BBEE trust is often questionable, and they tend to serve the interest of the measured entity that pays their fees on the board of trustees. At times the secretariat support or company secretary of the trust is the same as that of measured entity.

So in real terms, the deal turns out to be just a sophisticated renting or leasing of black people to give an impression for the duration of the scheme that the entity is empowered to obtain a higher B-BBEE status. Our view is, if at the beginning of the scheme it is not clear how and when the acquired shares would vest, and if acquired by loan, how realistic the terms for the repayment are and how the said black shareholders would generate the money to service the loan, and if the dividend payment is linked to the performance of the share price, how realistic are the projections for the share price percentage agreed to, then the deal is likely to be fronting.

If our assessment clearly shows no prospect of the black shareholders generating money enough to facilitate repayment of the loan in time for the shares to vest, then such a deal would clearly undermine the objectives of the B-BBEE Act as real ownership is unlikely. If a deal starts with a problem of affordability to repay a loan or vendor financing, it is unlikely that it will lead to a black person acquiring, managing and controlling the asset, business or entity in question, and therefore it is unsustainable and flawed. There must be real prospects not just statements made in the financing and shareholders' agreements.

Further, the same financing and shareholders' agreements must be scrutinised to ensure that they do not place undue restrictions on the exercise of the voting rights and operational involvement and participation required for real empowerment. We note that even when the trust deed does not seem to place restrictions, the shareholders' agreement or financing agreement would, thus cancelling or reversing whatever rights were granted in the trust deed.

After all is said and done, these deals are complicated for employees and the measured entity is the one that would have lawyers and corporate advisors to structure them to the exclusion of the employees. Employees must be given information in simple terms and in the language they understand, failing to do that borders on unconscionable conduct. But don't be misled, this happens to employees who are at executive level as well, who may have read the documents, but again the power imbalance in the employee-employer relationship impel them to sign on the dotted line even if they don't agree with the terms.

Yes, we encourage broad-based schemes, but we condemn the extent of the abuse of employees under the guise of empowerment. If you wish to enter into a deal involving employees, make it real, and we are here to guide and assist in doing that. Broad-based economic empowerment is not about putting a few cents in someone's pocket, but it is about creating an opportunity for them to be owners, managers and controllers of strategic economic assets in order to change the ownership patterns in this country. It is also not about looking out for the most vulnerable B-BBEE partner that will not ask questions.

We look forward to the guidance from the Minister regarding this aspect for clearer parameters to be set upfront to protect employees from being abused. The task team that the Minister appointed had submitted a report to him, and we trust that he will issue his directive soon. Meanwhile, we are investigating a number of these schemes and will make findings. Our advice to employees in such situations, please contact us through our tipoff line anonymously, and to those that are about to enter into such deals, please seek our advice before it is too late.

The B-BBEE Certificate Portal: One step towards minimising the risk of fake and fraudulent B-BBEE Certificates

Statement 005 issued by the Minister on 12 September 2011 required the Approved Regulatory Body and the Accreditation Body to require Approved Registered Auditors and accredited Verification Agencies, respectively, to upload the relevant information pertaining to the B-BBEE certificates on **the dti** BEE IT Portal containing the information underlying each verification certificate issued within 30 days of issuance of the certificate. There is currently no reliable database relating the B-BBEE Certificates issued by the Approved Registered Auditors and accredited Verification Agencies, which shows that this requirement was never implemented or monitored.

With the establishment of the B-BBEE Commission within the ambit of **the dti**, an urgent need was identified to develop a system/portal which will be the national central repository for all the B-BBEE certificates issued by the Approved Registered Auditors and accredited Verification Agencies, which the B-BBEE Commission has developed and rolled-out with success from 01 April 2017. All currently active Approved Registered Auditors and Verification Agencies were made aware of the revival of the B-BBEE IT portal and were provided with the *profile activation and access request forms* which needed to be completed and sent back to the B-BBEE Commission for providing them access to the portal.

The response and co-operation received from the verification industry has been remarkable, with some verification professionals completing and submitting back the *profile activation and access request forms* on the same day the instruction went out. This really showed that the verification industry was appreciative in that the portal is not only a benefit to government but that there will be a central place where the validity of the B-BBEE certificates can be verified to eradicate opportunity for 'bogus verification agencies' issuing the B-BBEE certificates using the Approved Registered Auditors or Verification Agencies' credentials, letterheads etc.

During the written interaction with the verification professionals, some could not hold back the excitement this portal has brought to them, one of the them said *"Thank you, that is wonderful news, the public has been waiting for this database for a very long time - it will be wonderful for them to have one database only from accredited agencies, knowing that these are not fraudulent certificates", while the other one wrote 'I hope all the agencies will comply. This is a fantastic project'*. We agree that this will be of benefit to the public and all entities that wish to verify validity of B-BBEE certificates submitted daily.

With the number of fraudulent B-BBEE certificates in circulation out there, some of which might have been used to secure lucrative contracts, the introduction of this portal is believed to be an intervention that is going to bring about change as only the currently active Approved Registered Auditors and active accredited Verification Agencies will be given access to enable South Africa to have credible B-BBEE information, with the public only allowed to view the B-BBEE certificates information, nothing more.

Another fascinating fact about this portal is that it is going to be integrated with the Central Supplier Database (CSD) managed by National Treasury, and it is believed that with time, the use of hard copies of the B-BBEE certificates by government organisations will be phased out since the B-BBEE information will be available on the CSD through this portal, in the same way as Tax Clearance Certificates (TCCs) information, wherein entities are no longer required to submit hard copies of the TCCs when responding to requests for quotations/proposals, **however, when that time has come National Treasury will make pronouncement on this.**

Accessing and using the B-BBEE IT portal is as easy as ABC. Each Approved Registered Auditor or Accredited Verification Agent completes the *profile activation and access request form* and send it back to the B-BBEE Commission for activation. Once activated, they get access to the portal and can start capturing the B-BBEE certificate information and uploading the required documents. Further, upon being activated and logging-in, verification professionals can access the process maps/steps which provide guidance on the entire process, under the '**HELP**' button.

The B-BBEE IT Portal Team would like to thank the verification professionals for their cooperation and patience demonstrated during the first few days of getting to understand our portal. This can only be effective with full cooperation of verification professionals. The information loaded on the portal will be quality assured by the B-BBEE Commission before it is accepted for availability on the portal.

For further assistance or feedback on the B-BBEE IT portal, verification professionals can send an e-mail to ICTSupport@beecommission.gov.za
Contributed by **Nontokozo Nokhwali-Mboyi, Operations Division**



Nontokozo Nokhwali - Mboyi

Activity Report

We have covered our activity report in the overview of our performance.

Notices and Updates

No updates and Notices were issued in this period.

Events

Breakfast Session

We held a Breakfast Session on the National State of Transformation at the DBSA on 24 March 2017 to share with the public the results of the study conducted by Who Owns Whom, and also announced the launch of the portal for B-BBEE Certificates and the status of compliance reports from the JSE listed entities. The session was attended by 162 people from various sectors and entities, including government officials and verification professionals. Our Minister, Dr. Rob Davies and our Director-General, Mr Lionel October, honoured us with their presence, with the Minister giving the keynote address.



Delegates

Delegates



Ms Mould & Ms Chagonda



Ms Lindiwe Madonsela



Registration Process of the Breakfast Session



Dr. Rob Davies



Mr Lionel October &
Other Delegates



Delegates



Mr Gqubule



Moving into our new offices...albeit temporarily

As we have said before, the B-BBEE Commission was being incubated in **the dti** and was therefore operating on **the dti** premises. We had limited space for operation and as a separate entity with independent decision-making, it was important that we find our own operational space to create our identity separate from **the dti**, even though it remains the department that we administratively report to. The procurement process for our office space is not yet completed and is run by the Department of Public Works.

Meanwhile, we have relocated to Centurion where we will be based until the Department of Public Works process is completed. Our clients have already started visiting us there, and we feel re-energised and accessibility is easier, oh, and there is parking for our clients! We look forward to meeting you there soon.



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Editorial: Compiled by B-BBEE Commission
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