

Questioning the BBBEE commission’s approach to public benefit organisations in BBBEE ownership structures

5 February 2020 4 min read

By Pieter Steyn, Director

1. A Public Benefit Organisation (“**PBO**”) is defined in the Income Tax Act as a non-profit company or a trust which has been incorporated, formed or established in South Africa and which has the sole or principal object of carrying out one or more public benefit activities. These activities are defined in the Ninth Schedule to the Income Tax Act as activities relating to welfare and humanitarian objectives, health care, land and housing, education and development, the promotion of a religion, belief or philosophy, cultural objects, conservation, environment and animal welfare, research and consumer rights and sport. A PBO enjoys various tax benefits.
2. A PBO would generally not have “owners” as this term is commonly understood. However paragraph 2.5 of Statement 004 of the Codes of Good Practice (“**Codes**”) issued under the Broad Based Black Economic Empower Act (“**BBBEE Act**”) provides that a PBO may contribute to black ownership if it is structured as a Broad Based Ownership Scheme (“**BBOS**”). The Codes accordingly expressly permit a PBO which is also a BBOS to contribute BBBEE ownership points to a company in which the PBO holds shares. The key condition is compliance with all the requirements for a BBOS in Annexe 100(B) of Statement 100 of the Codes. Annexe 100(B) requires inter alia that the participants in a BBOS and their claims to distributions from the BBOS must be clearly defined and that the “fiduciaries” (ie directors or trustees) of the BBOS must have no discretion in this regard. 85% of all benefits or distributions by the BBOS must be made to Black People as defined in the BBBEE Act. Significantly Annexe 100(B) does not contain any requirements relating to the objects of a BBOS.
3. The use of a BBOS in BBBEE ownership structures is common practice and is in line with the objects of the BBBEE Act which specifically promote broad based black economic empowerment. More Black People may benefit from the inclusion of a PBO in a BBBEE ownership structure than in structures limited to individual black shareholders. Amendments to the Codes in 2015 incentivised the use of a BBOS by increasing the number of BBBEE ownership points (from 1 to 3) that a company may score from including a BBOS in its ownership structure. This indicates Government policy support for the use of a BBOS in BBBEE ownership structures.
4. The BBBEE Commission has adopted the attitude that the objects of a BBOS must be limited solely to promoting the ownership of assets by Black People. More particularly, where a BBOS is also a PBO, the Commission is requiring that the PBO limits its objects to promoting black ownership, failing which the Commission’s view is that the PBO cannot contribute BBBEE ownership points. This approach has caused great uncertainty amongst PBOs. As a BBOS/PBO often gives contractual undertakings to the company and/or its co-shareholders regarding its compliance with the Codes and its contribution of BBBEE ownership points, the BBBEE Commission’s approach raises the spectre of breach of contract, litigation, exit of the PBO from existing shareholdings and damages claims against the PBO.
5. As the express requirements for a BBOS in the Codes do not restrict the objects of a BBOS, the Commission cannot rely on the Codes to justify its approach. The Commission’s approach also has a fundamental flaw in that if a PBO complies with the Commission’s requirement, it will cease to conduct a public benefit activity and will be deregistered as a PBO by the South African Revenue Service. The counter intuitive effect of the Commission’s approach is accordingly that a PBO can never contribute BBBEE ownership points. This directly contradicts the express requirements of the Codes and the Commission’s approach is accordingly subject to challenge.
6. The Codes are issued by the Minister of Trade & Industry and may only be amended by the Minister. In terms of the BBBEE Act, the Commission is an entity within the Department of Trade and Industry and the Minister may issue directives of a general nature which are binding on the Commission. The BBBEE Act accordingly provides a mechanism whereby the Minister can resolve and clarify the uncertainty caused by the Commission’s approach. Such resolution and clarification is urgently required given the serious consequences that may result for PBOs if they breach contractual undertakings and because the Commission’s approach is disincentivising the inclusion of PBOs in BBBEE ownership structures to the prejudice of Black People who benefit from PBOs. It is hoped that the Minister will clarify the position as soon as possible.



Pieter Steyn

Director

[View Profile](#)