WERKSMANS
ATTORNEYS

REGULATORY

The use of Broad-Based Black Economic Empowerment ("BBBEE") criteria for government relief funds in the COVID-19 crisis

3 June 2020 *7 min read*

An analysis of the Solidarity/Afriforum case involving the Tourism Relief Fund for small micro and medium sized enterprises ("SMMES")

By Pieter Steyn, Director

The serious negative effects of the COVID-19 crisis on business (and particularly on SMMEs) has led to several funding relief measures by the Government including a R200 million Tourism Relief Fund for SMMEs established by the Minister of Tourism in terms of regulations issued under the Disaster Management Act. The Tourism Fund has attracted much media attention and public debate due to its use of BBBEE as a criterion for grants from the Fund. This culminated in legal action being instituted against the Minister of Tourism by Afriforum (a non-governmental organisation) and the Solidarity trade union.

A proper understanding of the facts is important. Key features of the Tourism Fund are:

- Applicants had to be Exempted Micro Enterprises ("**EMEs**") as defined in the Amended Tourism Sector Code issued under the Broad-Based Black Economic Empowerment Act ("**BBBEE Act**"). An EME is defined as an enterprise with total annual revenue of R5 million or less;
- Applicants had to be accommodation establishments (e.g. hotels, lodges, B&Bs, guest houses and backpackers) or provide hospitality services (e.g. restaurants, conference venues and professional catering) or travel services (e.g. tour operators, travel agents, tourist guides, car rentals and coach operators);
- Qualifying criteria included being in existence for at least one financial year, registration with the Companies and Intellectual Property Commission, a valid tax clearance certificate, compliance with minimum wage requirements, registration of employees with the Unemployment Insurance Fund ("**UIF**") and proof of financial position and the need for relief;
- Funding was limited to a total "once off" amount of R200 million and grants were capped at R50 000 per EME. Assuming that each EME received the full amount, the Fund could only assist 4000 EMEs;
- Applicants would be scored out of a maximum 100 points. 25 Points were allocated for formal and regulatory compliance (e.g. company, UIF and tax registration). 55 Points were allocated for "functionality" (e.g. business and team member profiles, annual financial statements, bank statements and proof of the effect of the crisis on the business). 20 Points were allocated for BBBEE status.

The allocation of 20 (out of a total 100) points for BBBEE status was the focal point of the High Court applications brought by Afriforum and Solidarity. 20 Points were allocated to an applicant with a Level 1 BBBEE status and 12 points for an applicant with a Level 4 BBBEE status. Under the Amended Tourism Sector Code:

- all EMEs (regardless of the race or origin of their owners) are deemed to have a Level 4 BBBEE status. Thus, a 100% "white" owned EME would automatically score at least 12 points and could improve its score to up to 18 points if it had

undertaken certain BBBEE initiatives;

- a 51% "black" owned EME is deemed to have a Level 2 BBBEE status and would automatically score at least 18 points;
- a 100% "black" owned EME is deemed to have a Level 1 BBBEE status and would automatically score all 20 points.

The resulting difference between the score of a 100% "white" owned and a 100% "black" owned EME could vary between a maximum of 8, and a minimum of 2, out of a total 100 points. If the 100% "white" owned EME had a better score on the non-BBBEE related criteria (80 out of a total 100 points), it could still qualify to receive a grant from the Fund. 100% "White" owned EMEs were not automatically disqualified from receiving grants from the Fund. In his judgement on the application by Afriforum and Solidarity, Judge Kollapen found that the BBBEE criteria had the effect of giving 51% and 100% "black" owned EMEs a "head start", but that this did not create an "insurmountable advantage for black businesses over white businesses" and it was "possible that a white applicant may score more points than a black applicant".

Afriforum and Solidarity argued that the use of BBBEE criteria was not expressly permitted by the Disaster Management Act. Judge Kollapen held that the decision by the Minister of Tourism to establish the Fund constituted executive policy making and not administrative action, which could be subject to administrative review under the Promotion of Administrative Justice Act (although a decision to refuse an application would constitute such administrative action). The Judge noted that the need for empowerment and transformation in the tourism sector was accepted and expressly recognised in the Amended Tourism Sector Code and that this accords with the "general transformative trajectory of the Constitution". The closure of "black" owned businesses would undermine and set back transformation in the sector. Providing crisis relief to EMEs while at the same time pursuing BBBEE was permissible especially as the scoring criteria did not exclude "white" owned EMEs. The Judge found it noteworthy that Afriforum and Solidarity did not take issue with the COVID-19 related small business relief funds announced by the Minister of Small Business Development (who had also been sued by Solidarity and was a party to the High Court case), which included priority criteria based on gender, youth and disability.

The Minister of Tourism argued that she was legally obliged to take BBBEE into account in terms of section 10 of the BBBEE Act, which provides that every organ of state and public entity must apply any relevant code of good practice issued in terms of the BBBEE Act in determining criteria for the awarding of grants in support of BBBEE. Afriforum and Solidarity argued that the purpose of COVID-19 disaster relief funds in terms of the Disaster Management Act is not to support BBBEE and that section 10 accordingly did not apply. Judge Kollapen did not make a clear finding on whether or not section 10 applied. Section 10 imposes an absolute obligation on Government and public entities so the scope of its application and its interpretation are important issues. If the purpose of grants like the Tourism Fund is to provide economic relief to those affected by COVID-19, then it is arguable that section 10 would not apply.

The High Court applications by Afriforum and Solidarity were dismissed on 30 April 2020. Solidarity applied for leave to appeal directly to the Constitutional Court on an urgent basis. On 15 May 2020, the Constitutional Court dismissed the application finding that there were insufficient grounds for a direct appeal on an urgent basis. It is understood that Afriforum and Solidarity intend to appeal against Judge Kollapen's decision to the Supreme Court of Appeal.

The judgement (and the media articles and debate on the Tourism Fund generally) refer to "white" and "black" applicants and businesses. However, from a BBBEE legal perspective, it should be noted that "black people" are specifically defined in the BBBEE Act as "a generic term which means Africans, Coloureds and Indians:

- who are citizens of the Republic of South Africa by birth or descent; or
- who became citizens of the Republic of South Africa by naturalisation either before 27 April 1994 or on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation before 27 April 1994".

A person who does not fall within this definition is not "black" for BBBEE purposes. This includes all foreign citizens (regardless of their actual race) and all South African citizens (regardless of their actual race) who were naturalised on or after 27 April 1994 but would not have been entitled to acquire citizenship by naturalisation before 27 April 1994. This has the curious result that a black, mixed race, Indian or Asian person may, for BBBEE purposes, be treated as "white".



Pieter Steyn

Director

View Profile