

(24 October 2014 - to date)

[This is the **current** version and applies as from **24 October 2014**, i.e. the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 – **to date**]

BROAD-BASED BLACK ECONOMIC EMPOWERMENT ACT 53 OF 2003

(Gazette No. 25899, Notice No. 17 dated 9 January 2004. Commencement date: 21 April 2004 [Proc. No. R26, Gazette No. 26285])

As amended by:

Broad-Based Black Economic Empowerment Amendment Act 46 of 2013 - Government Notice 55 in Government Gazette 37271 dated 27 January 2014. Commencement date: 24 October 2014 – unless otherwise indicated [Proc. No. 72, Gazette No. 38126]

(English text signed by the President)

(Assented to 7 January 2004)

ACT

To establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice and to publish transformation charters; to establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith.

PREAMBLE

WHEREAS under apartheid race was used to control access to South Africa's productive resources and access to skills;

WHEREAS South Africa's economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills;

WHEREAS South Africa's economy performs below its potential because of the low level of income earned and generated by the majority of its people;

AND WHEREAS, unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race;

Prepared by:

In partnership with:

AND IN ORDER TO -

- promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and
- establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services,

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

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1. Definitions

In this Act, unless the context indicates otherwise—

"B-BBEE initiative" means any transaction, practice, scheme or other initiative which affects compliance with this Act or any other law promoting broad-based black economic empowerment *[sic]*;
(Definition of "B-BBEE initiative" inserted by section 1(a) of Act 46 of 2013)

"B-BBEE verification professional" means a person who performs any work in connection with rating the status of enterprises in terms of broad-based black economic empowerment compliance on the authority of, or for a rating agency accredited by, a B-BBEE Verification Professional Regulator;
(Definition of "B-BBEE verification professional" inserted by section 1(a) of Act 46 of 2013)

"B-BBEE Verification Professional Regulator" means a body appointed by the Minister for the accreditation of rating agencies or the authorisation of B-BBEE verification professionals;
(Definition of "B-BBEE Verification Professional Regulator" inserted by section 1(a) of Act 46 of 2013)

"black people" is a generic term which means Africans, Coloureds and Indians-

- (a) who are citizens of the Republic of South Africa by birth or descent; or
- (b) who became citizens of the Republic of South Africa by naturalisation-
 - (i) before 27 April 1994; or
 - (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date;

(Definition of "black people" substituted by section 1(b) of Act 46 of 2013)

"broad-based black economic empowerment" means 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 that include, but are not limited to-

- (a) increasing the number of black people that manage, own and control enterprises and productive assets;
- (b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;

- (c) human resource and skills development;
- (d) achieving equitable representation in all occupational categories and levels in the workforce;
- (e) preferential procurement from enterprises that are owned or managed by black people; and
- (f) investment in enterprises that are owned or managed by black people;

(Definition of "broad-based black economic empowerment" substituted by section 1(c) of Act 46 of 2013)

"Commission" means the Broad-Based Black Economic Empowerment Commission established by section 13B;

(Definition of "Commission" inserted by section 1(d) of Act 46 of 2013)

"Council" means the Black Economic Empowerment Advisory Council established by section 4;

"Department" means the Department of Trade and Industry;

(Definition of "Department" inserted by section 1(e) of Act 46 of 2013)

"fronting practice" means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative-

- (a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- (b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;
- (c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or
- (d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which-
 - (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;

- (ii) the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;
- (iii) the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis;

(Definition of "fronting practice" inserted by section 1(e) of Act 46 of 2013)

"knowing", "knowingly" or "knows", when used with respect to a person, and in relation to a particular matter, means that the person either-

- (a) had actual knowledge of that matter; or
- (b) was in a position in which the person reasonably ought to have-
 - (i) had actual knowledge;
 - (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
 - (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;

(Definition of "knowing", "knowingly" or "knows" inserted by section 1(e) of Act 46 of 2013)

"members" means members of the Council;

"Minister" means the Minister of Trade and Industry;

"organ of state" means—

- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act No. 1 of 1999);
- (b) a municipality as contemplated in the Constitution;
- (c) Parliament;
- (d) a provincial legislature; and
- (e) a constitutional institution listed in Schedule 1 to the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"premises" includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;

(Definition of "premises" inserted by section 1(f) of Act 46 of 2013)

"**prescribe**" means prescribe by regulation;

"**public entity**" means a public entity listed in Schedule 2 or 3 to the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"**sector charters**" means sectoral transformation charters referred to in section 9;

(Definition of "sector charters" inserted by section 1(g) of Act 46 of 2013)

"**strategy**" means a strategy for broad-based black economic empowerment issued in terms of section 11; and

"**this Act**" includes any code of good practice or regulation made under this Act.

2. Objectives of Act

The objectives of this Act are to facilitate broad-based black economic empowerment by—

- (a) promoting economic transformation in order to enable meaningful participation of black people in the economy;
- (b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;
- (c) increasing the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises and increasing their access to economic activities, infrastructure and skills training;
- (d) increasing the extent to which black women own and manage existing and new enterprises, and increasing their access to economic activities, infrastructure and skills training;
- (e) promoting investment programmes that lead to broad-based and meaningful participation in the economy by black people in order to achieve sustainable development and general prosperity;
- (f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills;

(Section 2(f) substituted by section 2(a) of Act 46 of 2013)

- (g) promoting access to finance for black start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and

(Section 2(g) substituted by section 2(b) of Act 46 of 2013)

- (h) increasing effective economic participation and black owned and managed enterprises, including small, medium and micro enterprises and co-operatives and enhancing their access to financial and non-financial support.

(Section 2(h) added by section 2(c) of Act 46 of 2013)

3. Interpretation of Act

- (1) Any person applying this Act must interpret its provisions so as—

- (a) to give effect to its objectives and purposes; and

(Section 3(a) substituted by section 3(a) of Act 46 of 2013)

- (b) to comply with the Constitution.

- (2) In the event of any conflict between this Act and any other law in force immediately prior to the date of commencement of the Broad-Based Black Economic Empowerment Amendment Act, 2013, this Act prevails if the conflict specifically relates to a matter dealt with in this Act.

(Section 3(2) added by section 3(b) of Act 46 of 2013 – only with effect from 24 October 2015, and the current section to be renumbered to section 3(1))

4. Establishment of Black Economic Empowerment Advisory Council

The Black Economic Empowerment Advisory Council is hereby established.

5. Functions of Council

The Council must—

- (a) advise government on black economic empowerment;
- (b) review progress in achieving black economic empowerment;
- (c) advise on draft codes of good practice which the Minister intends publishing for comment in terms of section 9(5);
- (d) advise on the development, amendment or replacement of the strategy referred to in section 11;
- (e) if requested to do so, advise on draft transformation charters; and
- (f) facilitate partnerships between organs of state and the private sector that will advance the objectives of this Act.

6. Composition of Council and appointment of members

- (1) The Council consists of—
 - (a) the President, who is the chairperson of the Council;
 - (b) the Minister, with the Minister's Director-General as an alternate;
 - (c) three other Cabinet Ministers, appointed by the President, with their respective Directors-General as alternates;
 - (d) no fewer than 10 and no more than 15 other members appointed by the President.
- (2) When appointing members in terms of subsection (1)(d), the President shall have regard to the need for the Council—
 - (a) to have appropriate expertise;
 - (b) to represent different relevant constituencies including trade unions, business, community-based organisations and academics.
- (3) In appointing members in terms of subsection (1)(d), the President shall follow an appropriate consultative process.
- (4) The President shall appoint a Cabinet Minister who is also a member of the Council to act as chairperson of the Council in the President's absence.

7. Constitution and rules of Council

- (1) The Minister must establish a constitution for the Council.
- (2) The Minister may amend the constitution of the Council from time to time, after consultation with the Council.
- (3) The Council may, by resolution, and after consultation with the Minister, make rules to further regulate the proceedings of the Council.

8. Remuneration and reimbursement of expenses

Council members must be remunerated for their services in accordance with the provisions of the National Treasury Regulations, and must be reimbursed for expenses incurred by them in carrying out their duties, as determined by the Minister, with the concurrence of the Minister of Finance.

(Section 8 substituted by section 4 of Act 46 of 2013)

9. Codes of good practice

- (1) In order to promote the purposes of the Act, the Minister may by notice in the *Gazette* issue codes of good practice on black economic empowerment that may include—
 - (a) the further interpretation and definition of broad-based black economic empowerment and the interpretation and definition of different categories of black empowerment entities;
 - (b) qualification criteria for preferential purposes for procurement and other economic activities;
 - (c) indicators to measure broad-based black economic empowerment;
 - (d) the weighting to be attached to broad-based black economic empowerment indicators referred to in paragraph (c);
 - (e) guidelines for stakeholders in the relevant sectors of the economy to draw up transformation charters and codes of good practice for their sector; and
(Section 9(1)(e) substituted by section 5(a) of Act 46 of 2013)
 - (f) any other matter necessary to achieve the objectives of this Act.
- (2) A strategy issued by the Minister in terms of section 11 must be taken into account in preparing any code of good practice.
- (3) A code of good practice issued in terms of subsection (1) may specify—
 - (a) targets consistent with the objectives of this Act; and
 - (b) the period within which those targets must be achieved.
- (4) In order to promote the achievement of equality of women, as provided for in section 9(2) of the Constitution, a code of good practice issued in terms of subsection (1) and any targets specified in a code of good practice in terms of subsection (3), may distinguish between black men and black women.
- (5) The Minister must, before issuing, replacing or amending a code of good practice in terms of subsection (1)—

- (a) publish the draft code of good practice or amendment in the *Gazette* for public comment; and
 - (b) grant interested persons a period of at least 60 days to comment on the draft code of good practice or amendment, as the case may be.
- (6) If requested to do so, the Minister may by notice in the *Gazette* permit organs of state or public entities to specify qualification criteria for procurement and other economic activities which exceed those set by the Minister in terms of subsection (1).
- (Section 9(6) added by section 5(b) of Act 46 of 2013)*
- (7) A code of good practice remains in effect until amended, replaced or repealed.
- (Section 9(7) added by section 5(b) of Act 46 of 2013)*

10. Status of codes of good practice

- (1) Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in-
- (a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;
 - (b) developing and implementing a preferential procurement policy;
 - (c) determining qualification criteria for the sale of state-owned enterprises;
 - (d) developing criteria for entering into partnerships with the private sector; and
 - (e) determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.
- (2)
- (a) The Minister may, after consultation with the relevant organ of state or public entity, exempt the organ of state or public entity from a requirement contained in subsection (1) or allow a deviation therefrom if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an exemption or deviation.
 - (b) The Minister must publish the notice of exemption or deviation in the *Gazette*.
- (3) Subject to section 9(6), an enterprise in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, may only be measured for compliance with the requirements of broad-based black economic empowerment in accordance with that code.

- (4) Enterprises operating in a sector in respect of which the Minister has issued a sector code of good practice in terms of section 9, must report annually on their compliance with broad-based black economic empowerment to the sector council which may have been established for that sector.

(Section 10 substituted by section 6 of Act 46 of 2013)

11. Strategy for broad-based black economic empowerment

- (1) The Minister—
- (a) must issue a strategy for broad-based black economic empowerment;
 - (b) may change or replace a strategy issued in terms of this section.
- (2) A strategy in terms of this section must—
- (a) provide for an integrated co-ordinated and uniform approach to broad-based black economic empowerment by all organs of state, public entities, the private sector, non-governmental organisations, local communities and other stakeholders;
 - (b) develop a plan for financing broad-based black economic empowerment, including the creation of incentive schemes to support effective black owned and managed enterprises;
(Section 11(2)(b) substituted by section 7 of Act 46 of 2013)
 - (c) provide a system for organs of state, public entities and other enterprises to prepare broad-based black economic empowerment plans and to report on compliance with those plans; and
 - (d) be consistent with this Act.

12. Transformation charters

The Minister must publish in the *Gazette* for general information and promote a transformation charter for a particular sector of the economy, if the Minister is satisfied that the charter—

- (a) has been developed by major stakeholders in that sector; and
- (b) advances the objectives of this Act.

13. Support services and funding of Council

- (1) The Department of Trade and Industry must provide the Council with the necessary support services and funding out of money appropriated by Parliament for that purpose.
- (2) The funds referred to in subsection (1), must be utilised for—
 - (a) the establishment and operating costs of the Council; and
 - (b) the development and implementation of a communication plan on broad-based black economic empowerment.

13A. Cancellation of contract or authorisation

Any contract or authorisation awarded on account of false information knowingly furnished by or on behalf of an enterprise in respect of its broad-based black economic empowerment status, may be cancelled by the organ of state or public entity without prejudice to any other remedies that the organ of state or public entity may have.

(Section 13A inserted by section 8 of Act 46 of 2013)

13B. Establishment and status of Broad-Based Black Economic Empowerment Commission

- (1) The Broad-Based Black Economic Empowerment Commission is hereby established as an entity within the administration of the Department.
- (2) The Commission is headed by a Commissioner appointed by the Minister.
- (3) The Commission-
 - (a) has jurisdiction throughout the Republic;
 - (b) must be impartial and perform its functions without fear, favour or prejudice; and
 - (c) must exercise the functions assigned to it in terms of this Act or any other law-
 - (i) in the most cost-effective and efficient manner; and
 - (ii) in accordance with the values and principles mentioned in section 195 of the Constitution.
- (4) The Minister may issue directives of a general nature, which are consistent with this Act, to the Commission concerning the performance of its functions and the Commission must comply with any such directive.

- (5) Each organ of state must assist the Commission to exercise its authority and perform its functions effectively.

(Section 13B inserted by section 8 of Act 46 of 2013)

13C. Appointment of Commissioner and Acting Commissioner

- (1)
- (a) The Minister must appoint a person with suitable qualifications and experience to be the Commissioner for a term of not more than five years.
 - (b) When appointing the Commissioner, the Minister must consult the relevant Portfolio Committee of the National Assembly and the relevant Select Committee of the National Council of Provinces.
- (2) The Minister may re-appoint a person as Commissioner at the expiry of that person's term of office for one additional term of office.
- (3) The Commissioner, who is the Chief Executive Officer of the Commission, is responsible for the general administration of the Commission and for carrying out any functions assigned to it in terms of this Act, and must-
- (a) perform the functions that are conferred on the Commissioner by or in terms of this Act;
 - (b) manage and direct the activities of the Commission; and
 - (c) supervise the Commission's staff.
- (4) The Minister must, in consultation with the Minister of Finance, determine the Commissioner's remuneration, allowances, benefits and other terms and conditions of employment.
- (5) The Commissioner may, on three months' written notice addressed to the Minister, resign as Commissioner.
- (6) The Minister may remove the Commissioner from office on account of-
- (a) serious misconduct;
 - (b) permanent incapacity;
 - (c) engaging in any activity that may undermine the integrity or standing of the Commission; or

- (d) any other legitimate ground that justifies the removal of the Commissioner.
- (7) If the Commissioner and the Deputy Commissioner are for any reason at the same time unable to perform their functions assigned to them in terms of this Act, the Minister may, on such conditions as the Minister may determine, appoint a suitable person as Acting Commissioner to perform the functions of the Commissioner.

(Section 13C inserted by section 8 of Act 46 of 2013)

13D. Appointment of Deputy Commissioner and staff of Commission

- (1) The Commissioner, in consultation with the Minister, must appoint a person with suitable qualifications and experience to be the Deputy Commissioner for a term of five years.
- (2) Section 13C(2), (4), (5) and (6) apply to the Deputy Commissioner, read with such changes as are required by the context.
- (3) The Deputy Commissioner must perform the functions of the Commissioner whenever-
 - (a) the Commissioner is unable for any reason to perform those functions; or
 - (b) the office of Commissioner is vacant.
- (4) The Commissioner may-
 - (a) appoint staff members with suitable qualifications and experience, or contract with other persons, to assist the Commission in carrying out its functions; and
 - (b) in consultation with the Minister and the Minister of Finance, determine the remuneration, allowances, benefits and other terms and conditions of appointment of each member of the staff.

(Section 13D inserted by section 8 of Act 46 of 2013)

13E. Finances of Commission

- (1) The Commission is financed from-
 - (a) money that is appropriated by Parliament for the Commission; and
 - (b) money lawfully received from any other source.

- (2) The Auditor-General must audit the Commission's financial records every year.

(Section 13E inserted by section 8 of Act 46 of 2013)

13F. Functions of Commission

- (1) The functions of the Commission are-
- (a) to oversee, supervise and promote adherence with this Act in the interest of the public;
 - (b) to strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of broad-based black economic empowerment;
 - (c) to receive complaints relating to broad-based black economic empowerment in accordance with the provisions of this Act;
 - (d) to investigate, either of its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment;
 - (e) to promote advocacy, access to opportunities and educational programmes and initiatives of broad-based black economic empowerment;
 - (f) to maintain a registry of major broad-based black economic empowerment transactions, above a threshold determined by the Minister by notice in the *Gazette*;
 - (g) to receive and analyse such reports as may be prescribed concerning broad-based black economic empowerment compliance from organs of state, public entities and private sector enterprises;
 - (h) to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of broad-based black economic empowerment; and
 - (i) to exercise such other powers which are not in conflict with this Act as may be conferred on the Commission in writing by the Minister.
- (2) A complaint contemplated in subsection (1)(c) and (d) must be-
- (a) in the prescribed form; and
 - (b) substantiated by evidence justifying an investigation by the Commission.

- (3) The Commission must increase knowledge of the nature and dynamics and promote public awareness of matters relating to broad-based black economic empowerment by-
- (a) implementing education and information measures to develop public awareness of the provisions of this Act, and in particular to advance the purposes of this Act;
 - (b) providing guidance to the public by-
 - (i) issuing explanatory notices outlining its procedures;
 - (ii) issuing non-binding opinions on the interpretation of any provision of this Act; or
 - (iii) applying to a court for a declaratory order on the interpretation or application of the provisions of this Act; and
 - (c) conducting research relating to its mandate and activities and, from time to time, publishing the results of that research.
- (4) The Commission may liaise with any regulatory authority on matters of common interest and, without limiting the generality of the foregoing, may-
- (a) exchange information with and receive information from any such regulatory authority pertaining either to matters of common interest or to a specific complaint or investigation;
 - (b) participate in the proceedings of any regulatory authority; and
 - (c) advise, or receive advice from, any regulatory authority.
- (5) Notwithstanding the provisions of any law, but subject to the approval of the Minister, the Commissioner may enter into an agreement with any other person, body of persons or organ of state, including a special investigating unit established under the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), to perform any of the Commission's duties and functions under this Act.

(Section 13F inserted by section 8 of Act 46 of 2013)

13G. Reporting

- (1) All spheres of government, public entities and organs of state must report on their compliance with broad-based black economic empowerment in their audited annual financial statements and annual reports required under the Public Finance Management Act, 1999 (Act No. 1 of 1999).

- (2) All public companies listed on the Johannesburg Stock Exchange must provide to the Commission, in such manner as may be prescribed, a report on their compliance with broad-based black economic empowerment.
- (3) All Sectoral Education and Training Authorities contemplated in the Skills Development Act, 1998 (Act No. 97 of 1998), must report on skills development spending and programmes to the Commission.

(Section 13G inserted by section 8 of Act 46 of 2013)

13H. Delegation

- (1) The Commissioner may delegate any power conferred on him or her or any duty assigned to him or her under this Act, to any other person with appropriate knowledge and experience who is appointed to or contracted with the Commission to assist it in the carrying out of its functions.
- (2) Notwithstanding subsection (1), the Commissioner may not delegate the powers referred to in section 13D(1) or (4).
- (3) A delegation under subsection (1) must be in writing and-
 - (a) may be subject to any conditions or restrictions determined by the Commissioner;
 - (b) does not prevent the exercise of the relevant power by the Commissioner; and
 - (c) may be withdrawn or amended by the Commissioner.

(Section 13H inserted by section 8 of Act 46 of 2013)

13I. Specialist committees

- (1) The Minister may appoint one or more specialist committees to advise the Commission on the management of its resources or the performance of its functions.
- (2) The Minister may assign specific powers to the members of a specialist committee for the purposes of performing any function contemplated in subsection (1).
- (3) A specialist committee may-
 - (a) be established for an indefinite term or for a period determined by the Minister when the committee is established; and
 - (b) determine its own procedures.

- (4) A specialist committee established under this section must-
- (a) perform its functions impartially and without fear, favour or prejudice; and
 - (b) consist of-
 - (i) not more than eight persons who are independent from the Commission and are appointed by the Minister for a term of not more than five years; and
 - (ii) not more than two senior employees of the Commission designated by the Commissioner.
- (5) A member of a specialist committee must-
- (a) be a fit and proper person;
 - (b) have appropriate expertise or experience; and
 - (c) have the ability to perform effectively as a member of the committee.
- (6) Members of a specialist committee must not-
- (a) act in any way that is inconsistent with subsection (4)(a);
 - (b) expose themselves to any situation in which the risk of a conflict may arise between their responsibilities and any personal financial interest; or
 - (c) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.
- (7) A member of a specialist committee ceases to be a member if-
- (a) the member resigns from the committee;
 - (b) the Minister terminates the person's membership because the member no longer complies with subsection (5) or has contravened subsection (6); or
 - (c) the member's term of office has expired.

- (8) A member of a specialist committee who has any personal or financial interest in any matter on which the committee gives advice, must disclose that interest and withdraw from the proceedings of the specialist committee when that matter is discussed.
- (9) The Commission must remunerate and compensate-
 - (a) a member contemplated in subsection (4)(b)(i) for expenses incurred to the extent determined by the Minister; and
 - (b) a member contemplated in subsection (4)(b)(ii) for expenses incurred to the extent that the member's remuneration and allowances as an employee of the Commission does not extend to that person's services as a member of the specialist committee.

(Section 13I inserted by section 8 of Act 46 of 2013)

13J. Investigations by Commission

- (1) Subject to the provisions of this Act, the Commission has the power, on its own initiative or on receipt of a complaint in the prescribed form, to investigate any matter arising from the application of the Act, including any B-BBEE initiative or category of B-BBEE initiatives.
- (2) The format and the procedure to be followed in conducting any investigation must be determined by the Commission with due regard to the circumstances of each case, and may include the holding of a formal hearing.
- (3) Without limiting the powers of the Commission, the Commission may make a finding as to whether any B-BBEE initiative involves a fronting practice.
- (4) The Commission may institute proceedings in a court to restrain any breach of this Act, including any fronting practice, or to obtain appropriate remedial relief.
- (5) If the Commission is of the view that any matter it has investigated may involve the commission of a criminal offence in terms of this Act or any other law, it must refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Service.
- (6) The Commission may, if it has investigated a matter and justifiable reasons exist, refer to-
 - (a) the South African Revenue Services any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service; or
 - (b) any regulatory authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.

- (7)
- (a) The Commission may publish any finding or recommendation it has made in respect of any investigation which it had conducted in such manner as it may deem fit.
 - (b) A decision of the Commission to publish any finding or recommendation it has made may not be put into effect-
 - (i) before proceedings for the judicial review of the decision have been completed or were not instituted within the period allowed therefor;
 - (ii) if the Commission has referred the matter to the National Prosecuting Authority or the South African Police Service in terms of subsection (5), and no prosecution has been instituted against the person concerned;
 - (iii) if the person concerned has been prosecuted and acquitted following the investigation of the Commission; or
 - (iv) where the person concerned has been convicted by a court of law, following an investigation of the Commission, before such person has in respect of the conviction exhausted all recognised legal proceedings pertaining to appeal or review.

(Section 13J inserted by section 8 of Act 46 of 2013)

13K. Summonses

- (1) At any time during an investigation being conducted by the Commission, the Commission may issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation or to have possession or control of any book, document or other object that has a bearing on that subject-
- (a) to appear before the Commission to be questioned at a time and place specified in the summons; or
 - (b) to deliver or produce to the Commission any book, document or other object referred to in paragraph (a) at a time and place specified in the summons.
- (2) A summons contemplated in subsection (1)-
- (a) must be signed by the Commissioner or by an employee of the Commission designated by the Commissioner; and

- (b) may be served in the same manner as a subpoena in a criminal case issued by a magistrates' court.
- (3) If a person is summoned to appear before the Commission, or is required to deliver any book, document or other object to the Commission, the Commissioner or an employee of the Commission designated by the Commissioner-
 - (a) may interrogate and administer an oath to, or accept an affirmation from, the person named in the summons; and
 - (b) may retain any such book, document or other object for examination for a period not exceeding two months or such longer period as the court on good cause shown, may allow.
- (4) A person questioned by the Commission must answer each question truthfully and to the best of that person's ability, but-
 - (a) is not obliged to answer any question if the answer is self-incriminating; and
 - (b) the person asking the questions must inform that person of the right set out in paragraph (a).
- (5) No self-incriminating answer given or statement made by any person to the Commission will be admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury or in which that person is tried for an offence relating to the disclosure of false information, and then only to the extent that the answer or statement is relevant to prove the offence charged.

(Section 13K inserted by section 8 of Act 46 of 2013)

13L. Confidential information

- (1) When submitting information to the Commission, a person may claim that all or part of that information is confidential.
- (2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.
- (3) The Commission must-
 - (a) consider a claim made in terms of subsection (1); and
 - (b) as soon as practicable make a decision on the confidentiality of the information and access to that information and provide written reasons for that decision.

- (4) A person who has made a claim contemplated in subsection (1) in respect of which the Commission has made a decision in terms of subsection (3), may apply to court for a review of that decision within-
 - (a) 60 court days of becoming aware of the decision; or
 - (b) such longer period as a court may allow on good cause shown.
- (5) When making any finding in respect of an investigation, the Commission may take confidential information into account.
- (6) If any finding would reveal any confidential information, the Commission must provide a copy of the proposed finding to the party claiming confidentiality at least 30 court days before publishing those reasons.
- (7) Within 14 court days after receiving a copy of the proposed finding in terms of subsection (6), a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information.

(Section 13L inserted by section 8 of Act 46 of 2013)

13M. Conflicting interests of employees

The Commissioner, members of a specialist committee and any person appointed to or contracted with the Commission to assist the Commission in the carrying out of its functions, must not-

- (a) engage in any activity that may undermine the integrity of the Commission;
- (b) participate in any investigation, hearing or decision concerning a matter in respect of which that person has a personal financial interest;
- (c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission; or
- (d) divulge any information referred to in paragraph (c) to any third party, except as required as part of that person's official functions within the Commission.

(Section 13M inserted by section 8 of Act 46 of 2013)

13N. Offences in connection with Commission

- (1) It is an offence to disclose any confidential information concerning the affairs of any person obtained-

- (a) in carrying out any function in terms of this Act; or
 - (b) as a result of initiating a complaint with the Commission, or participating in any proceedings in terms of this Act.
- (2) Subsection (1) does not apply to information disclosed-
- (a) for the purpose of the proper administration or enforcement of this Act;
 - (b) for the purpose of the proper administration of justice;
 - (c) at the request of the Commission or a court entitled to receive the information; or
 - (d) when required to do so by any court under any law.
- (3) A person commits an offence if that person-
- (a) hinders, obstructs or improperly attempts to influence the Commission when it is exercising a power or performing a duty in terms of this Act;
 - (b) does anything calculated to improperly influence the Commission concerning any matter connected with an investigation by the Commission;
 - (c) knowingly provides false information to the Commission;
 - (d) anticipates any findings of the Commission in a way that is calculated to improperly influence the proceedings or findings;
 - (e) does anything in connection with an investigation of the Commission that would have been contempt of court if the proceedings had occurred in a court of law; or
 - (f) refuses to attend when summoned or, after attending, refuses to answer any question or produce any document as required by the summons, other than as contemplated in section 13K(4)(a).

(Section 13N inserted by section 8 of Act 46 of 2013)

130. Other offences and penalties

- (1) A person commits an offence if that person knowingly-

- (a) misrepresents or attempts to misrepresent the broad-based black economic empowerment status of an enterprise;
 - (b) provides false information or misrepresents information to a B-BBEE verification professional in order to secure a particular broad-based black economic empowerment status or any benefit associated with the compliance with this Act;
 - (c) provides false information or misrepresents information relevant to assessing the broad-based black economic empowerment status of an enterprise to any organ of state or public entity; or
 - (d) engages in a fronting practice.
- (2) A B-BBEE verification professional or any procurement officer or other official of an organ of state or public entity who becomes aware of the commission of, or any attempt to commit, any offence referred to in subsection (1) and fails to report it to an appropriate law enforcement agency, is guilty of an offence.
- (3) Any person convicted of an offence in terms of this Act, is liable-
- (a) in the case of a contravention of subsection (1), to a fine or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment or, if the convicted person is not a natural person, to a fine not exceeding 10 per cent of its annual turnover; or
 - (b) in the case of a contravention of subsection (2) or section 13N, to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment.
- (4) For the purpose of determining a fine to be imposed for an offence in terms of subsection (1), the court must take into account the value of the transaction which was derived from, or sought to be derived from, the commission of the offence.
- (5) A court in which any person is convicted of an offence in terms of subsection (3) must report the conviction-
- (a) to the B-BBEE Verification Professional Regulator, if that person is a B-BBEE verification professional; and
 - (b) to in any other case, to the Council and to that person's employer.
- (6) Despite anything to the contrary contained in any other law, a magistrates' court has jurisdiction to impose any penalty provided for in this Act.

(Section 130 inserted by section 8 of Act 46 of 2013)

13P. Prohibition on business with organs of state following conviction under this Act

- (1) Any person convicted of an offence in terms of this Act may not, for a period of 10 years from the date of conviction, contract or transact any business with any organ of state or public entity and must for that purpose be entered into the register of tender defaulters which the National Treasury may maintain for that purpose.
- (2) Where the convicted person is not a natural person, the court may in its discretion restrict the order contemplated in subsection (1) to only those members, directors or shareholders who contravened the provisions of this Act.

(Section 13P inserted by section 8 of Act 46 of 2013)

14. Regulations, guidelines and practice notes

- (1) The Minister may make regulations with regard to-
 - (a) any matter that in terms of this Act may or must be prescribed;
 - (b) the lodging of complaints with the Commission;
 - (c) the conducting of investigations by the Commission;
 - (d) the information that any organ of state, public entity or private enterprise is required to provide to the Commission and the form and period of such reporting;
 - (e) requiring all broad-based black economic empowerment transactions above a prescribed threshold to be reported to the Commission; and
 - (f) any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper implementation and administration of this Act.
- (2) The Minister may by notice in the *Gazette* issue guidelines and practice notes relating to the interpretation and application of this Act.

(Section 14 substituted by section 9 of Act 46 of 2013)

15. Short title and commencement

This Act is called the Broad-Based Black Economic Empowerment Act, 2003, and comes into operation on a date to be determined by the President by proclamation in the *Gazette*.

(Please note that PDF copies of all the B-BBEE Sector Charters and Codes of Good Practice are available on the dti website: http://www.thedti.gov.za/economic_empowerment/bee_sector_charters.jsp.

Should you be unable to find anything specific, it will be provided upon request. Kindly refer to our website for our contact details.)

Prepared by:



In partnership with:

