



CORPORATE & COMMERCIAL ALERT

IN THIS ISSUE

BLACK ECONOMIC EMPOWERMENT: THE "YES INITIATIVE", INTRODUCED

Earlier this year, the Minister of Trade and Industry published proposed changes to the Codes of Good Practice on Broad-Based Black Economic Empowerment of 2013 (Codes) for the introduction of the Youth Employment Service Initiative (YES Initiative), a business-driven initiative in partnership with government and labour aimed at job creation for black youth between the ages 18 and 35, as a measurable target in the Codes.

DIVISION OF SHARES IN A COMPANY ON DIVORCE: LESSONS LEARNED FROM *DE SOUSA V TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD*

Like many cases involving companies, multiple shareholders and divorce proceedings, this case spawned a plethora of litigation.

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On 28 August 2018, as a result of the gazetting of Notice 502 of 2018 in Government Gazette no 41866, the Yes Initiative was formally incorporated into Amended Code Series 000 as Statement 000: Youth Employment Services (YES Statement) with immediate effect, providing for B-BBEE recognition for entities partaking in the YES Initiative (YES Entities) and the qualification criteria applicable thereto. The inclusion of the YES Initiative will encourage entities to play a positive role in job creation through the benefit of enhanced B-BBEE recognition for participating entities that meet certain job creation targets. On 12 October 2018, the Minister also issued Practice Note No1 of 2018-Youth Employment Service Initiative Practice (Practice Note) in respect of the implementation of the YES Initiative. The Practice Note applies to all YES Entities.

The YES Statement sets out the following qualification criteria that measured entities must meet in order to partake in the YES Initiative and gain B-BBEE recognition for such participation:

- A large enterprise (enterprises with an annual total revenue of R50 million or more), must achieve:
 - (i) the 40% sub-minimum under each of the priority elements of the generic B-BBEE scorecard (being ownership, skills development and enterprise and supplier development) or

- (ii) an average of 50% across all three priority elements.
- Qualifying small enterprises (QSEs) (enterprises with an annual total revenue of between R10 million and R50 million), must achieve:
 - (i) at least 40% in two of the three priority elements, provided ownership is one of the two elements or
 - (ii) they must achieve an average score of 40% across two priority elements with ownership being one of them.
- No sub-minimum eligibility requirements apply to exempted micro enterprises (EMEs) (enterprises with an annual total revenue below R10 million).
- Measured entities must ensure that they maintain or improve their B-BBEE status level and performance against the targets under the overall scorecard that they obtained in the year prior to partaking in the YES Initiative.

The Practice Note sets out the manner in which the sub-minimums can be calculated. It also provides that public entities and specialised entities are not required to adhere to any sub-minimum requirements in order to partake in the YES Initiative. According to the Practice Note, if an entity wishes to partake in the YES Initiative but it has not maintained its previous B-BBEE status level as a result of, *inter alia*, an

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The skills development scorecard has also not been amended as yet to include the measurement criteria of bursaries for black students and it is not clear whether any subsequent inclusion of such criteria may result in any additional qualification criteria being imposed on large enterprises.



ownership deal terminating, amendments to a sector code resulting in a lower B-BBEE status level, a decrease in the market value of shares reducing the entities net value, or an unpredicted business cycle that results a lower procurement spend or a supplier of an entity fails to maintain its recognition level, then such entity shall be entitled to engage with the DTI B-BBEE Policy Unit with justifiable evidence for participation.

The draft YES Statement that was published for public comment earlier this year had included an additional requirement that large enterprises must also score full points for a proposed new measurement item under the skills development scorecard, of bursaries for black students and Higher Education Institutions. Such a requirement has not been included in the final YES Statement. The skills development scorecard has also not been amended as yet to include the measurement criteria of bursaries for black students and it is not clear whether any subsequent inclusion of such criteria may result in any additional qualification criteria being imposed on large enterprises for obtaining B-BBEE recognition in respect of the YES Initiative.

In terms of the Practice Note, measured entities will be required to register with the YES Non-Profit Company (YES NPO), for monitoring and evaluation purposes. Entities will only be awarded B-BBEE recognition if they are registered with the YES NPO.

The YES Statement sets out the various YES targets, against which measured entities will be measured, for the creation of new jobs. The targets for QSEs and EMEs are set out in Table 2 – Annexure B to the YES Statement and are based on their headcount, as an example, QSEs or EMEs with a headcount of 20 - 39 will have a YES target per annum

of 2 while QSEs or EMEs with a headcount of 200-219 will have a YES target per annum of 11. The targets for large enterprises will be the higher of:

- 1,5% of the measured entity's headcount in the preceding year;
- 1,5% of the measured entity's net profit after tax from South African operations in the immediately preceding three years, converted to headcount by dividing such net profit after tax by R55,000; and
- A target determined in terms of Table 1 – Annexure A to the YES Statement. By way of example, Table 1 indicates that where the large enterprise's revenue is R50 million – R7 5 million the YES target per annum will be 6, and where the large enterprise's revenue is R400 million – R449 million the YES target per annum will be 14.

The Practice Note also addresses how the targets should be calculated where a large entity:

- (i) has made an average loss over the preceding three years,
- (ii) does not have a net profit after tax; and
- (iii) has been trading for less than three years.

New jobs must be created in addition to existing jobs within the entity and are limited to job placements for black people between the ages of 18-35. Measured entities that achieve or exceed the YES targets together with a percentage of absorption into the workforce of such individuals, could move up 1 or 2 B-BBEE recognition levels on the generic scorecard. The Practice Note, however, provides that the targets

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for absorption will not be verified for B-BBEE recognition during the first year of implementation of the YES Initiative and will instead be verified when absorption takes place in the following measurement period. In terms of the YES Statement, where entities are unable to create a sufficient number of new jobs in order to meet their YES targets, they may also sponsor new placements in EMEs or QSEs in order to meet their targets. The Practice Note, however, goes beyond this and provides that placements can also be for EME and QSE non-profit organisations and that entities may place eligible employees in entities irrespective of size to ensure a quality work experience is achieved. It is not clear as to why this was not provided for in the YES Statement and only in the Practice Note. Furthermore, entities will be entitled to claim up to 50% of their skills development spend in respect of YES employees as Informal Training (informal instructional programmes such as workshops, seminars and short courses) on the Skills Development Scorecard.

Measured entities will be required to sign fixed-term or temporary employment contracts with eligible employees who are filling the new positions within their entity. A quality work experience must be provided

to the employees and the new positions must provide at least a 12-month full time work experience that will be paid for by the entity. The workplace experience cannot be in the form of a learnership, internship or apprenticeship programme. The new jobs must be created in addition to existing headcount and cannot be used to fill current positions. According to the Practice Note, if an eligible employee does not complete a full 12-month period due to unforeseen circumstances, at least 8 months must have been completed in order for the measured entity to be eligible for B-BBEE recognition. A measured entity will have one-month to replace an eligible employee that falls out of the YES Initiative due to any circumstances in order to be eligible for B-BBEE recognition. Absorption into the workplace can only occur after the 12-month work experience period has been completed. The YES NPO will monitor the 12-month quality workplace experience to ensure a quality workplace experience. It is not clear how this NPO will operate and what criteria it will use to determine the quality of the workplace experience.

Batool Hayath and Verushca Pillay

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It was against this backdrop that the court was required to determine whether Sharon was entitled to ownership of 15% of the shares.

By contrast, Sharon contended that when the community of property between her and De Sousa was dissolved as a consequence of the divorce order



Like many cases involving companies, multiple shareholders and divorce proceedings, this case spawned a plethora of litigation. What is ultimately relevant for present purposes is the judgment of the Gauteng Local Division (per Meyer J) as regards the following issue: can an ex-spouse, who was married in community of property, become the owner of 50% (or the co-owner of 100%) of shares registered in the name of the other ex-spouse and, vis-à-vis the company, be entitled to be registered as shareholder or co-owner of such shares and to payment of dividends attaching to the shares?

Relevant facts

Luis Vaz De Sousa (De Sousa) and Sharon Vaz De Sousa (Sharon) were married in community of property. De Sousa was the registered shareholder of 30% of the shares in a company called Technology Corporate Management (Pty) Ltd (TCM).

By virtue of their marriage in community of property, Sharon was the beneficial owner of an indivisible half of De Sousa's shares. De Sousa and Sharon divorced in 2015. An order of divorce had been granted, but the court had not divided the joint estate, and De Sousa and Sharon had not reached an agreement as to how it was to be divided.

It was against this backdrop that the court was required to determine whether Sharon was (as she claimed) entitled to ownership of 15% of the shares in TCM and to be registered as such in the register of shareholders and, thus, entitled to a share of the payment of dividends by TCM.

The court's findings

De Sousa's principal submissions were that it is a general principle of company law that the company shall only concern itself with registered holders of shares, and not the "beneficial owners", and that a company is only entitled to pay dividends to registered shareholders. By contrast, Sharon

contended that when the community of property between her and De Sousa was dissolved as a consequence of the divorce order, their "tied" co-ownership of their joint estate became "free" co-ownership and divisible. Thus, so it was argued on her behalf, that ownership of half of De Sousa's shares in TCM (ie 15%) became vested in her, and she became entitled to insist on being registered as a shareholder in the company. In this regard, she relied on the judgment of *Ex Parte Menzies et Uxor* in which it was held as follows: "...the co-ownership of their joint estate by spouses married in community of property is a species of 'tied' co-ownership, in which the shares of the spouses are not only undivided but also indivisible", read with the judgment of Meyer v Thompson NO in which it was held that the effect of the grant of an order of divorce is to bring to an end community of property between spouses and require an equal division of the joint estate.

The court ultimately rejected Sharon's contention that from the date of divorce De Sousa's registered shareholding in TCM became immediately divisible such that she was entitled to insist on being registered as a shareholder. It held that the effect of the divorce order was to terminate the community of property between De Sousa and Sharon, and to require the division of the

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joint estate after the payment of liabilities. This meant that, absent any agreement to the contrary, Sharon did not on divorce acquire a right to claim any specific asset in the joint estate in specie or in undivided form. Her entitlement was to "a share of the net proceeds of the joint estate after the realisation of liabilities".

In arriving at this conclusion the court also held that "a company recognises only its registered shareholders, that is, those whose names are entered in its register of members. The company is not concerned with the principal whose name does not appear on the register, usually described as the 'beneficial owner'". Thus, Sharon could not insist on a right to claim dividends.

Conclusion

Thus, there is a clear distinction between those persons who are registered shareholders and those persons who are beneficial owners but not registered in a company's securities register. Shareholders must therefore make sure that those persons who are reflected as shareholders in the company's securities register are indeed the persons who are intended to receive the dividend, exercise voting rights and transfer the shares and to be treated as shareholders.

Justine Krige

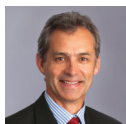


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