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# CORPORATE & COMMERCIAL ALERT

## IN THIS ISSUE

### External companies and the obligation to provide the BEE Commission with the report contemplated in section 13G(2) of the BEE Act

In terms of section 13G(2) of the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act), all public companies listed on the JSE must provide the Broad-Based Black Economic Empowerment (BEE) Commission with a report on their compliance with BEE (BEE Report). Paragraph 16.21(g) of the JSE Listings Requirements (Listings Requirements) provides that the JSE must be advised of the publication of the annual BEE Report unless an exemption can be provided to the JSE.

## External companies and the obligation to provide the BEE Commission with the report contemplated in section 13G(2) of the BEE Act

This has created some confusion as to whether, *inter alia*, an external company, defined in the Companies Act 71 of 2008 as “a foreign company, that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2)”, is required to provide the BEE Report to the BEE Commission.

In terms of section 13G(2) of the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act), all public companies listed on the JSE must provide the Broad-Based Black Economic Empowerment (BEE) Commission with a report on their compliance with BEE (BEE Report). Paragraph 16.21(g) of the JSE Listings Requirements (Listings Requirements) provides that the JSE must be advised of the publication of the annual BEE Report unless an exemption can be provided to the JSE.

The term “public companies” is not defined in the BEE Act nor is this term defined in the Listings Requirements. This has created some confusion as to whether, *inter alia*, an external company, defined in the Companies Act 71 of 2008 (Companies Act) as “a foreign company, that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2)”, is required to provide the BEE Report to the BEE Commission. In this regard, one should have reference to the fundamental rule of statutory interpretation that one must look at the context in which a particular provision occurs. In addition, one may have regard to the instances where the

term “public company” is defined and it is then possible to have the Companies Act definition of the term as a reference point. A “public company” is defined in the Companies Act as “a profit company that is not a state-owned company, a private company or a personal liability company”. In addition, the term “company” is defined in the Companies Act as a juristic person incorporated in terms of this Act, a domesticated company, or a juristic person that, immediately before the effective date:

- “(a) was registered in terms of the –
- (i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or
  - (ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;
- (b) was in existence and recognised as an “existing company” in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
- (c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;”

CDH is a Level 1 BEE contributor – our clients will benefit by virtue of the recognition of 135% of their legal services spend with our firm for purposes of their own BEE scorecards.

## External companies and the obligation to provide the BEE Commission with the report contemplated in section 13G(2) of the BEE Act...*continued*

We are of the view that a preferred interpretation of the reference to “public companies listed on the JSE” in section 13G(2) of the BEE Act, includes public companies as envisaged in the Companies Act and external companies (as contemplated in the Companies Act), but external companies will only be included if they conduct a business, trade or profession in South Africa.

For purposes of the definition of “company” in the Companies Act as indicated above, an external company is excluded because it is not incorporated or deemed to be incorporated under the Companies Act (as is the case with domesticated companies). The recent case of *Cooperative Muratori & Cementisti-CMC Di Tavena Societa Cooperativa A Responsabilita Limitada (External Company Incorporated in Italy) and Others v Companies and Intellectual Properties Commission and Others* (15454/ 2019) [2019] ZAGPPHC 529, confirmed the principle that in the Companies Act the term “company” does not include external companies (or “branches” of foreign companies) and that a section of the Companies Act applies to external companies only if it expressly refers to them.

Thus, a foreign incorporated company (that is not a domesticated company) cannot be a “company” as defined in the Companies Act, and hence a public company as defined under the Companies Act. Accordingly, we would suggest that if one interprets the term “public companies

listed on the JSE” in section 13G(2) of the BEE Act to mean or to be a reference to a public company as contemplated in the Companies Act, then this would exclude external companies with securities listed on the JSE. This narrow interpretation may not be advisable in view of the BEE Act and the relevant codes of good practice issued in terms thereof, as it could potentially exclude external companies even when these are conducting business in South Africa.

Accordingly, we are of the view that a preferred interpretation of the reference to “public companies listed on the JSE” in section 13G(2) of the BEE Act, includes public companies as envisaged in the Companies Act and external companies (as contemplated in the Companies Act), but external companies will only be included if they conduct a business, trade or profession in South Africa. External companies that merely have certain employees in South Africa, but do not conduct a business, trade or profession in South Africa ought to be excluded.

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*Allan Hannie and Chloe Brockman*

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