



## FINDINGS AND RECOMMENDATIONS IN THE MATTER OF B-BBEE COMMISSION // BEE MATRIX SA (PTY) LTD AND OTHERS

**Summary:** *B-BBEE Commission initiated the investigation – BEE Matrix SA (Pty) Ltd – Allegations – issuing of B-BBEE certificates that appeared invalid to Zuri Quantity Surveyors Incorporated and Ilifa Africa Engineers (Pty) Ltd – Findings – B-BBEE certificates issued contrary to SASAE 3502, verification manual, Codes of Good Practice and the B-BBEE Act – Recommendations – public apology, independent audit of 2015/2016 and 2016/2017 verifications, refund to entities improperly issued with B-BBEE certificates, refrain from verification business for a period of five years, amendment of shareholders’ agreement to clarify participation of black shareholder – failing which must refer matter to CIPC for investigation, to SANAS for withdrawal of accreditation, to IRBA for conduct of auditor, and court action to seek appropriate relief, including declaring directors as delinquent under 13J (4).*

### 1. Introduction

- 1.1 The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”) within the administration of the Department of Trade and Industry (“**the dti**”).
- 1.2 The B-BBEE Commission is empowered to conduct investigations on any matter arising from the application of the B-BBEE Act, including any B-BBEE initiative or a category of B-BBEE initiatives, in terms of section 13F (1) (d) and section 13J (1) of B-BBEE Act, read with regulation 15 of the Regulations Regulating the Administration and Implementation of the B-BBEE Act and the Functions of the B-BBEE Commission, 2016 (“B-BBEE Regulations”).

- 1.3 Without limiting the powers of the B-BBEE Commission, in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, the B-BBEE Commission may make a finding on whether any B-BBEE initiative involves a fronting practice.
- 1.4 In terms of regulation 15 (13) of the B-BBEE Regulations, before making its final findings, the B-BBEE Commission must notify the respondent in writing of the details of the adverse finding(s) and afford them an opportunity to respond to each or any finding within thirty (30) days, which on merit can be extended by a maximum period of ten (10) days.
- 1.5 In terms section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (a)-(c) of the B-BBEE Regulations, the finding(s) or recommendation(s) made by the B-BBEE Commission must be in writing, communicated to the complainant and published in a manner it may deem fit or appropriate, subject to section 13J (7) (b) of the B-BBEE Act.
- 1.6 This publication is therefore issued in line with these provisions of the B-BBEE Act and in the interest of the public.

## **2. *Brief description of the complaint***

- 2.1 On or about the 01<sup>st</sup> of June 2017, the B-BBEE Commission resolved to initiate an investigation, against BEE Matrix SA (Pty) Ltd, a private company registered in terms of the company laws of the Republic of South Africa with registration number 2013/031126/07, in terms of its powers under section 13F (1) (d) read with section 13J (1) of the B-BBEE Act.
- 2.2 The investigation was prompted by two (2) B-BBEE certificates received by the B-BBEE Commission, which were seemingly invalid/fraudulent and appeared to have been issued by BEE Matrix SA (Pty) Ltd to measured entities named Zuri Quantity Surveyors Incorporated and Ilifa Africa Engineers (Pty) Ltd.
- 2.3 Copies of the B-BBEE certificates issued by BEE Matrix SA (Pty) Ltd, which together with additional information obtained by the B-BBEE Commission formed the basis of the investigation, which covered the allegations that BEE Matrix SA (Pty) Ltd issued a B-BBEE

certificate to an Exempted Micro Enterprise named Zuri Quantity Surveyors Inc. for the 2016/2017 verification period, even after a written communique was issued by the B-BBEE Commission that Exempted Micro Enterprises are only required to obtain a sworn affidavit or a CIPC certificate declaring that they make an annual turnover of less than R 10 000 000 (Ten Million Rand), and that BEE Matrix SA (Pty) Ltd also issued and extended the validity of a B-BBEE certificate to Ilifa Africa Engineers (Pty) Ltd without depicting the original date of issue.

- 2.4 The B-BBEE Commission had prior to the investigation communicated these apparent violations in writing to BEE Matrix SA (Pty) Ltd and the entity failed to adhere to guidance provided by the B-BBEE Commission, and provided unsatisfactory responses thereto. The B-BBEE Commission had to determine whether the conduct of the BEE Matrix SA (Pty) Ltd is in compliance with the B-BBEE Act and make a finding(s) or recommendation(s).
- 2.5 Messrs. Obed de Swardt (“Mr de Swardt”), Selvin Munusamy (“Mr Munusamy”) and Nathan Cyril Naidoo are the directors of BEE Matrix SA (Pty) Ltd and Ms. Simone Mitchell (“Ms Mitchell”) is the technical signatory who signed the said B-BBEE certificates at BEE Matrix SA (Pty) Ltd.

### **3. Findings of the B-BBEE Commission**

- 3.1 Having investigated the allegations in terms of the mandate under section 13F (1) (d) and section 13J (1) of the B-BBEE Act, and considered the responses to the preliminary findings from BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell, the B-BBEE Commission in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, has made the following findings:

- 3.1.1 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell issued a B-BBEE certificate on the 07<sup>th</sup> of June 2016 to an Exempted Micro Enterprise named Zuri Quantity Surveyors Incorporated contrary to paragraph 4 of Statement 000 of the Generic Codes of Good Practice 2013, which states that Exempted Micro Enterprises are only required to obtain a sworn affidavit on an annual basis confirming the entity’s revenue and level of black ownership;

- 3.1.2 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell further issued a B-BBEE certificate to a Generic Enterprise named Ilifa Africa Engineers (Pty) Ltd on the 04<sup>th</sup> of August 2016, with no indication that the initial B-BBEE certificate was withdrawn and the re-issued B-BBEE certificate further failed to indicate the date of issue, re-issue and expiry, in a manner that is contrary to the objectives of the B-BBEE Act, and the verification procedures guiding the verification and issuing of B-BBEE certificates under **the dti's** Framework for Accreditation and Verification by all Verification Agencies, Government Gazette No. 31255 of 18 July 2008 ("verification manual");
- 3.1.3 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell verified Ilifa Africa Engineers (Pty) Ltd using the Construction Sector Code despite the fact that the said code was repealed on the 17<sup>th</sup> of February 2016 and with entities that fell under the construction sector required to be verified under the Generic Codes of Good Practice 2013, a fact known to BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy, and Ms Mitchell, demonstrating clear negligence of their duties and obligations as verification professionals or agency;
- 3.1.4 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy failed and neglected to have quality control measures for verification, as stated in the verification manual that a verification professional shall establish policies and procedures designed to provide it with reasonable assurance that its personnel comply with relevant ethical and legal requirement, establish and implement appropriate quality control procedures for the verification engagements undertaken and ensure that the quality control procedures are documented and communicated, also evidenced by the failure to put in place such measures even after being advised by the Compliance Division of the B-BBEE Commission of the clear breach in their verification processes and issuing of B-BBEE certificates;
- 3.1.5 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy have financially benefited from issuing B-BBEE certificates, without legal authority, to Exempted Micro Enterprises that should not have been subjected to such unnecessary costs and an invalid B-BBEE certificate to Zuri Quantity Surveyors Incorporated, and further have failed to withdraw such B-BBEE certificates even after being advised of the apparent breach through the Compliance Division of the B-BBEE

Commission as would be expected of an ethical and honest verification professional or agency;

- 3.1.6 Whereas they cooperated with the investigation and apologised for the conduct, Messrs. de Swardt and Munusamy provided some responses that were not true, not honest and contradictory in a manner that is unethical, improper and indicates a total disregard of their fiduciary duties as shareholders and directors of BEE Matrix SA (Pty) Ltd in a manner that may also amount to a contravention of the Companies Act, as amended, casting doubt on their fitness to hold such positions in entities, and a total disregard of the required standards for verification professionals or agency in a manner that undermines the objectives of the B-BBEE Act;
- 3.1.7 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell provided false and misleading information to the B-BBEE Commission in their averment that the Exempted Micro Enterprise certificate issued to Zuri Quantity Surveyors Incorporated was issued at no cost and that they have control measures in place to address any possible circumvention of the B-BBEE Act, when such was clearly not the case, which conduct may also amount to an offence in terms of section 13N (3) (c) of the B-BBEE Act in addition to it being dishonest, unethical and devoid of the professionalism expected of verification professionals or agencies;
- 3.1.8 The conduct of issuing a B-BBEE certificate to Ilifa Africa Engineers (Pty) Ltd without proper verification procedures being followed is contrary to South African Standard on Assurance Engagements 3502, Assurance Engagements on Broad-Based Black Economic Empowerment Verification Certificates (“SASAE 3502”) which bestows a duty upon auditors to fully conform to ethical requirements and to plan and perform their engagements in a manner that would ensure that they obtain limited assurance about whether the issued B-BBEE certificate is free from material misstatement, an obligation that Ms. Mitchell, as an auditor affiliated to Independent Regulatory Board for Auditors (IRBA), and BEE Matrix SA (Pty) Ltd ought to have known;

- 3.1.9 BEE Matrix SA (Pty) Ltd and Ms. Mitchell, failed to use and apply professional scepticism and due diligence in performing verification function, assessing the information and issuing the apparent invalid B-BBEE certificates to Zuri Quantity Surveyors Incorporated and Ilifa Africa Engineers (Pty) Ltd, in a manner that displays a total disregard of the transformation ideals and objectives of the B-BBEE Act as well as the verification methodology prescribed by the verification manual, and the dismissive and dishonest approach with which they dealt with the apparent breach on being informed of it is indicative of lack of such professional scepticism and due diligence required;
- 3.1.10 BEE Matrix SA (Pty) Ltd and Ms. Mitchell failed to consider the guidance as well as the methodologies for verification of B-BBEE Codes of Good Practice which would have ensured that they perform their verification in accordance with the applicable criteria and minimised any information that would lead to the issuance of an invalid B-BBEE certificates to Zuri Quantity Surveyors Incorporated and Ilifa Africa Engineers (Pty) Ltd, or any other entity, which is unacceptable unprofessional conduct from a verification professional or agency;
- 3.1.11 The conduct of BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell may further amount to an offence in terms of section 13O 1 (a) of the B-BBEE Act, in that they may have misrepresented the broad based economic empowerment status of Zuri Quantity Surveyors Incorporated and Ilifa Africa Engineers (Pty) Ltd given that proper verification procedures were not followed in the issuance of the B-BBEE certificates in question; and
- 3.1.12 The B-BBEE ownership structure of BEE Matrix SA (Pty) Ltd has 45% black shareholding is as reflected on its sworn affidavit supported by the shareholders' agreement, as amended from time to time, however provisions relating to board representation and voting rights must be made clearer and proof of participation be kept to demonstrated both *de facto* and *de jure* control over BEE Matrix SA (Pty) Ltd commensurate with the 45% shareholding by Mr Munusamy.

- 3.2 The B-BBEE Commission may, if it is of the view that a matter can be resolved through alternative dispute resolution mechanism, facilitate a resolution of a matter or refer a matter for alternative dispute resolution to any appropriate dispute resolution process in terms of regulation 15 (11) of the B-BBEE Regulations.
- 3.3 The B-BBEE Commission did not explore alternative dispute resolution mechanism in this case as the initial intervention by the Compliance Division of the B-BBEE Commission did not achieve a change in behaviour leading to a formal investigation. BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell have also not requested or made a proposal to this effect.
- 3.4 The findings were communicated to BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell and afforded a period of thirty (30) days to respond, and the above-mentioned findings were made after consideration of the said representations, which included a meeting to clarify issued. The parties cooperated with the investigation and apologised for the conduct.

#### **4. Recommendations of the B-BBEE Commission**

- 4.1 Based on the above-mentioned findings, considering the demonstrated level of cooperation during the investigation by BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy, the B-BBEE Commission has made the following recommendations that in its view would remedy the adverse findings, taking into account the need to address the prejudiced parties, if any, the apparent violation of the B-BBEE Act in a manner that advances transformation in the interest of the public, and measures to prevent similar transgressions from occurring in future:
- 4.1.1 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy must within **ten (10)** days of the findings issue a written public apology and written individual apologies to the measured entities in question for this conduct, the contents of which must be approved by the B-BBEE Commission, and must circulate the public apology to all clients in their verification part of the business, and further place the public apology on the website of BEE Matrix SA (Pty) Ltd for a period of **thirty (30)** days;

- 4.1.2 BEE Matrix SA (Pty) Ltd must make a written undertaking under oath that BEE Matrix SA (Pty) Ltd will fully abide by the B-BBEE Act and seek advice from the B-BBEE Commission when in doubt on any matter relating to B-BBEE, and such undertaking must be submitted to the B-BBEE Commission within **ten (10) days** of the findings;
- 4.1.3 BEE Matrix SA (Pty) Ltd must commission an independent audit of all B-BBEE certificates issued in 2015/2016 and 2016/2017 to identify any other B-BBEE certificates that were issued by Ms. Mitchell and BEE Matrix SA (Pty) Ltd using the approach they adopted in the verification of Ilifa Africa Engineers (Pty) Ltd and the issuance of B-BBEE certificates to Exempted Micro-Enterprises, and submit a report of such independent audit to the B-BBEE Commission within **sixty (60) days** of the findings;
- 4.1.4 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy must thereafter refund all measured entities that the independent audit will identify to have been improperly verified and issued with B-BBEE Certificates in the approach used in verifying Ilifa Africa Engineers (Pty) Ltd and the issuance of B-BBEE certificates to Exempted Micro-Enterprises, and send proof of refund to the B-BBEE Commission within **thirty (30) days** of the independent audit report being submitted to and accepted by the B-BBEE Commission;
- 4.1.5 The shareholders' agreement of BEE Matrix SA (Pty) Ltd be amended within **thirty (30) days** of these findings to reflect clearly the board constitution, the voting rights and participation of the black shareholder, and that proper records be kept for any resolution relating to the shareholding, economic interest and net value, including any change in directorship and reason thereof;
- 4.1.6 BEE Matrix SA (Pty) Ltd must ensure that Messrs. de Swardt and Munusamy attend training on corporate governance and the B-BBEE Act within **sixty (60) days** of these findings with any institution accredited to offer such training in terms of the laws of South Africa in order to prevent the conduct from occurring in the future, and proof thereof be submitted to the B-BBEE Commission;



- 4.1.7 In light of the submission in response to the B-BBEE Commission's recommendation for a site visit and audit by the South African National Accreditation System (SANAS) that BEE Matrix SA (Pty) Ltd will voluntarily withdraw its B-BBEE verification with SANAS, BEE Matrix SA (Pty) Ltd and any of its current shareholders, directly or indirectly, shall not engage in the B-BBEE verification business and shall not revive or register for B-BBEE verification accreditation with SANAS for a period of **five (5) years** from the date on which the current accreditation is withdrawn by SANAS, except for Mr Nathan Cyril Naidoo who joined and became a director in the entity after the conduct that is subject of these findings; and
- 4.1.8 In view of her role as a technical signatory, Ms Mitchell must implement recommendations 4.1.1, 4.1.2, 4.1.6 and 4.1.7, with the text adjusted to apply to her, and same timelines applicable in respect of each recommendation, failing which a separate investigation is to be pursued against her and also that her conduct be referred to the regulatory body for auditors for further investigation and appropriate remedy.
- 4.2 BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell have agreed in writing to implement the remedial recommendations outlined above. However, in the event that they fail to accept and implement any of these recommendations, the B-BBEE Commission is empowered to implement the following actions in accordance with the B-BBEE Act:
- 4.2.1 pursue criminal proceedings on the basis of misrepresentation of B-BBEE status against BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell by referring this matter to the National Prosecuting Authority in terms of 13J (5) of the B-BBEE Act, in their respective capacity as a juristic person and natural person, for contravening sections 13O (1) (a) and 13N (3) (c) of the B-BBEE Act and any other law;
- 4.2.2 refer the matter to Companies and Intellectual Property Commission (CIPC) for an investigation to be conducted into the affairs of BEE Matrix SA (Pty) Ltd and the conduct of its directors, and the extent to which their conduct could be applicable

to any other entity in which Messrs. de Swardt and Munusamy and Ms. Mitchell are shareholders/members and directors, with a view of also obtaining a declaration of them as delinquent or unfit to hold directorship or membership in any entity without prejudice to other remedies under the law;

4.2.3 refer the findings on this matter to SANAS for the purposes of seeking a suspension of the accreditation of BEE Matrix SA (Pty) Ltd, so that its directors and officers are collectively and individually barred from conducting B-BBEE verification of any business for a specified period;

4.2.4 that as the accreditation by SANAS in respect of this matter is regarded as authorisation or concession within the context of section 13A of the B-BBEE Act, refer to and advise that SANAS may immediately suspend BEE Matrix SA (Pty) Ltd's accreditation, without prejudice to any other remedies for misrepresentation of its adherence to professional and required standards for verification agencies upon which such accreditations are granted;

4.2.5 refer the findings to IRBA for an investigation and appropriate remedy under the Audit Professions Act in respect of the conduct of Ms. Mitchell and BEE Matrix SA (Pty) Ltd; and

4.2.6 in terms of section 13J (4) of the B-BBEE Act, consider instituting proceedings in a court to restrain any breach of the B-BBEE Act, including to obtain appropriate remedial relief against BEE Matrix SA (Pty) Ltd, Messrs. de Swardt and Munusamy and Ms. Mitchell.

## **5. Commencement date for implementation of recommendations**

5.1 The implementation of the recommendations is effective from the **6<sup>th</sup> of July 2018** and reference to 'days' in the recommendations above means calendar days unless stated otherwise. The B-BBEE Commission will be monitoring the implementation of recommendations.

## **6. Status of this publication**

6.1 This publication is prepared only for the purpose of publishing the findings and recommendations of the B-BBEE Commission on this matter, but does not constitute an investigation report.

## **7. Conclusion**

7.1 The B-BBEE Commission has taken all due care in preparing this publication, and should there be any errors or should you require any clarity regarding the contents of this publication, please do not hesitate to contact us immediately.

7.2 This publication will also be available on the website of the B-BBEE Commission from the date of its release and it will be circulated to the public through channels that the B-BBEE Commission deems fit.

7.3 For any queries or further clarity on this publication, kindly feel free to contact us at the following contact details:

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