



**FINDINGS AND RECOMMENDATIONS IN THE MATTER OF
GADIFELE MASHABATHAKA AND ANOTHER // AMAX SA (PTY) LTD
CASE NUMBER: 18/10/2016 & 19/10/2016**

Summary: *Allegations: that Amax SA misrepresented the B-BBEE status of Planet Waves 237 (Pty) Ltd, for the verification period of 2014/2015 – that the B-BBEE certificate to Planet Waves 237 (Pty) Ltd indicated no black ownership when entity was 60% black owned – that there was collusion between verification agency and measured entity – Findings - Amax SA and the technical signatory, Mr Gerhard Stols, had misrepresented the B-BBEE status of Planet Waves 237 (Pty) Ltd – that the verification was conducted contrary to standards in verification manual resulting in unprofessional conduct – no evidence of collusion found - Recommendations – Remedial recommendations including audit, refunds, apology, failing which further action to be taken in terms of the B-BBEE Act.*

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 provides for both instances where the B-BBEE Commission responds to a complaint and where it investigates a complaint on its own initiative.
- 2.1 The B-BBEE Commission investigated the matter pursuant to complaints lodged by Ms. Olivia Mashabathaka and Mr. Klaas Sebothoma (also herein after referred to as “Complainants”), who are the majority shareholders of Planet Waves 237 (Pty) Ltd, against Amax SA (Pty) Ltd (also herein after referred to as “Respondent”) alleging practices which are contrary to objectives of the B-BBEE Act. As the complaints related to the same issue and respondent, the investigation was consolidated.

- 2.2 The allegations are summarised for the purpose of this publication as follows:
- 2.2.1 that Amax SA (Pty) Ltd misrepresented the B-BBEE status of Planet Waves 237 (Pty) Ltd for the verification period of 2015/2016 by issuing a B-BBEE certificate to Planet Waves 237 (Pty) Ltd which stated that the entity was not black owned;
 - 2.2.2 that for the 2016/2017 verification period, Amax SA (Pty) Ltd allegedly issued a B-BBEE certificate which reflected that Planet Waves 237 (Pty) Ltd was 15% black youth male owned and 45% black youth female owned, while black economic empowerment was a struggle to the black directors and shareholders of Planet Waves 237 (Pty) Ltd;
 - 2.2.3 that Amax SA (Pty) Ltd was fully aware that no economic benefits have accrued to the black directors and shareholders of Planet Waves 237 (Pty) Ltd, however they continued to issue B-BBEE certificates to them; and
 - 2.2.4 furthermore, that, Amax SA (Pty) Ltd has allegedly assisted the white directors and shareholders of Planet Waves 237 (Pty) Ltd to evade Tax by moving funds from Planet Waves 237 (Pty) Ltd to other unknown entities and or bank accounts.
- 2.3 The B-BBEE Commission investigated the allegations that fall within its mandate in terms of the B-BBEE Act and afforded the Respondent an opportunity to respond to the allegations as well as the findings during the investigation in accordance with the requirements of regulation 15 of the B-BBEE Regulations.

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, considered your response to the preliminary findings from the Respondent and further clarification provided in a meeting, 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 final findings:

- 3.1.1 Amax SA (Pty) Ltd and Mr Gerhard Stols in his capacity as the Technical Signatory, misrepresented the 2014/2015 B-BBEE status of Planet Waves 237 (Pty) Ltd by issuing the entity with a B-BBEE certificate reflecting 0% black ownership while the entity had 60% black ownership at the time of issuing of the certificate as a result of Mr Gerhard Stols failure to request supporting documents to prove the ownership structure of Planet Waves 237 (Pty) Ltd as per claim on the application sheet;
- 3.1.2 Amax SA (Pty) Ltd and Mr Gerhard Stols were entitled to issue the 2016/2017 B-BBEE certificate to Planet Waves 237 (Pty) Ltd, in that the financial year end of Planet Waves 237 (Pty) Ltd was February 2015, as such the 2007 Codes of Good Practice was still applicable to the verification process of an EME;
- 3.1.3 Mr Gerhard Stols acted unethically and improperly with total disregard of his verification duties as a verification professional when he issued a B-BBEE certificate without any evidence supporting the claims made by Planet Waves 237 (Pty) Ltd in 2014;
- 3.1.4 Mr Gerhard Stols's conduct was contrary to the South African Standard on Assurance Engagements (SASAE) 3502: Assurance Engagements on Broad Based Black Economic Empowerment (B-BBEE) Verification Certificates which requires Auditors to comply with ethical requirements and to plan and perform their engagement to obtain limited assurance about whether the Certificate is free from material misstatement, an obligation that Mr Gerhard Stols, ought to have known;
- 3.1.5 Amax SA (Pty) and Mr Gerhard Stols in performing verification function, failed to use and apply professional scepticism and due diligence when assessing and validating information prior to issuing the apparent invalid B-BBEE certificate to Planet Waves 237 (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;

3.1.6 Whereas Mr. Gerhard Stols, Mr Erik Botha and Amax SA (Pty) Ltd have now shown a willingness to cooperate and further apologised for their conduct in failing to provide the B-BBEE Commission with all the required information, the failure to provide the B-BBEE Commission with the required information amounts to an offence in terms of section 13N (3) (a) of the B-BBEE Act, in that it hindered and obstructed B-BBEE Commission when it was exercising its mandate during the investigation of this matter;

3.1.7 That the conduct of Mr. Gerhard Stols and Amax SA (Pty) Ltd falls short of meeting the required standard for verification professionals and is contrary to South African Standard on Assurance Engagements 3502 of Assurance Engagements on Broad-Based Black Economic Empowerment Verification Certificates and the objectives the B-BBEE Act;

3.1.8 The conduct of Mr. Gerhard Stols and Amax SA (Pty) Ltd amount to an offence in terms of section 13O (1) (a) of the B-BBEE Act, in that they have misrepresented the B-BBEE status of Planet Waves 237 (Pty) Ltd in issuing the B-BBEE certificates in question without properly verifying the information submitted; and

3.1.9 The conduct of Mr. Gerhard Stols and Amax SA (Pty) Ltd may amount to an offence in terms of section 13O (2) of the B-BBEE Act, which provides that a *verification professional who becomes aware of the commission of, or any attempt to commit, any offence referred to in sub-section (1) and fails to report it to an appropriate law enforcement agency, is guilty of an offence;*

3.2 Further to the above findings, the B-BBEE Commission has found no tangible proof of collusion by Amax SA (Pty) Ltd and Planet Waves 237 (Pty) Ltd to exploit the black shareholders. The B-BBEE Commission has however identified the following:

- 3.2.1 that Planet Waves 237 (Pty) Ltd has been using Amax SA through Stols Accountants & Auditors as their Accounting Officers and B-BBEE verification professional from 2014 to date;
- 3.2.2 that the allegations that Amax SA (Pty) Ltd has assisted Planet Waves 237 (Pty) Ltd in exploiting the black shareholders and directors emanated from the fact that the Complainants raised their concerns with the Respondent and B-BBEE analyst of Amax SA (Pty) Ltd about the irregularities happening in Planet Waves 237 (Pty) Ltd, however their concerns were not addressed to their satisfaction;
- 3.2.3 that Amax SA (Pty) Ltd failed to address the concerns raised by the Complainants with Planet Waves 237 (Pty) Ltd as their Accounting Officers and B-BBEE verification professional which created an impression to the Complainants that Amax SA (Pty) Ltd colluded with Planet Waves 237 (Pty) Ltd to their detriment; and
- 3.2.4 that the failure of Amax SA (Pty) Ltd as Accounting Officers to indicate the concerns raised by the majority shareholders in the “Accounting Officer’s Report” for the 2014/2015 and 2015/2016 audited financial statements, made Complainants to question their independence from Planet Waves 237 (Pty) Ltd.
- 3.3 The above findings were issued after the B-BBEE Commission had received the response from the Respondent to preliminary findings in terms of which they explained their processes and interpretation thereof, and highlighted that the conduct was not intentional. Of significant concern to the B-BBEE Commission was the fact that the Respondent had issued certificate purely based on claims made by the entity, and did not conduct the verification to ascertain the correctness of the claims regarding black ownership.
- 3.4 The preliminary findings were therefore slightly revised after consideration of their explanation as reflected in the final findings reflected above. It must be noted that there are various entities that operate under the brand Amax SA, including B-BBEE verification, accounting and tax services. Respondent demonstrated cooperation and willingness to correct the conduct.

4. Recommendations of the B-BBEE Commission

4.1 Based on the final findings above, the B-BBEE Commission has made the following remedial recommendations, which are considered appropriate to address this matter, in the interest of the prejudiced party, the public and the objectives of the B-BBEE Act:

- 4.1.1 Amax SA (Pty) Ltd and Mr. Gerhard Stols in his capacity as the Technical Signatory, must make a written undertaking under oath that Amax SA (Pty) Ltd and Mr. Gerhard Stols, and any other entity operating under the umbrella of Amax 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;
- 4.1.2 Amax SA (Pty) Ltd must commission an independent audit of all Exempted Micro-Enterprises B-BBEE Certificates issued in 2014/2015, 2015/2016 and 2016/2017 by Mr. Gerhard Stols and Amax SA (Pty) Ltd using the approach they adopted in the verification of Planet Waves 237 (Pty) Ltd, and submit a report of such independent audit to the B-BBEE Commission within **sixty (60) days** of the findings;
- 4.1.3 Amax SA (Pty) Ltd and Mr. Gerhard Stols 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 Planet Waves 237 (Pty) Ltd 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; and
- 4.1.4 Amax SA (Pty) Ltd and Mr. Gerhard Stols must within **ten (10) days** of the findings issue a written public apology and written individual apologies to Ms Olivia Mashabathaka, Mr Klaas Sebothoma and measured entities which would have been identified by the independent audit for this conduct, the contents of which must be approved by the B-BBEE Commission.

4.2 In the event that Amax SA (Pty) Ltd and Mr. Gerhard Stols fail to comply and or are not agreeable to implementing the remedies recommended above, which in the view of the B-BBEE Commission would be appropriate to remedy the adverse findings, and given the seriousness of the conduct in question, the B-BBEE Commission may in accordance with the B-BBEE Act:

4.2.1 refer Mr. Gerhard Stols to Independent Regulatory Board for Auditors for investigation and if guilty, disciplinary action to be taken against him, in his capacity as an accredited Auditor for the unethical conduct of issuing the 2014/2015 B-BBEE certificate that misrepresented the status of Planet Waves 237 (Pty) Ltd and failing to report the violation of the B-BBEE Act when the Complainants made them aware of the conduct of their fellow directors and shareholders of Planet Waves 237 (Pty) Ltd;

4.2.2 refer the findings on this matter to South African National Accreditation System for the purposes of seeking a withdrawal of the accreditation of Mr. Gerhard Stols as a Technical Signatory, so that he is barred from conducting B-BBEE verification of any business for a specified period;

4.2.3 pursue criminal proceedings against Amax SA (Pty) Ltd and Mr. Erik Botha on the basis of hindering and obstructing the B-BBEE Commission's investigation in this matter by referring this matter to the National Prosecuting Authority in terms of section 13J (5) of the B-BBEE Act, in their respective capacity as a natural and juristic person, for contravening section 13N (3) (a) of the B-BBEE Act;

4.2.4 pursue criminal proceedings on the basis of misrepresentation of B-BBEE status of Planet Waves 237 (Pty) Ltd against Amax SA (Pty) Ltd and Mr. Gerhard Stols 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 section 13O (1) (a) and 13O (2) of the B-BBEE Act and any other law; and

- 4.2.5 in terms of section 13J (4) of the B-BBEE Act, consider instituting proceedings in a court of law to restrain any breach of the B-BBEE Act, including to obtain appropriate remedial relief, against Amax SA (Pty) Ltd and any other entity operating under Amax SA (Pty) Ltd.
- 4.3 The Respondent accepted the remedial recommendations and have cooperated with the B-BBEE Commission in respect of these recommendations. The B-BBEE Commission would not pursue the matter further if all remedial recommendations are complied with.

5. *Implementation of recommendations*

- 5.1 Reference to 'days' in the recommendations above means calendar days unless stated otherwise. The B-BBEE Commission may adjust timelines as may be necessary to give effect to the recommendations. The B-BBEE Commission is monitoring the implementation of recommendations. The final findings were issued on 11 April 2019.

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 in the interest of the public, 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 you wish to highlight 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:

B-BBEE Commission
Private Bag X84
Pretoria
0001

Telephone: +27 12 649 0918
Email: bee-info@beecommission.gov.za
Website: www.bbbeeecommission.co.za

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