



SUMMARY OF FINDINGS AND RECOMMENDATIONS IN THE MATTER OF THULANI GOODWILL MBATHA // DIGIT MEDIA HOLDINGS (PTY) LTD & OTHERS

CASE NUMBER: 2/1/2017

Summary: *Allegations – complainant alleged that he was made a shareholders and director in two entities, Digit Media Holdings (Pty) Ltd and The Amaji Beverage Company (Pty) Ltd, but denied access to records of the entities, participation in decisions and economic benefits - Findings – no adverse findings in relation to The Amaji Beverage Company (Pty) Ltd – in relation to Digit Media Holdings (Pty) Ltd, it was found that the entity was created as a front with B-BBEE credentials of the complainant to pitch for work, and entity used an invalid B-BBEE certificate - Recommendations – undertaking to cease conduct and comply with the B-BBEE Act, obtain a B-BBEE certificate from accredited verification agency, and to seek advice from the B-BBEE Commission to prevent future violations.*

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”).
- 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 30 (thirty) days, which on merit can be extended by a maximum period of 10 (ten) 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 The Minister of Trade and Industry issued the B-BBEE Regulations on 06 June 2016 which prescribe the process for complaints in terms of the B-BBEE Act. Regulation 15 specifically outlines the process from submission to resolution of a complaint, and further provide for both instances where the B-BBEE Commission responds to a complaint and where it investigates a complaint on its own initiative.
- 2.2 Thulani Goodwill Mbatha (hereinafter also referred as the Complainant), lodged a complaint with the B-BBEE Commission on or about the 16 January 2017 alleging practices that are contrary to objectives of the B-BBEE Act. The essence of the allegations is summarised for the purposes of this publication as follows:
 - 2.2.1 that on or about November 2015, the Complainant was approached by the founder of Digit Media Holdings (Pty) Ltd, a company duly registered in accordance with the company laws of South Africa under registration number 2016/198685/07 (also

hereinafter referred to as the “first Respondent”), Mr. Brett Lipman (also hereinafter referred to as “Mr Lipman” or the “second Respondent”) about a business idea to launch a tequila product;

- 2.2.2 that the Complainant did most of the research, concept development, branding and submitted plans under the impression that he would be the co-founder and partner in a new company called The Amaji Beverage Company (Pty) Ltd, a company duly registered in accordance with the company laws of South Africa under registration number 2016/068385/07 (also hereinafter referred to as “the third Respondent”);
- 2.2.3 that on or about January 2017, the Complainant discovered that not only had he been appointed as a director of Digit Media Holdings (Pty) Ltd without his prior knowledge or consent, but he had also been made a shareholder of The Amaji Beverage Company (Pty) Ltd;
- 2.2.4 that upon discovering that he had been made a director and shareholder of Digit Media Holdings (Pty) Ltd and The Amaji Beverage Company (Pty) Ltd, the Complainant requested company documents but was denied access;
- 2.2.5 that the Respondents have been using the Complainant’s credentials, as a black person, in order to gain a B-BBEE status level;
- 2.2.6 that the Complainant has no knowledge of the operations and activities of Digit Media Holdings (Pty) Ltd and The Amaji Beverage Company (Pty) Ltd;
- 2.2.7 that the Complainant is not involved in any of the decision making of Digit Media Holdings (Pty) Ltd and The Amaji Beverage Company (Pty) Ltd;
- 2.2.8 that despite being appointed as an Executive Director of Communications; the Complainant was never consulted about the appointment of an external Public Relations (PR) Agency in The Amaji Beverage Company (Pty) Ltd; and

2.2.9 that the Complainant has never derived appropriate economic benefits from Digit Media Holdings and The Amaji Beverage Company (Pty) Ltd commensurate to his position in the respective entities.

2.3 After conducting the assessment as to the merit of the complaint, the B-BBEE Commission determined that there is merit in investigating the complaint. In line with Regulation 15 (4) (d) of the B-BBEE Regulations, the Respondents were notified of the complaint and afforded an opportunity to respond to the allegations.

2.4 The B-BBEE Commission determined that some of the aspects raised do not fall within its mandate as they may be intellectual property related, and the Complainant was advised to approach the Companies and Intellectual Property Commission in respect of such matters.

2.5 The First, Second and Third Respondents are collectively referred to as Respondents, but where a matter specifically relates only to the First or Second or Third Respondent, such will be so specified.

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 also considered the response of the respondents to the allegations and the preliminary findings, 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 found as follows:

3.1.1 there is no evidence that the B-BBEE Act was violated in respect of the part of the complaint against The Amaji Beverage Company (Pty) Ltd as lodged by Mr Thulani Goodwill Mbatha, and therefore there are no adverse findings;

3.1.2 in respect of Digit Media Holdings (Pty) Ltd, it is apparent that the entity was created to be used as a front to pitch for a contract and Mr Thulani Goodwill Mbatha was appointed as a black shareholder and director in the entity for purposes of complying with the B-BBEE requirements. This is corroborated by the B-BBEE certificate that the entity subsequently sourced to comply with the B-BBEE requirement;

- 3.1.3 the B-BBEE certificate “DTI BEE REF B0844588” is invalid as it was improperly issued by a certain Mr Ramba who is not accredited or approved to conduct any verification by South African National Accreditation Systems or Independent Regulatory Board for Auditors as was required at the time of issuance, contrary to the Codes of Good Practice, 2013;
- 3.1.4 Digit Media Holdings (Pty) Ltd sourced and traded, or attempted to trade using a B-BBEE certificate that is evidently invalid contrary to the objectives of the B-BBEE Act, and its directors had a duty of care and skill that they failed to apply in this regard;
- 3.1.5 Mr Ramba’s conduct of issuing B-BBEE certificates without authority is illegal and contrary to the objectives of the B-BBEE Act; and
- 3.1.6 the conduct of the Digit Media Holdings (Pty) Ltd and its directors was clearly contrary to the B-BBEE Act and may amount to a fronting practice in terms of section 13O (1) (d) of the B-BBEE Act or attempt to misrepresent B-BBEE status in terms of section 13O (1) (a) of the B-BBEE Act.
- 3.2 In respect of The Amaji Beverage Company (Pty) Ltd, the B-BBEE Commission noted that Mr Thulani Goodwill Mbatha was actually aware that he had a 16% stake and director in the entity contrary to his allegation in his complaint that this was done without his knowledge. Mr Thulani Goodwill Mbatha evidently failed to honour meetings for which he was notified and he conceded to signing the transfer forms relating to his stake himself, voluntarily disposing of his stake in The Amaji Beverage Company.
- 3.3 In terms of regulation 15 (13) of the B-BBEE Regulations, the Respondents were afforded a period of thirty (30) days to respond to adverse findings and in this case the Respondents failed to respond. In terms of regulation 15 (14) of the B-BBEE Regulations, the B-BBEE Commission must proceed to issue its findings if the Respondents fail to respond. The Respondents, however, provided their response to the findings prior to the B-BBEE Commission issuing final findings.

4. Recommendations of the B-BBEE Commission

4.1 Based on the above-mentioned findings, considering that Mr. Thulani Goodwill Mbatha does not seem to have suffered any financial loss as a result of the conduct, the short duration of the conduct, as well as the level of cooperation of the Respondents with the investigation, the B-BBEE Commission made the following recommendation:

4.1.1 that Digit Media Holdings (Pty) Ltd sign an undertaking under oath that it will not engage in such practice again, and further that it will ensure that it obtains verification services, if necessary, from South African National Accreditation Systems accredited verification agencies, and further that it will seek advice from the B-BBEE Commission if it engages in any B-BBEE initiative in the future.

4.2 The Respondents cooperation with the B-BBEE Commission and accepted the recommendations made, and these have since been implemented. The final findings and recommendations were issued on 16 August 2018. The B-BBEE Commission will continue to monitor the conduct and compliance going forward.

4.3 In line with regulation 15 (12) (a)-(c) of the B-BBEE Regulations, any findings or recommendations made by the B-BBEE Commission in respect of an investigation must be in writing, communicated to the complainant, and published in a manner that the B-BBEE Commission deems appropriate, including on its website. The complainant was notified in writing of the outcome of this complaint.

4.4 The B-BBEE Commission has resolved to publish the findings in accordance with section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (c) of the B-BBEE Regulations in the interest of the public.

5. Status of this publication

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

6. Conclusion

- 6.1 The B-BBEE Commission has taken all due care in preparing this publication, and should there be any errors you wish to highlight or should you require any clarity regarding the contents of this publication, please do not hesitate to contact us immediately.
- 6.2 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.
- 6.3 For any queries or further clarity on this publication, kindly feel free to contact us at the following contact details:

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