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BLACK ECONOMIC EMPOWERMENT ALERT

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RECENT CHANGES TO THE BEE LANDSCAPE

Draft regulations to the Preferential Procurement Policy Framework Act, No 5 of 2000 have been issued for comment and regulations to the BBBEE Act have come into force.

A public entity or an organ of state wishing to be exempt from or to deviate from the application of the BBBEE Codes or any sector code must apply for and be granted consent to do so by the Minister of Trade and Industry.



There have been several changes to the BEE regulatory landscape in the past 24 months or so. This document summarises the key changes.

Amendments to the Broad-Based Black Economic Empowerment Act, No 53 of 2003 (BBBEE Act) became effective from October 2014 and amendments to the Codes of Good Practice on Black Economic Empowerment (BBBEE Codes), originally gazetted in 2013, became effective in May 2015. The Black Industrialists Policy was released and regulations were issued under the BBBEE Act. Draft regulations to the Preferential Procurement Policy Framework Act, No 5 of 2000 have been issued for comment and a draft new Mining Charter has also been published.

BBBEE Act

Significant changes to the BBBEE Act include:

- A compulsory obligation on the part of organs of state and public entities to apply the BBBEE Codes or relevant sector codes of good practice gazetted in terms of the BBBEE Act (Sector Code) when awarding licences and authorisation, and procuring goods and services. Previously this was not cast as an absolute obligation, and now seeks to remove any discretion on the part of such entities as to whether or not, or in what form, to apply BEE codes of good practice.
- Provisions which require a public entity or organ of state to apply for the approval of or an exemption from the Minister of Trade and Industry should they wish to exceed the qualification criteria set out in any Sector Code or the BBBEE Codes or deviate from or

be exempt from the application of any of the requirements of the BBBEE Act, any Sector Code or the BBBEE Codes.

- The so-called "trumping provision" came into force and effect on 24 October 2015. The trumping provision states that in the event of any conflict between the BBBEE Act and any other law in force immediately prior to the date of commencement of the BBBEE Act, as amended, the BBBEE Act will prevail if the conflict relates to a matter dealt with in the BBBEE Act. In November 2015, the Minister of Trade and Industry granted an exemption of one year to the Department of Mineral Resources and the mining industry from compliance with the BBBEE Act;
- The codification of fronting as an offence and the introduction of penalties in relation thereto. The term "fronting" is very broadly defined in the BBBEE Act and would include any conduct which is designed to circumvent the objective of the BBBEE Act. Penalties include fines and imprisonment, and where the offender is a company, the fine can be as much as 10% of turnover. This provision has caused more companies to apply greater scrutiny to the way in which they undertake their BEE compliance, particularly with regard to BEE ownership transactions. We expect to see more of this kind of scrutiny in time. In addition, because there are consequences for verification agencies as well, the verification process is also likely to become more stringent.

RECENT CHANGES TO THE BEE LANDSCAPE

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On 6 June 2016, final regulations were issued under the BBBEE Act, which have key implications.



- The establishment of a BEE Commission which has the power, amongst other things, to oversee, supervise and promote adherence to the BBBEE Act; to receive and investigate complaints relating to BEE; and to maintain a registry of major BEE transactions. The Commission has recently been set up and new regulations have been promulgated under the BBBEE Act which give clarity on the Commission's functions. The Commission will have greater direct involvement in the implementation of BEE processes and a greater oversight role.

Regulations to the BBBEE Act

On 6 June 2016, final regulations were issued under the BBBEE Act, which have key implications, including the following:

- The parties to a "major broad-based black economic empowerment transaction" must submit the transaction to the BEE Commission for registration with 15 business days after concluding the transaction. A major broad-based black economic empowerment transaction will be classified in terms of a threshold determined by the Minister of Trade and Industry by notice in the government gazette (no such threshold has been determined as yet). While the regulations specify that the requirement to register is not a requirement to obtain the BEE Commission's approval, the regulations nevertheless provide that the Commission can advise the parties of any concerns it has regarding the transaction, and that the parties

must then take steps to address the Commission's concerns. If adequate steps are not taken, the Commission can then initiate an investigation into the transaction in terms of the BBBEE Act. The exercise of such powers may have the effect of delaying the finalisation of such major BEE transactions.

- Forms and processes to be followed by JSE-listed companies to report on their BEE compliance to the BEE Commission annually after the end of their financial years.
- Forms and processes to be followed by organs of state and public entities should they wish to make application for an exemption or deviation from the application of any of the provisions of the BBBEE Act, any Sector Codes or the BBBEE Codes to the conduct of particular activities.

BBBEE Codes

- The changes to the BBBEE Codes have been discussed a fair amount since they were finally gazetted in 2013. Generally, the compliance targets and weightings have been increased; there are three priority elements that set minimum thresholds with which a company must comply failing which its BEE compliance level will be reduced by one level; and new measurement criteria have been added to the skills development, preferential procurement and supplier development elements. Good compliance will be more difficult to achieve and to maintain under the BBBEE Codes.

RECENT CHANGES TO THE BEE LANDSCAPE

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The government released its Black Industrialists Policy in 2016. The objective of the policy is to promote and support the participation and long term sustainability of black industrialists in the industrial sectors of the economy.



- The various Sector Codes are undergoing changes to align with the BBBEE Codes. This has been an ongoing exercise since 2014 but a number of sector codes have been gazetted for final comment and should be finalised in this year. Notably, the Construction Sector Codes and the Accountancy Sector Codes have been repealed. However a new draft of the Construction Sector Codes is expected to be released soon for public comment.

Black Industrialist Policy

The government released its Black Industrialists Policy in 2016. The objective of the policy is to promote and support the participation and long term sustainability of black industrialists in the industrial sectors of the economy.

The Black Industrialists Policy aims to leverage the state's capacity to unlock the industrial potential that exists within black-owned and managed businesses that operate within the South African economy through deliberate, targeted and well-defined financial and non-financial interventions as described in the Industrial Policy Action Plan (IPAP) and other government policies.

The policy defines black industrialists as natural persons who are black people, or juristic persons owned by black people, who create and own value-adding industrial capacity and provide long-term strategic and operational leadership to

a business. The policy also provides that the following are characteristics of a black industrialist:

- provides strategic and operational leadership to the business;
- has a high level of ownership (>50%) and/or exercises control over the business;
- identifies opportunities and develops business to take advantage of these opportunities (entrepreneurial);
- takes personal risk in the business;
- does business in the manufacturing sector, with particular reference to IPAP focus areas; and
- makes a long-term commitment to the business and is a medium to long-term investor.

The policy targets entities that have extensive experience, operations and track records in their respective or envisaged industrial sectors and value chains. It is expected that the entities supported will:

- expand their current operations or businesses to become major players in the domestic and/or global markets within 10 years of being in the programme;
- start a new operation or business that will enable them to become major players in the domestic and/or global markets within 10 years of being in the programme; and

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The draft regulations to the Preferential Procurement Policy Framework Act, No 5 of 2000, published for comment on 14 June 2016, contain several BBBEE provisions.



- acquire an existing or new business that will enable them to become major players in the domestic and/or global markets within a specified period.

Such entities should be operating in the manufacturing sectors of the economy in line with the industrialisation path as articulated in the IPAP as follows:

- blue/ocean economy, including vessel building and repair;
- oil and gas;
- clean technology and energy;
- mineral beneficiation;
- aerospace, rail and automotive components;
- industrial infrastructure;
- information communication technologies;
- agro-processing;
- clothing, textiles/leather and footwear;
- pulp, paper and furniture;
- chemicals, pharmaceutical and plastics;
- nuclear;
- manufacturing-related logistics; and
- designated sectors for localisation.

The State envisages that black industrialists will contribute towards South Africa's developmental objectives, such as job creation, exports, skills development,

supplier development, industrial decentralisation and localisation. Particular focus will be given to assisting entities owned by women, youth, small business and co-operatives, people with disabilities and those based in historically disadvantaged regions.

The policy also sets out the ways in which the state and state-owned institutions will provide financial support and market access to black industrialists.

The Black Industrialists Programme was also launched by the DTI and intends to provide up to R50 million of financial support to successful applicants who are black industrialists who present projects that require at least R30 million of investment.

Draft PPPFA Regulations

The draft regulations to the Preferential Procurement Policy Framework Act, No 5 of 2000, published for comment on 14 June 2016, contain several BBBEE provisions. These include:

- Clarity on the use of BBBEE compliance levels when awarding points to a tenderer for BBBEE compliance during the tender adjudication process. Where, for example, the particular tender carries a total of 10 points for BBBEE compliance, entities that have a BBBEE compliance level of 1 will score 10 points and those with a BBBEE compliance level of 8 will score 1 point;

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A draft new Mining Charter has been published. It proposes various changes to the measurement of BEE as contemplated in the existing Mining Charter and attempts to align the Mining Charter with the BBBEE Codes.



- Provisions which favour tenders that will benefit black-owned or black-women owned companies. An example of this is the proposed regulation that a tender can be awarded to a tenderer that has not scored the highest points in the tender adjudication process but that has committed to subcontract a minimum 30% of the value of the contract to exempt micro enterprises or qualifying small enterprises that are black-owned or black-women owned.
- If two or more tenderers score an equal number of points in the tender adjudication process, the tender must be awarded to the tenderer that scored the highest for BBBEE compliance; and
- An organ of state may apply pre-qualifying criteria in the evaluation of a tender and such pre-qualification criteria may include a stipulated minimum BBBEE compliance level or that the tenderer agrees to subcontract a minimum of 30% of the value of the contract to one or more exempt micro enterprises or qualifying small enterprises that are black-owned or black-women owned.
- Each mining right is required to have 26% black ownership through a special purpose vehicle in which employee trusts and community trusts must have a stake.
- Pre-existing BEE ownership deals must be amended in order to align them with the requirements set out in this draft Mining Charter.
- Increased employment equity targets for black people.
- Increased targets for procurement of goods and services from BEE compliant suppliers.
- Suppliers are not required to be 25.1% black-owned but must be BEE compliant in terms of the BBBEE Codes.
- A requirement for the mining industry to invest 5% of the annual payroll on skills development and of this, 15% must be paid into a Ministerial Skills Development Trust Fund to be administered by the Minister.
- The ownership, housing and living conditions and human resources development elements have been classified as ring-fenced elements which will require 100% compliance from mining companies. Any failure by a mining right holder to comply with the targets contemplated under such ring-fenced elements shall render the mining right holder in breach of, and subject to the sanction in terms of, the Mineral and Petroleum Resources Development Act, No 28 of 2002.

Draft Mining Charter

A draft new Mining Charter has also been published. It proposes various changes to the measurement of BEE as contemplated in the existing Mining Charter and attempts to align the Mining Charter with the BBBEE Codes. Notable proposals include the following:

- No recognition for the continuing consequences of past BEE transactions.

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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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