

4 MAY 2020

CORPORATE & COMMERCIAL

# BLACK ECONOMIC EMPOWERMENT ALERT

## IN THIS ISSUE

### COVID-19 Tourism Relief Fund: B-BBEE criteria validated by High Court

The announcement by Tourism Minister Mmamoloko Kubayi-Ngubane that the COVID-19 Tourism Relief Fund for SMMEs would incorporate empowerment-related criteria saw the Minister taken to court by AfriForum and Solidarity.

## COVID-19 Tourism Relief Fund: B-BBEE criteria validated by High Court

In ruling in favour of the Minister, Judge Jody Kollapen reasoned that the powers granted to the Minister under the Disaster Management Act must be interpreted in the context of the need for empowerment and transformation.

**The announcement by Tourism Minister Mmamoloko Kubayi-Ngubane that the COVID-19 Tourism Relief Fund for SMMEs (Tourism Fund) would incorporate empowerment-related criteria saw the Minister taken to court by AfriForum and Solidarity (Applicants).**

The challenge by the Applicants centred on the fact that the scoring criteria (which will be used to rank potential grant recipients) will include a component relating to the B-BBEE status of the potential grant recipient. This B-BBEE component will account for 20 out of a possible 100 points.

In support of her decision to administer the Tourism Fund in line with the objectives of economic transformation, the Minister relied on section 10 of the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act), the relevant portion of which provides as follows:

*“Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in ... determining criteria for the awarding ... grants ... in support of broad-based black economic empowerment”.*

The Minister argued that section 10 obliges her to apply the Codes of Good Practice (and therefore incorporate qualification criteria relating to B-BBEE status) as the Tourism Fund constitutes a “grant in support of broad-based black economic empowerment”.

The Applicants argued that the Tourism Fund does not in fact constitute a grant which will be used in support of broad-based black economic empowerment (which the Applicants contended is the only form of grant which section 10 aims to capture), but rather a grant aimed at providing financial relief in a time of crisis. Furthermore, the Applicants argued that the provisions of the Disaster Management Act 57 of 2002 (Disaster Management Act) may only be exercised to the extent necessary for limited purposes, which include “dealing with the destructive and other effects of the disaster”. Thus, in the view of the Applicants, no express provision is made for empowerment or transformation in the Disaster Management Act, and the Minister was not empowered by section 10 of the BEE Act to introduce conditions relating to empowerment.

On 30 April 2020, the North Gauteng High Court ruled that the requirements of the BEE Act justified the inclusion of empowerment-related criteria in the administration of the Tourism Fund. In ruling in favour of the Minister, Judge Jody Kollapen reasoned that the powers granted to the Minister under the Disaster Management Act must be interpreted in the context of the need for empowerment and transformation which are expressly recognised by the tourism sector (and that this constituted the requisite trigger for the furtherance of the Tourism BEE Sector Codes). In answering the legal question as

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.

## COVID-19 Tourism Relief Fund: B-BBEE criteria validated by High Court...continued

Solidarity has confirmed that it will ask the Constitutional Court to decide whether the granting of economic relief on the basis of race is constitutional.

to whether there was a rational connection between the objectives of the Tourism Fund's eligibility criteria and the objectives of the government in dealing with both the effects of COVID-19 and the need to promote transformation (which is the test when interrogating whether executive action, such as the decision of the Minister at hand, complies with the requirements of the principle of legality) Judge Kollapen answered in the affirmative.

The judgement side steps the question whether section 10 of the BEE Act has application, and simply concludes that the Tourism Fund can support those affected by COVID-19 while at the same time pursuing empowerment. The language of section 10 seems to suggest that only when an organ of state determines qualification criteria for a grant in support of broad-based black economic empowerment (that is, a grant which is designed to support broad-based black economic empowerment), is such organ of state obliged to apply the relevant code of good practice. If it is accepted that the Tourism Fund is a grant designed to provide economic relief to those affected

by COVID-19 (and not, in its essence, a grant in support of broad-based black economic empowerment), then it is arguable that section 10 would not apply to the Tourism Fund. If so, the broader questions of constitutionality and public policy would apply.

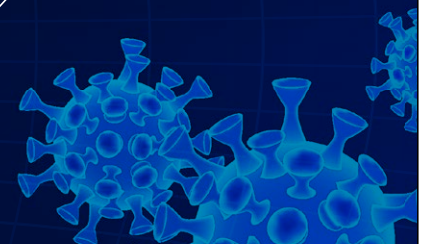
Solidarity has confirmed that it will ask the Constitutional Court to decide whether the granting of economic relief on the basis of race is constitutional.

This judgement (and of course the subsequent decision of the Constitutional Court if the matter progresses to that stage) is of particular importance given the substantial economic relief package announced by President Ramaphosa. If section 10 of the BEE Act indeed has application to funds such as the Tourism Fund created pursuant to the Disaster Management Act, then each other minister will be obliged to apply the relevant BEE codes of good practice when determining eligibility criteria for grants aimed at alleviating the economic effects of COVID-19.

*Ryan Alho and Verushca Pillay*

## CDH'S COVID-19 RESOURCE HUB

Click here for more information 



## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Projects & Energy  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Jay Govender**  
Projects & Energy Sector Head  
Director  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesselting**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesselting@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
M +27 (0)83 645 5044  
E kendall.keanly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

**Johan Latsky**  
Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nkcubeko Mbambisa**  
Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E nkcubeko.mbambisa@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**Ayanda Mhlongo**  
Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E ayanda.mhlongo@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Tessmerica Moodley**  
Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E tessmerica.moodley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jerain Naidoo**  
Director  
T +27 (0)11 562 1214  
M +27 (0)82 788 5533  
E jerain.naidoo@cdhlegal.com

**Jo Neser**  
Director  
T +27 (0)21 481 6329  
M +27 (0)82 577 3199  
E jo.neser@cdhlegal.com

**Francis Newham**  
Executive Consultant  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

### Gasant Orrie

Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

### Verushca Pillay

Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

### David Pinnock

Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

### Allan Reid

Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

### Megan Rodgers

Oil & Gas Sector Head  
Director  
T +27 (0)21 481 6429  
M +27 (0) 79 877 8870  
E megan.rodgers@cdhlegal.com

### Ludwig Smith

Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

### Ben Strauss

Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

### Tamarin Tosen

Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E tamarin.tosen@cdhlegal.com

### Roxanna Valayathum

Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E roxanna.valayathum@cdhlegal.com

### Roux van der Merwe

Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

### Chart Williams

Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E chart.williams@cdhlegal.com

### BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 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.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 8915/MAY

