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Minister Patel clarifies his views on employee share ownership programmes and Broad Based Ownership Schemes but uncertainty continues

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A new Broad Based Black Economic Empowerment ("**BBBEE**") initiative was announced by Coca Cola on 5 February 2021. The initiative involves an Employee Share Ownership Programme ("**ESOP**"). At the announcement, the Minister of Trade and Industry, Ebrahim Patel, clarified his views on ESOPs and Broad-Based Ownership Schemes ("**BBOS**"). He noted that:

1. there were two types of ESOP, one where shares were owned directly by individual workers and the other which was "evergreen" and allowed benefits to flow to both present and future employees (and not just a few selected employees);
2. he was of the "firm view" that "evergreen" ESOPs were permitted by the Codes of Good Practice ("**Codes**") issued under the Broad-Based Black Empowerment Act ("**BBBEE Act**");
3. "evergreen" ESOPs give effect to the inclusive growth;
4. BBOS "like Kagiso" were "pioneers of BBBEE" and should be recognised "appropriately".

The historical context is important in assessing the significance of the Minister's speech. The Codes were amended with effect from 1 May 2015 and the amendments included increasing the number of BBBEE ownership points contributed by an ESOP or BBOS from one to three if the ESOP or BBOS had a 3% shareholding. From a policy perspective, this indicated Government support for ESOPs and BBOS and the extra points incentivised business to include an ESOP or BBOS in their BBBEE ownership structures. However, the Department of Trade and Industry caused widespread uncertainty and confusion by issuing a notice on 5 May 2015, which stated that an ESOP or BBOS could only contribute a maximum three BBBEE ownership points (out of the total available 25 points) to a company's BBBEE ownership score. This notice was withdrawn on 15 May 2015 and the previous position (that the BBBEE ownership contribution of ESOPs and BBOS to a company's BBBEE ownership score was not restricted) remained in place.

The 2015 amendments to the Codes also added new requirements for a BBOS including that its constitution had to define its participants and their claims to receive distributions and that its "fiduciaries" (trustees or directors) could not have any discretion in this regard. The financial reports of the BBOS also had to be presented to its participants at an annual general meeting. These requirements had previously applied to ESOPs but were now extended to BBOS. Compliance with all the requirements of the Codes is necessary in order for a BBOS to contribute BBBEE ownership points. The amendments accordingly required BBOS to review, and where necessary amend, their constitutions to ensure compliance with the amended Codes.

The BBBEE Commission has adopted an approach towards ESOPs and BBOS, which treats their individual beneficiaries/participants as the legal owners of the shares held by the ESOP or BBOS. The beneficiaries/participants are seen as "shareholders" or "owners" and if an individual beneficiary/participant ceases to be a beneficiary/participant, he/she should accordingly be paid for disposing of his/her "shares". The Commission's approach is not consistent with an interpretation that "evergreen" ESOPs and BBOS (where shares are legally owned by the ESOP or BBOS and not their beneficiaries/participants) are permitted by the Codes. The Codes and the BBBEE Act do not contain any prohibition on "evergreen" ESOPs and BBOS. The Minister's statements at the Coca Cola announcement are accordingly welcome.

The Commission's approach to BBOS has been controversial. The Commission's view is that a BBOS should only have the object of promoting ownership by Black People, and not other objects like skills development and socio economic development, which are measured under different sections of the Codes. This has set it on a collision course with BBOS which provide scholarships, bursaries, study grants and other educational benefits for Black People or which engages in poverty relief, community projects or other public benefit activities (as defined in the Income Tax Act) which benefit Black People. Such BBOS face an additional dilemma if they have been registered as Public Benefit Organisations ("**PBOs**") under the Income Tax Act. In order to be registered as a PBO, the Income Tax Act requires it to conduct a public benefit activity. The Commission is however of the view that a BBOS must not conduct a public benefit activity which in effect means that a BBOS can't be a PBO. This flies in the face of the express requirements of the Codes which allow PBOs to contribute BBBEE ownership points if they comply with the BBOS requirements. The Minister's statements in his speech at the Coca Cola announcement lauded BBOS as "pioneers of BBBEE" but he only said they should be treated "appropriately". He unfortunately did not give any further detail and accordingly did not resolve the uncertainty relating to BBOS.

The continuing uncertainty is unfortunate. ESOPS and BBOS can provide financial benefits to more Black People than individual ownership structures and can especially benefit poor and less educated Black People who would not otherwise have an opportunity to participate in a shareholding or other interest in a company. ESOPS and BBOS accordingly contribute to the stated objectives of the BBBEE Act to "facilitate the viable economic empowerment of all Black People, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies".

The Commission is created by the BBBEE Act as an "entity within the administration of the Department" of Trade and Industry. The BBBEE Act expressly empowers the Minister to give the Commission "directives of a general nature" concerning the performance of its functions and the Commission must comply with such directives. Minister Patel accordingly has a legal framework within which to resolve the current uncertainty relating to PBOs and "evergreen" ESOPs and BBOS. Although his statements at the Coca Cola announcement are helpful, they are not legally binding and were non-committal about the position of BBOS.

The Codes still provide for an extra three BBBEE ownership points to be scored if an ESOP or BBOS has a 3% shareholding. Given the great importance of BBBEE in South Africa, it is vital for local and foreign business to have certainty as to the requirements for ESOPs and BBOS. It is hoped that the Minister will exercise the powers granted to him under the BBBEE Act to resolve the current uncertainty finally and without ambiguity.



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