



B-BBEE Commission Team

## Sector codes must not derail real empowerment

One of the reasons legislation would have exemption provisions is the recognition that not every rule would fit all types of businesses, operations or sectors of the economy. Easing regulatory burden for businesses includes creating permutations within the regulatory framework for businesses to apply for exemptions or deviations from the applicable rule under certain circumstances or allow for self-regulation to the extent possible where there is no market failure.

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## GLOSSARY

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

<b>B-BBEE</b>	Broad-Based Black Economic Empowerment
<b>B-BBEE Act</b>	Broad-Based Black Economic Empowerment Act 53 of 2003 as amended by Act 46 of 2013
<b>B-BBEE Commission</b>	Broad-Based Black Economic Empowerment Commission established by section 13B
<b>B-BBEE Regulations</b>	Regulations issued by the Minister in terms of section 14 of the B-BBEE Act
<b>Codes</b>	Generic Codes of Good Practice issued by Minister
<b>EME</b>	Exempted Micro Enterprise
<b>Entity</b>	Any measured entity, including company, close corporation or trust
<b>EPPF</b>	Eskom Pension and Provident Fund
<b>JCPS</b>	Justice, Crime Prevention and Security Cluster
<b>JSE</b>	Johannesburg Stock Exchange
<b>Minister</b>	Minister of Trade and Industry
<b>QSE</b>	Qualifying Small Enterprise
<b>Sector Codes</b>	Sector Codes gazetted by Minister in terms of section 9(1)
<b>the dti</b>	Department of Trade and Industry

# EDITORIAL NOTE

This edition of *The Whistle* comes out in the time when the country is talking about radical economic transformation, which is one of the priorities of government. Judging by the public debates on this, it seems the dark cloud about B-BBEE benefiting the elites is not going away, but then the mess occurred far too long before the amendments were effected in 2013.

We must however focus on the objectives of B-BBEE, which emanate directly from the Constitution of South Africa. B-BBEE does not seek to replace white monopolies with black monopolies, but rather to create the inclusivity that is required to stimulate growth of our economy. We can't expect the level of economic growth that is satisfactory for as long as our economy remains this unequal.

We are already seeing spin-offs of our compliance strategy. More measured entities approach B-BBEE differently from how they did in the past. We base our view on the 405 requests for advice and increasing telephone enquiries that we received from the market players since our operationalisation in June 2016. We see measured entities seeking clarity and revising initiatives in line with the advice given.

In this edition we focus on governance, reporting requirements and sector related issues, and as usual give the status on our operations.

We are also happy to announce the planned Breakfast Session that will be held at the Development Bank of South Africa in Midrand on the National State of Transformation. We will share the study we commissioned, which will serve as a baseline for the Annual Report on the National State of Transformation that we will issue from 2017/2018 financial year.

We are also glad to indicate that some of the investigations we are conducting are now coming to a closure, and we will issue reports with findings and recommendations soon.

This means the next editions of *The Whistle* will cover summaries of some of the highlights in our investigations, which will give guidance to what is unacceptable conduct in the implementation of B-BBEE.

We are also happy to announce that we will be relocating offices from **the dti** Campus, where the B-BBEE Commission was being incubated, to a new location in Eco Glade Office Park Highveld, Centurion. A Government Gazette and communication to all stakeholders will be issued in due course.

Enjoy the reading, hope it is useful to you and your entity!



Ms. Zodwa Ntuli  
Acting Commissioner



# Sector codes must not derail real Sempowerment

One of the reasons legislation would have exemption provisions is the recognition that not every rule would fit all types of businesses, operations or sectors of the economy. Easing regulatory burden for businesses includes creating permutations within the regulatory framework for businesses to apply for exemptions or deviations from the applicable rule under certain circumstances or allow for self-regulation to the extent possible where there is no market failure.

The B-BBEE Act has created exceptions to the general application of the B-BBEE Act in section 9(6), section 10(2) and section 9(1). Section 9(6) provides for the Minister to permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in terms of the codes, and the process is outlined in Regulation 19 of the B-BBEE Regulations.

Section 10(2) further provides that the Minister may, based on objectively verifiable facts or circumstances, grant an exemption or deviation to an organ of state or public entity from any of the requirements set in the

codes, and Regulation 20 outlines the process for this purpose.

In respect of sectors, section 9(1) states that in order to promote the purposes of the B-BBEE Act, the Minister may by notice in the Gazette issue codes of good practice on B-BBEE, and section 9(1) (e) provides for issuance of guidelines for stakeholders in relevant sectors of the economy to draw up sector codes of good practice for those sectors, where necessary, to promote the purposes of the B-BBEE Act.

With the amendments to the B-BBEE Act and the revision of the 2007 codes, sector charters that were previously gazetted were required to align to the amendments, and by the deadline, the Construction and the Chartered Accountants sector codes had not been aligned, and were repealed by the Minister.

In looking at these draft sector codes, we take into account that there were targets set in the previous sector codes, the extent to which the sector has progressed in achieving those targets, and how far-reaching the new targets are



towards accelerating the transformational issues pertinent to that sector. The B-BBEE Commission is mindful that sector codes should not be used to create a separate dispensation for a particular sector with no real benefit to the objectives of the B-BBEE Act.

It is expected that sector codes should adhere to principles set in the generic codes to ensure that economic transformation is put at the forefront given the inequalities, barriers to entry and lack of transformation, and offer solutions that will take the country and intended beneficiaries forward, instead of paying lip service to the process and actually regressing on the bare minimum set by the generic codes.

Some of the sectors are the most untransformed, with extremely high barriers for new entrants, including small enterprises and black owned businesses. Sector codes must be allowed only if they are necessary given the peculiarities in the sector, targets must be meaningful enough to warrant a separate dispensation, not a watered down version of the generic codes, and must directly address the transformation challenges that exist in the sector.

The following are the general concerns the B-BBEE Commission regards as applicable to sector codes that it has already reviewed, which if not addressed will make the mandate of the B-BBEE Commission impossible to achieve and basically derail the achievement of the objectives of the B-BBEE Act:

### **Lack of consistency**

The B-BBEE Commission is amongst others mandated to increase knowledge of the nature and dynamics of matters relating to B-BBEE through implementation of public awareness campaigns, which includes providing clarification and advisory opinions on the interpretation of the B-BBEE Act.

It is the mandate of the B-BBEE Commission to provide guidance to achieve consistency in the interpretation, approach and application of the B-BBEE Act. This means for both generic codes and sector codes. The

inconsistencies identified in the sector codes will frustrate the execution of this mandate.

The drafting style and format of the sector codes reviewed, including the language used, is problematic as certain provisions are open to multiple interpretations. Inconsistencies open legal loopholes and an avenue for unnecessary litigation, and end up frustrating achievement of the objectives of the B-BBEE Act.

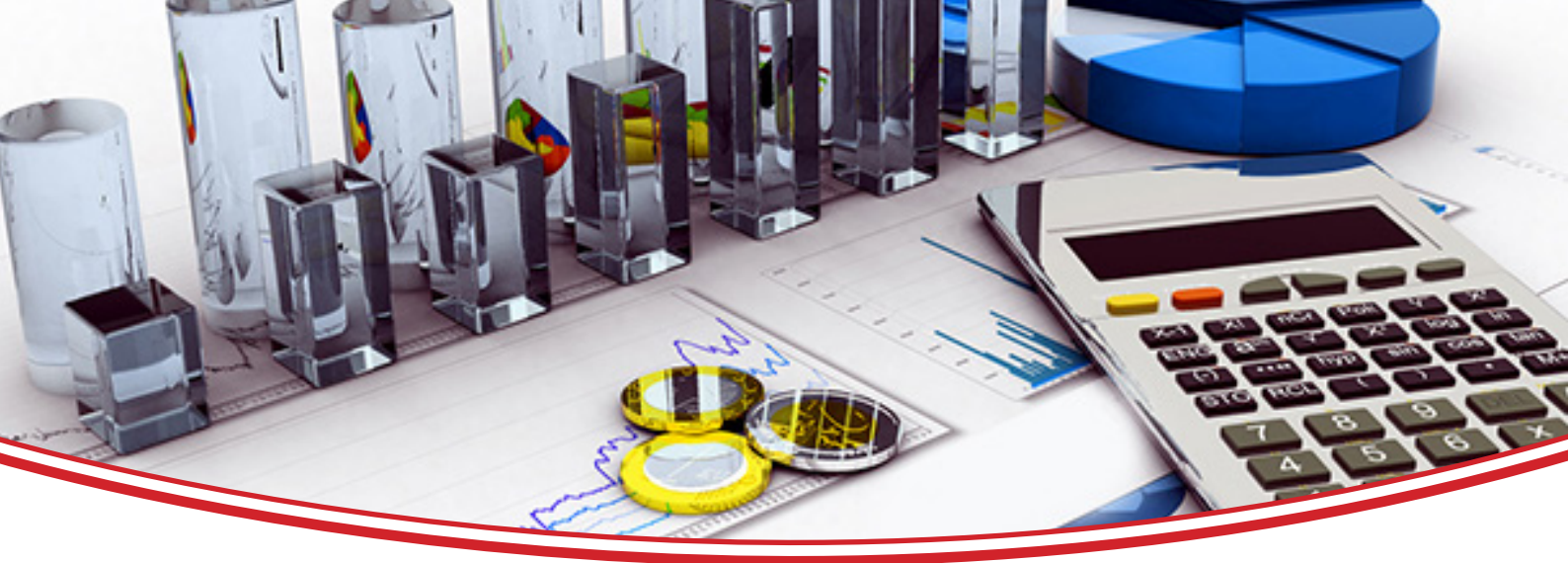
### **Reasons for deviation**

Sector codes are meant to recognise specific dynamics and peculiarities in the sector which cannot be properly addressed through the generic codes. In so doing, sector codes are allowed to deviate from targets and weightings used in the generic codes only where those deviations are justifiable based on sound economic principles, sectoral characteristics or empirical research.

The B-BBEE Commission is concerned that sector codes reviewed do not present a shift significant enough to warrant a sector code and do not positively enhance B-BBEE. Further, the motivation for why the proposed targets and weightings cannot be achieved using the generic codes is not detailed with supporting research or evidence. Some of the sector codes merely repeat the targets they had prior to the alignment process or they seek to deviate from the generic codes without providing substantial reasons for such. Some of the deviations are







instead watering down the requirements of the generic codes.

Failure to uphold the requirements set in Statement 003 on the development of sector codes will compel the B-BBEE Commission to advocate for the immediate implementation of the trumping provision to preserve the spirit of meaningful transformation.

### **Changing the principles**

There is no provision in Statement 003 authorising sector codes to change or introduce new principles that are different to those provided in the generic codes. The need to maintain the same principles both in the generic codes and sector codes is to ensure that there is certainty and transparency on matters relating to B-BBEE implementation.

For instance, sector codes should not be allowed to confer to sector councils powers that rest with the Minister in terms of the B-BBEE Act, and should not attempt to provide for exemptions and exclusions that do not have a legal basis in the B-BBEE Act. This is ultra vires, and will just make implementation a nightmare for the B-BBEE Commission and the sector players.

### **Application of sector codes to organs of state and public entities**

The seemingly standard provision contained in sector codes extending the scope of application to organs of

state and public entities is detrimental to economic transformation, and a possible limitation on the powers of organs of state and public entities to exercise the powers in section 9 (6) and 10 (2) of the B-BBEE Act.

The fact that there is a sector code should not preclude organs of state and public entities from exercising the powers to exceed the criteria or to deviate or obtain an exemption to accelerate real economic transformation.

Further, organs of state and public entities are measured under the specialised scorecard. Sector codes must therefore make it clear that the binding nature of the sector code means that organs of state or public entities must accept only compliance in accordance with the sector code, and not generic codes, in respect of a sector where the Minister has approved the sector code.

Lack of clarity could lead to multiple interpretations which will impede the smooth implementation of B-BBEE. As it is currently, various organs of state and public entities are taken to court over the interpretation of B-BBEE rules.

### **The role of sector councils**

The B-BBEE Commission has noted that part of the responsibilities for sector councils is to manage and facilitate the development of the sector code, as well as provide guidance on sector specific matters. These functions do not extend to functions under section 13F of the B-BBEE Act, including providing advisory opinions

or clarification, because such powers are conferred to the B-BBEE Commission.

Further, sector councils should not be given powers that are conferred to the Minister, such as exemptions or issuance or review of thresholds. It is important to clarify the role of the sector council for purposes of transparency and accountability.

### Recognition of ordinary course activities

There are provisions that appear to recognise ordinary course activities as B-BBEE initiatives, and even seek to provide bonus points for them. Recognising ordinary course activities undermines the need for B-BBEE. In fact attempting to incorporate such activities in the sector code could limit the extent to which entities could compete and try to outsmart each other in the ordinary course.

### Deadline for finalisation of sector codes

As the process of aligning sector codes seems to be open-ended, the B-BBEE Commission recommends that a definite timeline be set by the Minister for this process to be completed as it creates uncertainty in the market and negatively affects the mandate of the B-BBEE Commission.

For instance, the lack of alignment deprives target beneficiaries, such as EMEs and black owned and controlled QSEs who are in sectors that are not aligned, the benefit of enjoying the enhanced recognition status that has been granted as a result of being 51% and 100% black owned.

The sector codes that were published for comments in their current form do not convincingly justify the approval by the Minister, and provide little, if any, motivation for deviations proposed. Where sector specific issues are included, these seem to be normal or ordinary course activities, such as consumer education, which does not appear to justify a deviation.

From a competition perspective, aspects included as sector specific seem like items that players in the sector should be competing with each other on to obtain a competitive advantage. However, including them as items on which common targets are agreed upon removes the incentive to compete, thus facilitating collusion through a sector code.

Extending empowerment finance, for instance, is one aspect that the financial sector could compete with each other on, but is seemingly an aspect that they agree will be done for B-BBEE points. One will recall that when Capitec Bank started focusing and growing in the low-end and short-term lending market that the traditional banks did not seem interested in some years back, this saw traditional banks changing and diversifying some of their products to compete with Capitec Bank, which could not have occurred before then.

Therefore, the B-BBEE Commission is mindful that the good intentions of having sector codes do not inadvertently result in restriction of competition between or among industry players, or in a way facilitate some form of collusion, whether directly or indirectly.

It is important that sector codes do not become a vehicle to act in a parallel conscious manner to the detriment of the economy and consumers. The sector codes must enhance economic transformation and directly unlock sector opportunities for black owned enterprises to enter and thrive.

The B-BBEE Commission recognises that the powers to approve sector codes rest with the Minister, and the input has been made towards that process. Once approved and gazetted, the B-BBEE Commission will monitor the implementation of the said sector codes accordingly.

# A deadline must be set for all sector codes to be aligned to the amended B-BBEE Act and generic codes

The 9th of February 2017 marked ten year anniversary since the introduction of the codes of good practice in 2007. This ten year period was fraught with fronting, inconsistent implementation of the B-BBEE Act in both public and private sector as well as a proliferation of sector codes all in the pretence of addressing sectoral uniqueness. The next ten years therefore must turn this situation around, and facilitate real broad-based economic transformation.

The requirements effected in the amended B-BBEE Act, which include B-BBEE reporting, investigations and promotion of alignment between all B-BBEE related frameworks, together with the establishment of the B-BBEE Commission, will go a long way to address some of the structural challenges encountered to date. However, this important function of the B-BBEE Commission is undermined by the prevailing misalignment between the generic codes and sector codes.

It's been a year and eight months since the generic codes came into effect from 1 May 2015, and only three sector codes namely Tourism, ICT and Marketing, Advertising and Communication were gazetted for implementation. This means that the old sector codes, save for the Construction and the Chartered Accountants' ones that were repealed in February 2016, still apply because the B-BBEE Act provides that a code remains valid until amended, repealed or replaced.

This is all and well but it means that there will be a delay in harmonising B-BBEE implementation as well as transfer of benefits to black owned and controlled EMEs and QSEs. For example, a 51% or 100% black owned EME or QSE in a non-aligned sector code

cannot benefit from the enhanced recognition status provided to such entities by the generic codes.

Further, it will mean that in instances where an organ of state or public entity chooses to set a B-BBEE recognition level 1 or 2 as a prequalification in line with the 2017 PPPFA Regulations, such entities will not benefit from this opportunity because they can only enhance their level by being measured under the QSE scorecard and majority of them do not have the capability to achieve such a high level due to lack of resources in meeting the requirements set in the applicable scorecard.



Ms Lindiwe Madonsela



Even though implementation of the sector codes is not accompanied by a transitional period, the question that then follows is when will the remaining sector codes be finalised, because not only are they creating two dimensions of economic transformation, but may lead to conflict with regard to B-BBEE implementation and that will require application of the trumping provisions to be invoked.

Sector codes are as a result of negotiation and concessions amongst industry players with the guidance of **the dti** as the custodian of the B-BBEE legislative framework and often, the small black owned entities do not have bargaining power. Thus it is the responsibility of **the dti** to preserve the imperatives of the B-BBEE Act.

If there is no proper alignment between the generic codes and sector codes, the B-BBEE Commission will battle with monitoring B-BBEE implementation, because not only is it being presented with sworn affidavits by sector based entities, but must oversee the role of accounting officers who no longer feature under the generic codes, but still recognised as competent person to issue an accounting officer's letter to EMEs under the old sector codes.

At the same time, old sector codes will not assist in achieving government objective 4 on creation of inclusive economy and decent job creation as they do not focus on priority elements because there is no requirement to do so, which means a level 2 QSEs under the sector code may be seen as a significant contributor to B-BBEE without any substantial change in its operations nor ownership structure.

Thus, it would be expected that **the dti** will issue a directive to the sector councils to the effect that the generic codes will take precedence if they fail to finalise the sector codes within a certain period, after all the construction sector code and the chartered accountants sector codes were repealed for failure to meet the set time-frames.

Alternatively, **the dti** can issue a directive indicating that all EMEs and black owned and controlled QSEs are to obtain a sworn affidavit or CIPC certificate where applicable irrespective of the sector in which they operate in the interest of fairness.

*This article is contributed by Lindiwe Madonsela, Compliance Division*

## Time to know what the real state of B-BBEE is in South Africa

For a number of years South Africa has relied on speculations, surveys and research reports to get a sense of what the real state of broad-based black economic empowerment is. We have seen arguments regarding the National Empowerment Fund estimate of only 3% black equity in the JSE listed entities, while other commentators argue that it is 21%. The KPMG report of 2013 showed a slow pace of transformation in certain sectors.

Researchers have generally cited as a limitation unavailability of information from measured entities, which makes it difficult to issue reliable data regarding black ownership in this country. In a recent study the B-BBEE Commission commissioned, the researchers indicated that measured entities they wanted to interview were reluctant to disclose the required data regarding their score cards, thus affecting the study.



So looking at the codes, both the 3% and the 21% black ownership interpretations can stand depending on whether one is assessing direct or indirect ownership. Thus, black ownership could be 3% when one places emphasis on black people who directly own shares in JSE listed entities, or it could be 21% if we look at indirect ownership resulting from application of principles such as modified flow through, mandated investments and exclusion principle, that are allowed in the codes. Either way, the result must be based on reliable data, and taking into account a sizeable number of entities, B-BBEE initiatives or transactions.

The amendments to the B-BBEE Act in 2013 presents a great opportunity to gather, analyse, verify and publish regular reports and trends regarding B-BBEE, not only for ownership, but for all five elements of the B-BBEE codes. The existence of reliable data on broad-based black economic empowerment will assist in monitoring the pace, trends, obstacles and guide the introduction of appropriate measures to deal with such in accelerating transformation.

As market players attempt to be creative about the structuring of B-BBEE initiatives, the regular monitoring of activities in these reports will make it easier to identify fronting practices proactively and address them earlier before significant harm is done to the economy. In this way, vulnerable participants in B-BBEE initiatives can receive protection from abusive and onerous conditions that affect flow of economic benefit to black participants.

The previous dispensation of B-BBEE was criticised for failure to monitor key and strategic B-BBEE initiatives and compliance with the B-BBEE Act, and for lack of independent and objective testing of ownership assumptions underlying B-BBEE transactions to ensure that an appropriate level of true ownership has vested in black hands. Further, it is not known what the extent of broad-baseness of many of these B-BBEE transactions is, or if it exists at all in real terms.

Soon we will know what the real state of economic transformation as a result of B-BBEE is as a result of the new section 13G of the B-BBEE Act. All spheres of government, organs of state and public entities must report on their B-BBEE compliance in their audited annual financial statements and annual reports in terms of section 13G(1). Section 13G (2) requires JSE listed entities to report on their B-BBEE compliance to the B-BBEE Commission in the manner prescribed. Section 13G (3) requires all Sectoral Education and Training Authorities (SETAs) to report on skills development spending and programmes to the B-BBEE Commission.

Regulation 12 provides guidance on how prescribed reports are to be submitted and requires that 1) organs of state and public entities file the audited annual financial statements and annual report within 30 days of approval of such, and 2) JSE listed entities and SETAs must report within 90 days of the end of the financial year, but if B-BBEE is part of their audited financial statements, they must report within 30 days after approval of such statements.

Upon receipt of the report, the B-BBEE Commission is required to raise areas of non-compliance within 90 days, and grant the affected entity 30 days to address the concerns, if it fails to do so, the B-BBEE Commission will reject the report with reasons. If the report is in compliance with the B-BBEE Act, the B-BBEE Commission will notify the entity concerned.

While measured entities may have different financial year end dates, it is expected that organs of state would have their financial year end as 31 March, which should help devise appropriate work plans to deal with these reports.

The B-BBEE Commission will compile these reports, together with the data that it will receive relating to major B-BBEE transactions, and analyse them for purposes of determining the level of economic transformation resulting from the implementation of B-BBEE.

The B-BBEE Commission will also use the data collected from all B-BBEE certificates issued by accredited verification professionals as contained in the B-BBEE Certificate Portal that will be launched in the beginning of the financial year 2017/2018.

While this may not be the total of all entities registered by CIPC as some registered entities are excluded from these reporting requirements, and some B-BBEE transactions fall below the threshold, and EMEs and some QSEs use sworn affidavits as opposed to certificates, it will present a much better picture of the level and pace of economic transformation. Other

mechanisms will be used to collect as much as possible of the required data to enhance the credibility and reliability of the report.

The bad news therefore is, as the B-BBEE regulations were issued on 6 June 2016, the reporting obligations only kicked in in quarter 3 of the financial year. Further, the final threshold for major B-BBEE transaction is still to be issued by the Minister. The B-BBEE certificate portal will also become operational in the 2017/2018 financial year. This means that we will not be able to issue the annual report for 2016/2017. In this regard, we have commissioned a baseline study, and will start issuing the annual report on the national state of transformation for the financial year 2017/2018. But it will definitely be worth the waiting.

Meanwhile, other monitoring mechanisms are implemented to detect and prevent fronting and other ways of manipulating B-BBEE scorecards to create an impression that real empowerment is taking place in various markets, when such is not the case. Media monitoring also assists in identifying B-BBEE transactions that are announced by measured entities every day.

Measured entities are advised again to approach the B-BBEE Commission for advisory opinions on B-BBEE initiatives prior to implementing them. Failing to do so may expose the measured entity to risk of fronting and costs implications if ordered by the B-BBEE Commission to revise a transaction that has since closed.



## **B-BBEE Certificate Portal**




# Off the cuff observations on corporate governance failures in B-BBEE initiatives

<sup>1</sup>Corporate governance is referred to as the system of rules, practices and processes by which companies are directed and controlled. These essentially involve balancing the interests of a company's many stakeholders, such as shareholders and directors. As the first point of contact for the B-BBEE Commission, I hear many stories about how entities, be it companies or close corporations, are said to be running their affairs contrary to what corporate governance principles dictate.

Black entrepreneurs are still battling with how to start or run a business and interventions such as Small Enterprise Development Agency (SEDA), with simplification of registration processes at the Companies and Intellectual Property Commission (CIPC), were introduced to help entrepreneurs. With B-BBEE policy, more entities are bringing on board black shareholders and directors, but are allegedly ignoring corporate governance in that process.

Transformation is a positive step and in compliance with the B-BBEE Act, but entities seem to have a tendency to relax or disregard governance where black economic empowerment is involved. Based on stories we hear, most entities simply do not adhere to principles of governance and this creates a gap in implementation of proper transformation strategies and plans of these entities. In fact, these entities are most likely to be found in violation of the Companies Act 71 of 2008, as amended, in addition to the B-BBEE Act.

Most black directors and shareholders complain that they are deprived access to company records and financial information, and that no board meetings or shareholders' meetings are held in the entities they are involved in. Where meetings are held, no minutes or proper record of



such meetings are kept, and if kept, black shareholders or directors are denied access to such records. Strangely, most indicate that every time they request access to records they are referred to the 'confidentiality clause' in the shareholders' contract.

Mr Madidimalo Ramare

These black shareholders and directors claim that even where they are in attendance of the meeting, their opinion is normally not viewed on a serious note or even recorded where they do not agree with a particular issue. What is worse is that some black shareholders are majority shareholders but the arrangements are such that the minority shareholder(s) control the operations and the finances of the entity exclusively.

Business bank accounts are sometimes linked to personal accounts of the minority shareholder, with the business account seemingly being a conduit for transferring money from a supposedly black empowered entity to the white minority shareholder.

These practices are a clear indication of the rot that we may be facing in how business entities are formed, managed and operated, all in the name of black economic empowerment.

This basically means black partners are brought on board only for compliance on paper, but in actual fact the original owners of the business are running and

1. Definition of Corporate Governance obtained from: [www.investopedia.com](http://www.investopedia.com)

benefiting from the business to the detriment of the black person who ought to be empowered. It goes without saying that this would be a fronting practice.

Our country is still lagging behind in terms of transformation that will economically benefit the country partly due to this lack of adherence to principles of corporate governance.

The B-BBEE Commission offers advisory services to assist entities, and people who are planning to get into joint ventures, becoming minority shareholders or acquiring a stake in any entity in the name of B-BBEE are encouraged to approach the B-BBEE Commission for assistance to avoid these governance problems.

It is clear that most shareholders or directors do not understand their rights and obligations. We see that most allow the corporate governance failures to occur for too long before they can report them.

Knowing your right as a director and shareholder will assist you to take part in the running of operations or at least to understand the business fully and ask the right questions at the right time. Directors can be held personally liable, so it is important that they familiarise themselves with their rights and duties under the Companies Act 71 of 2008, as amended.

Drawing from the G20/OECD principles of corporate governance, the following are the basic corporate governance principles that corporate entities should adhere to:

- (a) *Ensuring the basis for an effective corporate governance framework* - this emphasises the role of the corporate governance framework in promoting transparent and fair market, and the efficient allocation of resources.
- (b) *The right and equitable treatment of shareholders and key ownership functions* - this involves basic shareholder rights, including the right to information and participation through the shareholders meeting in key company decisions. This also involves shareholders voting rights.

- (c) *Institutional investors, stock markets and other intermediaries* - this addresses the need for sound economic incentives throughout the investment chain, with a particular focus on institutional investors acting in a fiduciary capacity. This also includes the need to disclose and minimise conflict of interest that may compromise the integrity of the company.
- (d) *The role of stakeholders in corporate governance* - this encourages active co-operation between corporations and stakeholders and underline the importance of recognizing the rights of stakeholders established by law or through mutual agreements. It also supports stakeholders' access to information on a timely and regular basis, and their rights to obtain redress for violation of their rights.
- (e) *Disclosure and transparency* - this identifies key areas of disclosure, such as financial and operating results, company objectives, major share ownership, remuneration, related party transactions, risk factors and board members.
- (f) *The responsibilities of the board* - this provides guidance with respect to key functions of the board of directors, including review of corporate strategy, selecting and compensating management, overseeing major corporate acquisitions and divestitures, and ensuring the integrity of the company's accounting and financial reporting system.

It seems logical that the role of the B-BBEE Commission and CIPC in ensuring that entities adhere to proper corporate governance is crucial, and that there should be cooperation in addressing apparent violations. Joint information sessions will also be useful given that the target audience is the same.

We need to promote corporate governance for B-BBEE to be successfully implemented.

*This article is contributed by Mr Madidimalo Ramare, Operations Division*

# Are business bank accounts as safe as they should be?

When deciding to start a business, there are several aspects an individual will consider covering the nature of the business or industry they are targeting, how to access the market, what gap they want to fill in the market, possible challenges that may be encountered and ways to deal with those, amongst other things.

A business plan, which is core to running a business, will talk to issues such as mission, vision, goals, objectives, resources, customers, competitors, product or service offering and finances. In all this, there is a process of ensuring that the business is legitimised taking into account whether the business will operate through a profit or non-profit company.

There are a plethora of requirements that business people have to comply with in order to operate a legitimate and recognisable business. Key to these is the process of ensuring that the business is registered as a corporate entity with the CIPC, for tax purposes with SARS and that a valid business account is opened for the business.

A business account is crucial to a business and the business entity must determine signing powers for that account, state withdrawal limitations and person/s allowed to access statements from the account, etc.

In government when departments issue requests for proposals or tenders, one of the requirements is for service providers to verify their business bank account details and for their banks to confirm their status and provide bank stamped statements. This is to ensure that once an order number has been issued and services/products provided the funds can be paid directly into the legitimate service provider's bank account. The relevant supplier would then access the funds from their bank account to settle debts and keep the balance to keep the business afloat.

A business owner is expected to be able to access his/her account as and when necessary and to transact on the account without interference unless they have filed for liquidation.

Where there are co-signatories it would be expected that individuals with signing powers will be required to be present or to provide consent to the partner when transacting with the bank or accessing the funds. Further, it is not expected that a business owner would manage a business account as if it is his/her personal account as a company has its own legal status.

The Financial Intelligence Centre Act 38 of 2001 (FICA) states that in cases where a client has to access funds or conduct a single transaction on behalf of another then a certified copy of the identity document of applicant; certified copies of the identity documents of the directors and incorporators; the name confirmation certificate (COR9.4), if applicable; power of attorney (if applicable); for trust or company/juristic person as an incorporator, the resolution and certified copy of identity document of the duly authorised representative must be attached; and Memorandum of Incorporation, are required as proof.



Ms Busisiwe Ngwenya





Section 21 (1) of FICA further states that an accountable institution may not establish a business relationship or conclude a single transaction with a client unless the accountable institution has taken the prescribed steps to establish and verify the identity of the client; if the client is acting on behalf of another person, to establish and verify (i) the identity of that other person; and (ii) the client's authority to establish the business relationship or to conclude the single transaction on behalf of that other person; and if another person is acting on behalf of the client, to establish and verify (i) the identity of that other person; and (ii) that other person's authority to act on behalf of the client.

All these measures are an indication that steps have been taken to ensure that bank accounts are protected from fraudulent activities or instances where a partner could take or have sole control or access to the business bank account without approval or consent from the co-signatory.

However, in some of the cases reported to the B-BBEE Commission so far it would seem that either there is ignorance by bank officials of these requirements or that the relations between bank employees and some businesses run so deep to the extent where rules are bent and can be flouted with impunity.

An example is where Company X which is 100% black owned enters into a Joint Venture (JV) agreement with Company B a white owned company with Company X holding 51% and Company B holding 49% in the JV. The sole purpose of the JV might be to render services and tender for government contracts where there would be a requirement for only empowered companies to bid for such.

In this agreement there is a realisation that the incorporation of a JV by Company X and Company B will bring the required blackness, contacts and most probably skill, expertise and some funding. They would therefore

register the JV with CIPC, SARS and open a bank account with both being co-signatories and accountable for the finances of the company.

This would be followed by vigorous bidding for government contracts where Company X will be the main face of the JV attending briefing sessions and submitting tender documents, and they might be lucky and start getting some of the contracts with both expecting delivery on the contract and payment for work done.

However, the reality in most cases is that once the contract has been issued Company X would start disappearing from the scene and maybe only making appearances where there are meetings or during B-BBEE verification period. Monies will be deposited into the JV's bank account for work done and Company X would suddenly not have access to the bank account or would not even be aware that money has been deposited unless he/she enquires with the relevant government department as his/her partner might no longer be interested in him/her.

Upon enquiry Company X would determine that monies have been deposited in the joint bank account for work done but was immediately transferred into Company's B bank account without Company X's authorisation or contact from the bank. Sadly this is a story for most black partners in JVs and reporting these matters to relevant government departments that have awarded contracts have not yielded results for these black partners.

Another example is where black beneficiaries act as intermediaries for measured entities and their clients, where a black business would be invited to form part of an enterprise or supplier development programme but the work would still be performed by the measured entity which would in turn require the black company to invoice the client, who in turn will deposit payment in the black company's account.

The measured entity would then expect the black company to immediately transfer the funds into its own business bank account at most leaving the black company with just enough money to cover expenses such as bank charges.

The above examples raise a lot of questions in terms of banks' conduct and corporate governance issues in respect of these transactions, which borders on possible money laundering between the black companies and the measured entities as it is usually huge sums of money passing through these black companies' account into either a business account of a company owned by a white partner or to a personal bank account owned by such a partner.

Where a black company is made some sort of enterprise development, the business account seems to just facilitate payments to a white owned business so that for measurement for B-BBEE compliance it looks as if the black business is the one performing and receiving payment.

The question therefore is, why are co-signatories or joint bank account owners not alerted or called by banks to verify that they have sanctioned these monies to be deposited and immediately transferred from their accounts to co-partners or measured entity's bank account especially when the sums range from R1 million to above R40 million in certain instances?

Why would the rigorous processes of banks in monitoring bank accounts be so relaxed on matters involving B-BBEE type matters with black partners continuing to be ripped off? Why would banks not verify the authenticity of permissions said to be granted, if any, as most appear to forge resolutions changing signatories to the business account immediately the payments are due to start flowing into the account?

Investopedia defines corporate governance as the system of rules, practices and processes by which a company is directed and controlled. It essentially involves balancing the interests of the company's main stakeholders, such as management, customers, suppliers, financiers, government and the community (<http://www.investopedia.com/terms/c/corporategovernance.asp> - 5 Dec 2016)

In analysing these cases, it is apparent that the interests of bank account holders have not been taken into account or balanced with those who should be sharing in the profits of business. Banks are supposed to conduct themselves with integrity, care and trust, and due diligence as they are dealing with people's finances, emotions and livelihood.

Further, there is a requirement for entities to uphold the ethics of corporate governance and to treat each other with honesty, care and integrity. The systems and processes within banks are designed to ensure that the kind of integrity required does indeed exist. So why are these obvious gaps existing? This is a matter to address with the banking institutions at a high level to find out why the gaps, and what is being done to address them.

Meanwhile it is best to advise business people, especially black businesses, to enter into agreements/contracts with eyes wide open, to obtain clarity or guidance before signing on the dotted line and ensure that they understand the implications of the contracts they get into.

Business account owners need to familiarise themselves with processes for authorising business transactions, be involved and accountable for the business account, and ensure that they know what is happening to the company's assets, liabilities and financials.

Weekly or monthly status meetings to discuss financial statements, accounting records and deal with cash flow matters would be useful to ensure you do not become a bystander in your own business.

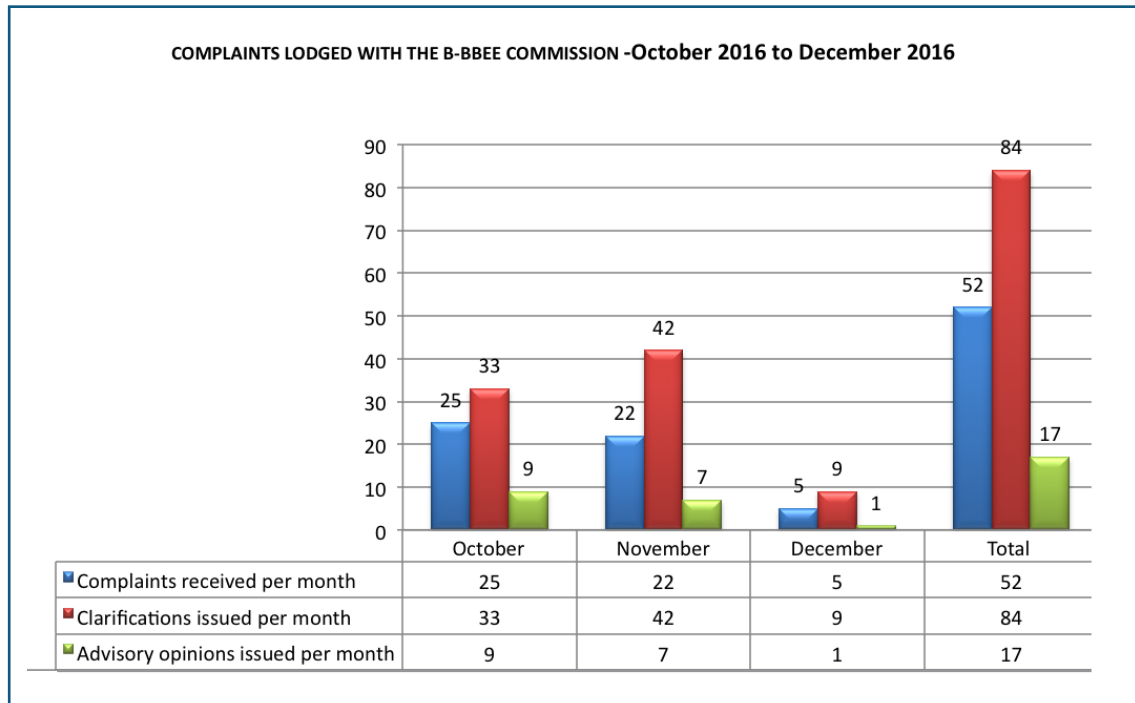
At the end of the day, it is your business, your reputation, your brand and your product/service that is at stake, therefore you need to take charge and be on top of your game.

Where banks or their employees are not acting in good faith, report them and raise your concerns with relevant authorities on time. Not only will you protect yourself from being ripped off but you will be taking responsibility for your company to ensure that fraudulent transactions are not conducted using your entity as you might also be held liable for that as the business owner.

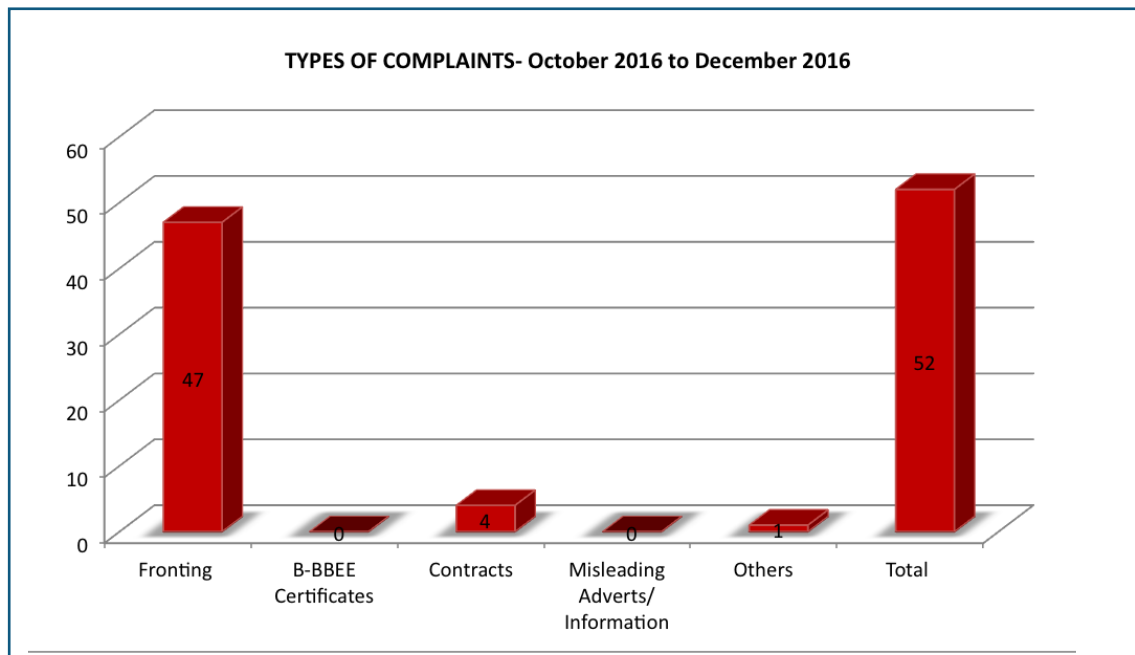
*This article is contributed by Ms Busisiwe Ngwenya, Compliance Division*

# Activity Report

The graphs below show the complaints, advisory opinions, clarifications and meeting held from October-December 2016.

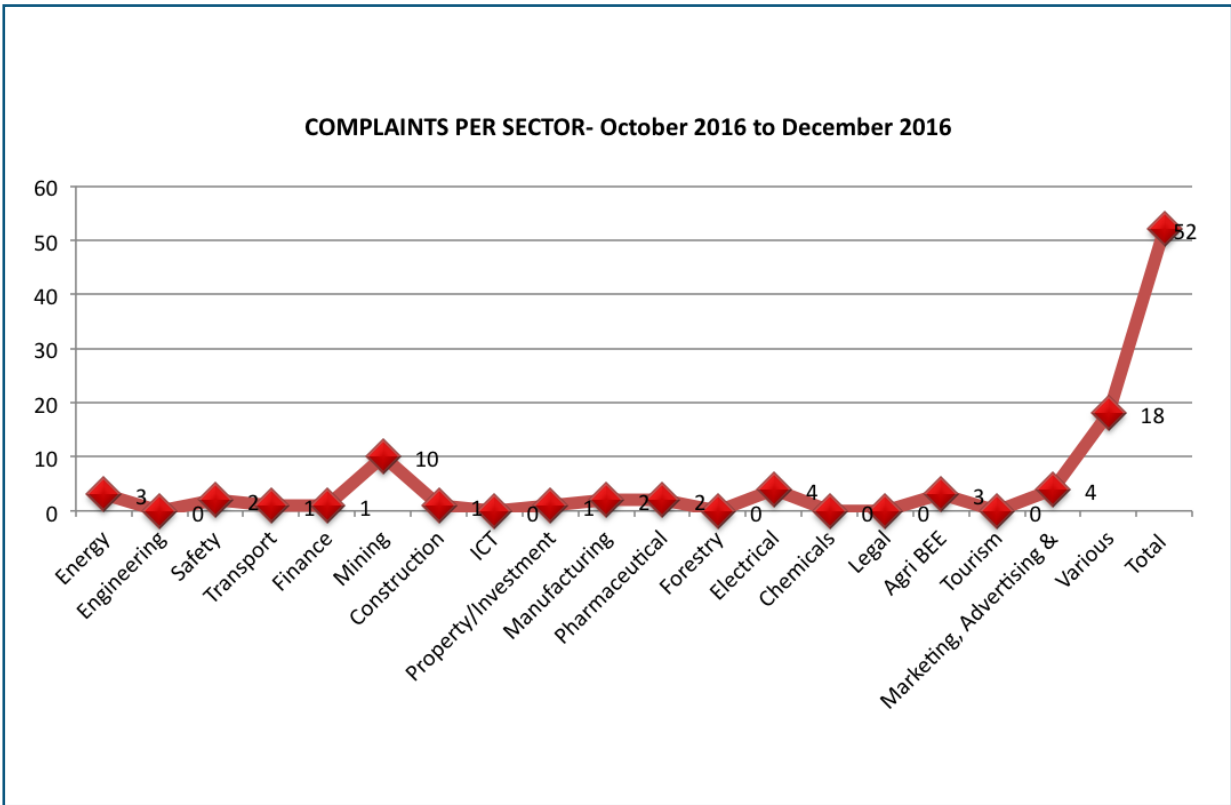


**Graph 1:** Complaints, clarification and advisory opinions October-December 2016

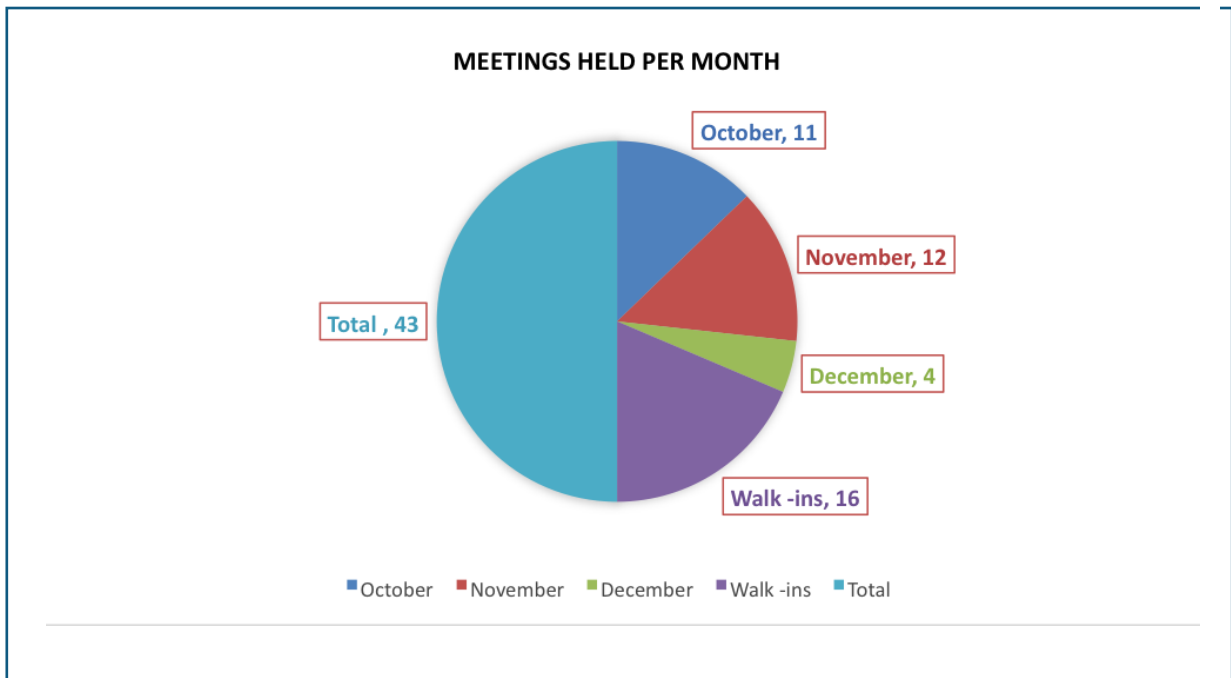


**Graph 2:** Complaints per type October-December 2016





**Graph 3:** Complaints per sector October-December 2016



**Graph 4:** Meetings held in October-December 2016



# Notices and Updates

None issued for this reporting period.

# Events

## Information Sessions

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

Date	Venue	Target/ Audience
5 October 2016	KZN, Esikhaweni	Department of Economic Development, Tourism and Environmental Affairs Roadshows
7 October 2016	Centurion	Department of Defence
12 October 2016	Cape Town	Select Committee of Trade and Industry
20 October 2016	Pretoria	Development Committee of the JCPS Cluster
27 October 2016	Mafikeng	North West Gambling Board
10 November 2016	Richards Bay, Pongola	Department of Economic Development, Tourism and Environmental Affairs Roadshows
16 November 2016	Durban	Durban Chamber and ABSA Enterprise and Supplier Development Conference
17 November 2016	Johannesburg	Wits
21 November	Bryanston	EPPF
29 November 2016	Johannesburg	Industrial Development Corporation

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