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LEGAL UPDATE

Broad-Based Black Economic Empowerment Commission ("Commission") finalises its first case

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On 23 January 2018, the Commission issued final findings against SAB & T BEE Services (Pty) Ltd ("**SAB&T**") and Ms Shameema Ismail ("**Ismail**"). This is the first case that the Commission has finalised since it was established in April 2016 and resulted from a complaint lodged by Mr Keith Levenstein, the chairperson and founder of Econoserv, a management consultancy specialising in Broad-Based Black Economic Empowerment ("**BBBEE**"). SAB&T (whose shareholders include accounting and auditing firm Nexia SAB&T and Sasfin Commercial Solutions) is a BBBEE consultancy and verification agent accredited with the South African National Accreditation System ("**SANAS**").

The complaint related to the verification by SAB&T and Ismail of the BBBEE status of Verve Marketing and Communications CC ("**Verve**"). SAB&T and Ismail used the same financial statements to issue Level 4 BBBEE certificates for Verve in 2014/15 and 2015/16. The Commission found that this was aimed at evading the coming onto effect of the new Codes of Good Practice issued in terms of the Broad-Based Black Economic Empowerment Act ("**BBBEE Act**"). In terms of the new Codes, the failure to score a minimum number of BBBEE ownership points will result in an automatic downgrade of a firm's BBBEE status. Verve had 0% black ownership and its BBBEE status would accordingly have been automatically downgraded from Level 4 to Level 5. The second certificate issued by SAB&T and Ismail for 2015/2016 resulted in a nine month extension of the 2014/2015 certificate (and Verve's Level 4 BBBEE rating).

The Commission found that this conduct was improper and contrary to both the ethical conduct expected from a verification professional and agent and applicable BBBEE verification standards. This conduct resulted in the misrepresentation of Verve's BBBEE status for 2015/2016. It was not a valid or justifiable defence for SAB&T and Ismail to have simply complied with Verve's request to use the information previously provided for the 2014/2015 verification. The Commission noted that the verification process was critical to properly reflect a firm's BBBEE status and that the manipulation of financial information in this process would not be tolerated.

In terms of the BBBEE Act, it is a criminal offence both to knowingly misrepresents (or attempt to misrepresent) the BBBEE status of an enterprise and to knowingly provide false information or misrepresents information to a BBBEE verification professional in order to secure a particular BBBEE status. A fine and/or imprisonment for up to 10 years may be imposed. If the convicted person is a company or other juristic person, a fine of up to 10% of its annual turnover may be imposed.

The BBBEE Act further provides that a BBBEE verification professional commits a criminal offence if such a professional becomes aware of the commission of, or any attempt to commit, any such offence and fails to report it to an appropriate law enforcement agency. A fine and/or imprisonment of up 12 months may be imposed. This is an important provision which effectively enlists verification agents to help enforce the BBBEE Act.

The Commission is not empowered to impose criminal sanctions but it is obliged in terms of the BBBEE Act, to refer a matter to the National Prosecuting Authority ("**NPA**") or the South African Police Service ("**SAPS**") if it is of the view that it may involve a criminal offence in terms of the BBBEE Act or any other law.

The Commission's recommendations in the SAB&T/Ismail case were that:

- both SAB&T and Ismail issue a written public apology to all clients (to be placed on the SAB&T website) and deliver a written undertaking under oath to comply with the BBBEE Act;
- an independent audit be conducted into all certificates issued by SAB&T and Ismail in 2014/2015 and 2015/2016 using the approach used in the Verve certificates and that SAB&T refunds all clients whose certificates were issued using such approach.

If the above recommendations were not implemented, the Commission would refer the matter to the SAPS and NPA for criminal investigation and prosecution, to SANAS for the immediate suspension of SAB&T's accreditation as a BBBEE verification agent and to the Independent Regulatory Board for Auditors (IRBA). The Commission would also consider applying to court for appropriate relief.

The Commission's approach in this case is instructive in that the referrals to the SAPS, NPA, SANAS and IRBA would only be made if the initial recommendations were not accepted and implemented. This indicates flexibility and a commercial approach towards resolving complaints (although it is arguable that the BBBEE Act does not give the Commission a discretion regarding referrals of possible offences to the NPA and SAPS). It appears that SAB&T and Ismail have accepted the initial recommendations (no doubt to avoid the more serious sanctions if they failed to do so).

The Commission's findings are silent about Verve's liability and it is not clear if Verve and its members are being investigated especially as misrepresenting BBBEE status and providing false information to a verification agent are both offences under the BBBEE Act.

The establishment of the Commission is an important milestone in BBBEE enforcement. Its first finalised case is of great interest not just because it resulted from a complaint by a competitor against another competitor but also as it may well set a precedent for the Commission's approach in other cases.



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