



No change in B-BBEE rules or policy regarding use of Trusts, BBOS and ESOPS

B-BBEE Act was amended in 2013 and introduced the regulatory body, the B-BBEE Commission, which started operating in 2016. This regulatory body oversees the implementation of the B-BBEE Act, which means it will help entities to implement proper schemes to comply with the B-BBEE Act, but will also call out those schemes that are merely taking black people for a ride contrary to what the B-BBEE Act seeks to achieve.

The Codes of Good Practice were amended and issued in 2013, but became effective on 1 May 2015, and they provide rules for measurement of ownership, management control, skills development, enterprise and supplier development and socio-economic development elements. This piece will only focus on ownership and addresses Trusts, Broad-Based Ownership Schemes (BBOS) and Employee Share Ownership Programmes (ESOP). The Codes of Good Practice permit the use of Trusts, BBOS and ESOP to facilitate the transfer of ownership to multiple beneficiaries such as employees and community members, amongst others. The truth about Trusts, BBOS and ESOP as ownership vehicles is in the detail.

Firstly, there is no policy shift, the Trusts, BBOS and ESOP are assessed based on the Codes of Good Practice issued in 2013, which are applicable. Neither **the dti** or the B-BBEE Commission has changed the rules that are contained in Statement 100 and the applicable rules for Trusts, BBOS and ESOPS in Annexes (B)-(D) of the same Statement. The approved sector codes also have the same rules, consistent with the generic Codes of Good Practice.

Secondly, recent media reports related to major B-BBEE ownership transactions which have been submitted to the B-BBEE Commission for registration as required (which are of R25 million and above in transaction value). The B-BBEE Commission is clear in its communication that of the 341 ownership transactions submitted to it for registration from 9 June 2017 to December 2018, 33% involved broad-based structures in the form of Trusts, BBOS and ESOPs.

When assessed against the ownership rules, the majority of the schemes involving Trusts, BBOS and ESOPS did not meet the rules set in Statement 100 Annexes (B)-(D), and thus cannot be recognised for ownership points.

Thirdly, the entities affected have been notified in writing about the concerns regarding their specific transactions and afforded an opportunity to remedy the concerns. The B-BBEE Commission team has made itself available to assist these entities to do so. Some entities have made an effort to seek clarity and request assistance to align, while others have failed to take steps to remedy the transactions as advised.

Example of typical things to remedy include amending the Trust Deed to comply by removing provisions that give all the power to the Founder of the Trust to control the Trust, BBOS or ESOP, amending the shareholders agreement to afford the Trust, BBOS or ESOP as a shareholder on behalf of black people to be represented on the board of the measured entity to be able to exercise the voting rights as required, and to submit a list of black beneficiaries that are being recognised for such black ownership. It is alarming that to date, some entities failed to provide a list of beneficiaries on request. These are aspects that can be remedied for entities to properly recognise ownership.

In terms of the B-BBEE Act and regulations, it is clear that where the entity has been afforded an opportunity to remedy and fails to do so, the B-BBEE Commission may escalate the matter into a formal investigation in terms of which findings can be made. Those entities that have failed to remedy, others given an opportunity since February/March 2018 and to date have not done so, have been referred for investigation. It being noted that there are other entities that have remedied their transactions and have since been issued with letters confirming compliance, therefore it is doable.

Trusts, BBOS and ESOPs can be used to facilitate achievement of targets under any element of B-BBEE, which are ownership (Statement 100), management control (Statement 200), skills development (Statement 300), enterprise & supplier development (Statement 400) and socio-economic development (Statement 500). However, for each element under which the claim is made, the rules applicable for that element will apply. Thus if an entity claims black ownership through a scheme that involves a Trust, BBOS or ESOP, the ownership rules will apply plus the additional rules for Trust, BBOS or ESOP. In aiding with compliance, the B-BBEE Commission has issued a brochure on the use of Trusts within the context of B-BBEE ownership.

So, if an entity creates some discretionary Trust that has socio-economic or skills development benefits for black people such as offering bursaries, building low cost housing, funding local entrepreneurs, etc, while that would benefit black people, such a Trust cannot be passed off as transferring ownership of a part of the measured entity to black people. However, it can pass the test for Statement 500 (socio-economic development) or Statement 300 (skills development), which are still part of empowerment imperatives that is envisaged, but not under the ownership element.

The B-BBEE Commission cannot be expected to accept as compliant the schemes that meet skills development or socio-economic development rules under the Codes of Good Practice as ownership schemes when they clearly fail to meet the ownership test, as that will make a mockery of what the purpose and intent of B-BBEE is.

Ownership is explained clearly in the objectives of the B-BBEE Act and in the Codes of Good Practice, and any structure that claims to give ownership to black people must indeed meet the requirements. Trusts, BBOS and ESOPS are allowed as vehicles to facilitate the transfer of ownership to the extent that they meet the requirements for ownership in Statement 100.

The B-BBEE Commission has never issued a statement that says Trusts, BBOS or ESOPs will no longer be recognised for ownership, and any commentator that says so is deliberately misleading the market, which is an act that undermines what we seek to achieve with the B-BBEE Act.

As indicated widely since 2016, the B-BBEE Commission has put its efforts mainly on its Compliance Strategy, which aims to assist entities to understand the B-BBEE requirements fully and effectively comply with these requirements for South Africa to achieve the intended impact of B-BBEE. Our Compliance Division is available every day for free to all entities, big and small, to assist with compliance.

Also to emphasise is, the fact that a particular scheme was regarded as compliant by the entity's B-BBEE consultant or legal advisor, or even ticked as fine by a certain verification agency, does not mean the scheme is B-BBEE compliant. This is so as various consultants have sold models that were not compliant, and some continued to do so with cooperation of some unscrupulous verification agencies, but the responsibility remains with the measured entity and its directors to ensure that their scheme is compliant irrespective of whether they used a consultant or advisor.

The B-BBEE Commission was set up for a purpose as a regulatory body and there is no reason why entities are not approaching the B-BBEE Commission for advice so they can ensure all their schemes, not only for ownership but for all B-BBEE initiatives, are compliant.

Finally, it is important to dispel the impression created that there is no certainty regarding B-BBEE, the Act, the Codes of Good Practice as well as approved sector codes are clear as to what the framework and the parameters are. All sector codes approved by the Minister of Trade and Industry under the B-BBEE Act are recognised for B-BBEE points. There is no change since the amendments in 2013 to the B-BBEE Act and the Codes of Good Practice in regard to this aspect.

Further, as we always state regarding foreign investors who are unable or not permitted by their policies to sell or allocate equity in South Africa, there is the Equity Equivalent Investment Programme that ensures that the entity can make certain commitments which are to be implemented and can be counted in the place of ownership points. This is the flexibility that is embedded in the B-BBEE framework which entities such as Caterpillar, IBM and Samsung had taken advantage of.

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