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

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On 12 July 2018, the Commission issued final findings against BEE Matrix, a BBBEE verification agent. The Commission's first finalised case in January 2018 also involved a verification agent, SAB & T BEE Services ("**SAB&T**"). The Commission's focus on BBBEE verification agents is important given the key role they play in the BBBEE policy framework by issuing certificates confirming a firm's BBBEE status. Under the Broad-Based Black Economic Empowerment Act ("**BBBEE Act**"), it is a criminal offence if a verification agent becomes aware of a fronting practice and fails to report it to an appropriate law enforcement agency. A fine and/or up to twelve months jail may be imposed. Verification agents are in effect enlisted in the battle against fronting, and the Commission is sending a strong message to the verification industry by actively investigating them. It is likely that verification agents will become more careful and conservative going forward and this may have implications for strategies and structures, which have previously been accepted in practice.

The complaint related to a BBBEE certificate that BEE Matrix had issued for Zuri Quantity Surveyors, an exempted Micro Enterprise ("**EME**"), which is a firm with an annual total revenue of R10 million or less. The Codes of Good Practice issued under the BBBEE Act provide that an EME's BBBEE rating may be proven simply by an affidavit certifying its total annual income and level of Black ownership. EMEs are deemed to have a Level 4 BBBEE rating and if they have a 51% or 100% Black ownership, they are rated Level 2 and 1, respectively.

BEE Matrix had also issued a certificate to Ilifa Africa Engineers, a "generic enterprise" (i.e. a firm with an annual total revenue of R50 million or more) without indicating that the initial certificate had been withdrawn and not indicating the date of issue, re-issue and expiry. BEE Matrix had also applied the Construction Sector Code to the certificate even though it had been repealed.

The Commission found that BEE Matrix had failed to use "professional skepticism" and due diligence in performing its verification function and was guilty of unacceptable and unprofessional conduct. The Commission found that this "may" have amounted to an offence under the BBBEE Act as it had misrepresented the BBBEE status of Zuri and Ilifa. A fine and/or imprisonment for up to 10 years may be imposed for such offence and, if the convicted person is a company, a fine of up to 10% of its annual turnover may be imposed. The Commission found that the directors (including the 45% black shareholder of BEE Matric) had been dishonest in answering the Commission's questions and may have contravened their fiduciary duties under the Companies Act.

The Commission's decision clearly warns verification agents not to issue BBBEE certificates for EMEs. The introduction of the affidavit requirement was intended to lower the costs of BBBEE compliance for EMES. However, criminalisation has made both private and public sector procurement managers more vigilant. They may in practice be reluctant to rely solely on an affidavit and may require other proof. Like verification agents, procurement officers or other officials of a governmental or parastatal entity face a fine and/or up to twelve months jail, if they fail to report a fronting practice.

The Commission also investigated BEE Matrix's 45% Black ownership structure and found that its shareholders agreement was unclear and did not demonstrate de facto and de jure control of BEE Matrix "commensurate" with such 45% shareholding.

The Commission is not empowered by the BBBEE Act to impose criminal or other penalties or sanctions and 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 were that BEE Matrix and involved individuals issue public written apologies, that BEE Matrix deliver a written undertaking under

oath to comply with the BBBEE Act, that an independent audit be conducted into all certificates issued by BEE Matrix in 2015/2016 and 2016/2017, and that clients be refunded if their certificates were issued using the approach adopted for Zuri and Ilifa. This is in line with the approach adopted by the Commission in the SAB&T case.

BEE Matrix voluntarily agreed to withdraw its BBBEE verification registration with the South African National Accreditation System ("**SANAS**"), and BEE Matrix and its shareholders (with one exception) agreed not to conduct BBBEE verification or revive its SANAS registration for five years. It appears that BEE Matrix effectively chose to close down its verification business to resolve the complaint.

The Commission also interestingly recommended that the BEE Matrix shareholders agreement be amended to "reflect clearly the board constitution, the voting rights and participation of the black shareholder". No further details were provided, but the Commission's involvement in amending previously negotiated and agreed contracts is a potential concern especially given that the Commission did not expressly find that the shareholders agreement contravened the BBBEE Act.

If the above recommendations were not implemented, the Commission would refer the matter to the NPA, the Companies and Intellectual Property Commission, SANAS and 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 in line with the SAB&T case and may indicate a general approach towards resolving complaints, namely that referrals to the NPA, SAPS and other regulatory bodies will only be made if the initial recommendations are not accepted and implemented. Although this seems like an aggressive "take it or leave it" approach, the Regulations under the BBBEE Act grant respondents thirty days (which may be extended by ten days) to make submissions to the Commission on its intended findings. The Commission must take these submissions into account before it issues its final findings and this provides some scope and flexibility for negotiating a solution and allowing a more commercial approach towards resolving complaints. The BBBEE Act, however, does not give the Commission a discretion regarding referrals of possible offences to the NPA and SAPS.

Several cases are being investigated, but to date only two cases have been finalised and published by the Commission. This may be explained by the BBBEE Act provisions that findings and recommendations may not be published until judicial review proceedings have been completed or not instituted within the relevant time period, if the NPA declines to prosecute, if a person is acquitted or, if he is convicted, until all appeal and review proceedings have been exhausted.

Given the risk of criminal prosecution for offences under the BBBEE Act, it is important for businesses to carefully consider and get prudent advice on their BBBEE strategies and structures. Prevention remains better than cure.



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