
REVISED CODES OF GOOD PRACTICE

1. INTRODUCTION:

Writer is of the view that it has now become the responsibility of entrepreneurs and business owners to take the Minister and the DTI to task on their total disregard to due administrative process and non-compliance with the provisions of the Constitution, so as to afford corporate South Africa the opportunity to ensure the establishment of a broad-based black economic empowerment plan that will be meaningful and sustainable and that will afford business owners the opportunity to be measured against a consistent set of rules that are unambiguous and more realistic.

2. THE LEGAL STATUS OF THE REVISED CODES:

2.1 The revised Codes of Good Practice on Broad Base Black Economic Empowerment (*“the revised codes”*) issued in terms of section 9(1) of the Broad Base Black Economic Empowerment Act, Act 53 of 2003 (*“the Act”*) and gazetted in Gazette no. 36928 is undoubtedly leading the way to a guaranteed failure of government’s Broad Base Black Economic Empowerment (*“B-BBEE”*) initiative as it appears to be nothing but mere lip service to the concept of B-BBEE in that it has become a mechanism for redistribution of wealth as opposed to the creation of wealth through meaningful and sustainable empowerment initiatives.

2.2 In this opinion, the writer will attend to illustrate the various contradictions in terms contained in the revised codes which, *inter alia*, relates to the re-adoption of a narrow-based approach following an exclusive approach towards B-BBEE as opposed to the approved broad-based approach by way of an inclusive process. It will further be illustrated that the revised

codes represents an absolute departure from the empowerment strategy of government as alluded to in the national growth path strategy which government so proudly represented to corporate South Africa as part of its economic growth strategy. In addition to the aforementioned realities, the revised codes are also characterised by its incompleteness, contradictory terms, vagueness, uncertainties and grammatical errors.

3. In the following brief analysis of the revised codes the writer will deal with the following critical issues:

3.1 The Minister of Trade & Industry exceeded his powers by acting outside the course and scope of his authority with the issuing of the revised codes. The aforementioned statement is based on the premise that the Minister has failed to apply his mind properly to the strategy on B-BBEE, as issued in terms of section 11 and prescribed by section 9(2) of the B-BBEE Act with particular reference to the following principles:

3.1.1 Broad-base beneficiation;

3.1.2 Inclusivity;

3.1.3 Economic growth.

3.2 Contrary to the provisions of section 9(5) of the Act, the revised codes did not lay for public commentary for the prescribed period of sixty days.

3.3 Despite an overwhelming response from interested parties emanating from public commentary including responses relating to technical issues, which calls for obvious rectification, the Minister failed to consider same and have no regard to such present issues.

3.4 Contrary to the authority granted to the Minister to only distinguish between black men and black women, the revised codes introduced different classes of black people with reference to African, Coloured and Indian, in dealing with the level of recognition they can contribute under management control and employment equity. To this end, the Minister clearly exceeded his powers and authority as set out in section 9(4) of the Act.

4. As already stated hereinabove, one of the unique features of the revised codes is the vagueness of its provisions. It appears to be riddled with uncertainties pertaining to, *inter alia*, its effective date, the commencement on of the transitional period and uncertainty as to which of the existing codes (Gazette No. 29617) remained and which of them have been repealed, substituted or amended. In addition to the aforementioned rather embarrassing short-comings, the following also appears to be left in a cloud of uncertainty:

4.1 A clear definition of the “*measurement period*” for measured entities;

4.2 The absence of any provision for a transitional mechanism for the measurement of the “*empowering supplier status*” of entities which fall within the ambit of sector codes or for the measurement of preferential procurement for the very first entities to be measured in terms of the revised codes who will have no suppliers who have been verified to be empowering suppliers;

4.3 The various references to terms which remain undefined;

4.4 The existence of clearly defined terms which are nowhere to be found in the contents of the revised codes

4.5 The existence of various contradictory definitions and applications of the same terms and principles throughout the revised codes;

- 4.6 The incorrect numbering of paragraphs in the revised codes.
5. The revised codes further appears to be unconstitutional for the following reasons:
- 5.1 The unfair and unjust administrative process from which the revised codes emanated infringes on the public's right to a just administrative action in terms of the provisions of section 33 of the Constitution.
- 5.2 The enforcement of a mechanism for the preferential procurement practices of government is in conflict with the provisions of section 217 of the Constitution in that such practices are patently unfair, inequitable and uncompetitive.
- 5.3 There is simply no room for individuals to freely participate in a trade of choice and as such it fails to constitute a law of general application that is reasonable and justifiable in a just and open society as envisaged in section 36 of the Constitution.
6. In what follows, I will briefly deal with the legislative background relevant to the subject matter so as to provide a better perspective of the submissions ventilated hereinabove.
7. **THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 108 OF 1996 (“THE CONSTITUTION”) WITH SPECIFIC REFERENCE TO SECTION 9 AND 217 THEREOF:**

7.1 Section 9 of the Constitution reads as follows:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law;

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- (2) *Equality includes the full and equal enjoyment of all rights and freedom. The promote the achievement of equality, legislative and other measures designed to protect or advance persons, or a category of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
- (5) *Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”*

7.2 As a consequence of the provisions of section 9 and emanating therefrom, the Employment Equity Act, Act 55 of 1998 purports to protect or advance categories of persons, disadvantaged by unfair discrimination in terms of the provisions of section 9(2) of the Constitution.

7.3 In addition to the aforementioned provisions, the Broad-Base Black Economic Empowerment Act, Act 53 of 2003 (the “B-BBEE Act”), as well as the Codes of Good Practice on B-BBEE emanating from the Act also purports to protect and advance categories of persons, disadvantaged by unfair discrimination in terms of the provisions of section 9(2) of the Constitution.

7.4 Section 217 of the Constitution reads as follows:

- “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
- (2) Sub-section (1) does not prevent the organs of state or institutions referred to in that sub-section from implementing a procurement policy providing for-*
- (a) categories of preference in the allocation of contracts; and*
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
- (3) National legislation must prescribe a framework within which the policy referred to in sub-section (2) must be implemented.”*

7.5 The provisions of section 217(3) of the Constitution manifested itself in the Preferential Procurement Policy Framework Act, Act 5 of 2000, which provides for the scoring mechanism in terms of which government tenders are to be awarded.

8. **GOVERNMENT’S BROAD-BASE BLACK ECONOMIC EMPOWERMENT STRATEGY (PUBLISHED JUNE 2003):**

8.1 In terms of section 9(2) of the B-BBEE Act, the Minister of Trade & Industry must issue a strategy in terms of section 11, which must be taken into account when in the preparation of any Codes of Good Practice. In

particular, section 11(1)(a) of the Act states that the Minister must issue a strategy for B-BBEE.

8.2 Following the aforementioned provisions of the Act, it is clear that the Minister, in developing any Codes of Good Practice must have due consideration, to the strategy document pertaining to B-BBEE. This point of departure is of fundamental importance in the legislative process dealing with the subject matter.

8.3 For this purpose, government's B-BBEE strategy document, published in June 2003 served as a precursor to the B-BBEE Act which followed in December 2003. It contains policy objectives and key principles that underpin government's strategy towards B-BBEE. These policy objectives, listed in section 3.3 of the B-BBEE strategy documents include, *inter alia*, the following:

8.3.1 Increasing the number of black people who participate in the ownership and control of existing and new business in the South African economy;

8.3.2 Increasing the proportion of ownership and management that community and broad-based enterprises and co-ops have;

8.3.3 Accelerated and shared economic growth.

8.4 The aforementioned policy objectives and the strategy from an holistic point of view is further underpinned by the following four key principles of B-BBEE as listed in section 3.4 of the B-BBEE strategy document:

8.4.1 B-BBEE is broad-based;

8.4.2 B-BBEE is an inclusive process;

8.4.3 B-BBEE is associated with good corporate governance;

8.4.4 B-BBEE is part of our growth strategy.

8.5 In pursuance of the aforementioned summary of the relevant legislative background, writer is of opinion that in terms of the provisions of section 9(2) of the B-BBEE Act, any Codes of Good Practice developed and issued by the Minister or DTI must be aligned and complementary to these aforementioned policy objectives and key principles. If such initiatives fall short of these requirements, it is open for attack in a Court of law.

9. **THE BROAD-BASE BLACK ECONOMIC EMPOWERMENT ACT, ACT 53 OF 2003:**

9.1 The B-BBEE Act gazetted in December 2003 and which became operational in January 2004 authorises the Minister of Trade & Industry to publish subordinate legislation relating to the subject matter, same of which is commonly referred to as the “Codes of Good Practice”. The Minister’s authority to issue the Codes of Good Practice is defined and minuted in section 9 of the B-BBEE Act. For ease of reference section 9 is quoted herein below:

“Section 9

(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-Base Black Economic Empowerment and the interpretation and definition of different categories of a Black Empowerment Entity;*
- b. *Qualification criteria for preferential purposes for procurement and other economic activities;*

c. *Indicators to measure Broad-Base Black Economic Empowerment;*

d. *The waiting to be attached to Broad-Base 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 for their sector; and*

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 preparing any Codes of Good Practice.*

(3) *A Codes of Good Practice issued in terms of sub-section (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 Codes of Good Practice issued in terms of sub-section (1) and any target specified in a Codes of Good Practice in terms of sub-section (3), may distinguish between black men and black women.*

(5) *The Minister must, before issuing, replacing or amending a Codes of Good Practice in terms of sub-section (1)-*

a. *Publish the draft Codes of Good Practice or amendment in the gazette for public comment; and*

b. *Grant interested persons a period of at least sixty days to comment on the draft Codes of Good Practice as amended, as the case may be.”*

9.2 In terms of the provisions of section 9(5) of the B-BBEE Act, the Minister is clearly obligated to publish such proposed amendments in the gazette for public comment so as to afford, *inter alia*, interested persons at least sixty days to comment on the draft Codes of Good Practice or amendment. It follows from these provisions that at the very least, the Minister is obligated to consider such commentary subsequent to submission thereof by members of the Public and in particular interested persons.

9.3 *In casu*, it is common cause that the Minister failed to meet these requirements and acted contrary to the provisions of section 9(5) of the Act. Writer is of opinion that such disregard to the purpose and processes contained in the B-BBEE Act is, *inter alia*, a contravention of the Promotion of Administrative Justice Act, Act 3 of 2000, emanating from section 33(1) of the Constitution which states the following:

*“33(1) Everyone has the right to administrative action that is **lawful, reasonable and procedurally fair.**”*

9.4 As a further consequence of the Minister’s disregard to the provisions of section 9(5), the revised Codes are riddled with drafting errors, including but not limited to spelling errors, incorrect numbering, incorrect references to old legislation, reference to legal entities (i.e. section 21 Companies) that no longer exists and the omission of essential information pertaining to the verification of measured entities. These blatant errors and omissions serves as evidence that the Minister simply did not consider

any of the commentaries submitted prior to the publication of the revised codes as these comments pointed out all these discrepancies.

9.5 In addition to the aforementioned discrepancies, the revised Codes further appear to be in contravention of the following provisions of the B-BBEE Act:

Transgression of section 9(2) of the Act:

9.5.1 In terms of section 9(2) the Minister must take into account the Broad-Based strategy in dealing with any Codes of Good Practice. It is therefore unequivocally clear that any subordinate legislation must have, as a fundamental principle, the idea of **Broad-Based Empowerment**.

9.5.2 In the national growth path published by Minister Ebrahim Patel, the following relevant statements were made:

“Government has adopted the position that Black Economic Empowerment should seek to empower all historically disadvantaged people rather than only a small group of black investors. To this end, it adopted a Broad-Based BEE Act which calls for expanded opportunities for workers and smaller enterprise as well a more representative ownership and management.

Current BEE provisions have, however, in many instances failed to ensure a Broad-Based approach, instead imposing significant costs on the economy without supporting employment creation or growth. The present BEE model remains excessively focused on transactions that involve existing assets and benefit a relatively small number of

individuals. The new growth path requires a much stronger focus on the Broad-Base elements of the BEE regulations / ownership by communities and workers, increased skills development and career pathing for all working people, and support for small enterprises and co-ops, as well as a new emphasis on procurement from local producers in order to support employment creation.

The following shortcomings have emerged in the implementation of BEE. First, ownership and senior management issues received this proportionate emphasis. The unintended consequences of this trend include 'fronting', speculation and tender abuse. Second, the regulations do not adequately incentivise employment creation, support for small enterprise and local procurement. The preferential procurement regulations aggravate this situation by privileging ownership over local production. Finally, the Broad-Base BEE regulations penalize public entities as suppliers. The democratic state owns public entities on behalf of our people yet the regulations do not count them as 'black empowered'.

A major rethink is needed of the BEE framework and policy to achieve South Africa's developmental and growth goals. The DTI and EDD will work with the relevant government departments and the BBEEE advisory council to ensure:

- 1. A substantial revision of the BBBEE Codes to do more to incentivise employment creation, investment in new productive capacity by black entrepreneurs, including small business and co-ops (using among other stronger local procurement), skills development and employment equity,*

collective and other forms of Broad-Based ownership, and sector strategies to create jobs.

2. *Consistent implementation of Broad-Based (instead of narrow) BEE in all sectors, with a systematic assessment of the effects on the cost of capital and investment.*
3. *Continuous monitoring and evaluation of the impact of Broad-Base BEE on overall equity, employment creation, support for new entrepreneurs, growth and innovation.”*

9.5.3 From the aforementioned extract it is evident that the national growth path focuses on a more Broad-Based approach in both its horizontal and vertical applications. This means that the beneficiary base of ownership transactions should include a broader base of black participants such as communities and workers as opposed to an elite group of black investors (horizontal application) and a de-emphasis of black ownership in favour of an emphasis on all the elements of the scorecard in aggregate when considering preferential treatment of a business entity (vertical application).

9.5.4 Unfortunately, the revised codes have failed miserably in achieving these objectives as it appears to distance itself from the B-BBEE fundamental principles in favour of a narrow-base approach towards BEE. To illustrate the aforementioned conclusion, I deem it necessary to refer to the following examples:

- (a) With the new definitions of “*enterprise development contributions*” and “*supplier development contributions*” which are now limited to black owned businesses, the amount of

points attributable to contributions directly related solely to black ownership of businesses have increased from 23 points (23%) to 53 points (48.62%). (The 53 points represents the 25 points on the ownership scorecard and the 28 points on the enterprise and supply development scorecard related solely to black ownership). As a result of the aforementioned amendments, 48% of the available points on the revised scorecard is therefore directly related to black ownership of businesses. Contrary to the principles set out in government's black economic empowerment strategy, which included the de-emphasising of black ownership, the revised Codes elevated ownership to more than double its value as compared to the existing codes. It is therefore evident that the revised codes have divorced itself from the government's official strategy on Broad-Base black economic empowerment.

- (b) In terms of the current codes a “*new entrant*” is defined as an individual who at the time of entering into a BEE transaction with a measured entity has not been a party to a prior BEE transaction with an aggregate value of more than R20 million. In terms of the revised Codes, this threshold has been increased to R50 million. This amendment undoubtedly has been included to accommodate the fortunate black elite to create even more wealth at the expense of the broad-base of beneficiaries, the national growth path aims to include in the ownership structure of measured entities. As such, this amendment has neither aligned itself with the stated intention as set out in the national growth path nor with the horizontal broad-based approach to ownership as ventilated hereinabove.

(c) Perhaps the most telling aspect of the revised codes with respect to its narrow-based emphasis is the new B-BBEE recognition levels set out in section 8 of statement 000 of the revised codes. Upon careful consideration of the recognition table, it appears that if one deducts the 25 points for ownership one is left with 84 points which would give a business a level 4 B-BBEE status. However, such an entity's overall B-BBEE status level will automatically be discounted with a further level down to level 5 as a consequence of the fact that ownership is regarded as a priority element. The top 4 B-BBEE status levels (level 1 to 4) is therefore reserved for entities that have scored all their ownership points. In the existing codes only the top 2 B-BBEE status levels are reserved. This amendment has resulted in a limited contribution of the other elements of the scorecard to the B-BBEE status level of an entity compared to its ownership.

Transgression of section 9(4) of the B-BBEE Act:

9.5.5 In terms of the revised codes, a clear distinction is made between different classes of black people (African, Coloured and Indian) and the level of recognition they can contribute under management control and employment equity. This clearly contradicts the provision of section 9(4) which allows the Minister to only distinguish between black men and black women. This amendment appears to be aligned with the controversial principle of representation of the national demographic which currently appears to be a bone of contention in other spheres of government. Although Coloured and Indian people are for purposes of black economic empowerment considered to be black, as defined in the B-BBEE Act, they are effectively marginalized by the revised Codes on the basis that

“although you are black, there are others that are more black than you”. Stated differently, “all black people, as per the definition in the B-BBEE Act are equal, but some are more equal than others.”

9.5.6 Although the methodology appears to be irrational and technically flawed it is not so much the technical application of the formulas that raises a major concern, but rather the principles these formulas embody. Writer is of opinion that one of the primary reasons for limiting the minister’s authority to distinguish only between black male and female, was to avoid the possibility of a further divide of South Africans along racial lines, which appears to be exactly what the revised codes has achieved.

Transgression of section 9(5) of the B-BBEE Act:

9.5.7 As already alluded to hereinabove, the obligation on the Minister to submit any draft codes for a public commentary period of at least sixty days before he may gazette a final code in terms of the provisions of section 9(5) and 9(1) has not been done.

9.5.8 In addition to the aforementioned, it is evident from the content of the revised codes that such public commentary which was in fact received were not considered at all.

10. **THE ARBITRARY APPROACH TO TARGET SETTING ADOPTED BY THE MINISTER OF TRADE & INDUSTRY:**

10.1 In terms of the provisions of section 9(3) of the B-BBEE Act, the Minister is to set targets that are consistent with the objectives of the B-BBEE Act. It

follows that such targets will not be created in a vacuum, but should at the very least be based on empirical research conducted in an administratively just fashion. *In casu*, it appears that the Minister has not dissolved itself of this responsibility and has adopted an arbitrary approach to target setting.

10.2 In statement 004 of the current codes, sectors of the economy that wish to develop their own sectoral codes are required to furnish empirical research to substantiate any deviations in waitings or targets that they propose. However, it appears that the DTI is not subjected to the same requirements. Although members of the parliamentary portfolio committee on B-BBEE, at hearings held on the Proposed Amendment Bill to the B-BBEE Act during 2013, commented on the lack of empirical research provided to them on the progress made with B-BBEE, it appears that such empirical research is non-existent alternatively, has no meaningful contribution at this time for the following reasons:

10.2.1 The B-BBEE Act only came into existence on 1 January 2004;

10.2.2 The codes, which contains the actual means of measuring B-BBEE were only gazetted three years later on 9 February 2007;

10.2.3 Only two years later on 9 February 2009, the DTI managed to accredit the first verification agencies. Only then was it possible to empirically measure B-BBEE. The refusal to actually amend the plethora of technical and drafting errors in the existing codes, together with unofficial *ad hoc* interpretations that were often adopted by the B-BBEE Unit, which more than often contradicted the actual legislation, made it impossible for verification agencies to apply measurement on a consistent basis. Writer is therefore of the opinion that any empirical research that may have been conducted, given the

aforementioned limitations, is fatally flawed and of little or no value.

10.2.4 It took a further 2½ years to align the B-BBEE codes with the Preferential Procurement Policy Framework Act, Act 5 of 2000, with the gazetting of the 2011 PPPFA regulation on 7 December 2011. Only then organs of state and public entities actually started applying the B-BBEE codes. Prior to the 7 December 2011 they were under official embargo by the Department of Finance (Treasury) to not apply the B-BBEE codes when considering preferential procurement in tenders.

10.3 During the years 2009 and 2011 we witnessed the gazetting of several sectoral codes as a consequence of which businesses had to constantly re-align themselves with the different rules. Writer therefore contends that it is impossible to draw reliable conclusions during this period.

10.4 The targets for employment equity and preferential procurement which only came into existence in February 2012 have already been increased in the revised codes. One cannot but question the merits of this increase in targets and should call for full disclosure of all relevant facts which were purportedly considered in justifying the same. One has to ask, what possible empirical research could have been embarked upon from February 2012 up until the release of the revised codes that could possibly warrant a further increase?

11. The increase in score thresholds to attain a particular B-BBEE status level appears to be entirely arbitrary and designed to make it impossible for any business that does not score full marks for black ownership to achieve a significant B-BBEE status level. The proportionate differences between B-BBEE levels also does not coincide with the proportionate points available in terms of the PPPFA 2011 regulations for each B-BBEE status level.

12. Other arbitrary changes in targets and waitings include the following:

12.1 Top management target increases from 40% to 60%;

12.2 Skills development expenditure target increases from 3% to 6%;

12.3 Preferential procurement target increases from 70% (this target only came into operation in February 2012) to 80%;

12.4 Preferential procurement target for procurement of black owned business increases from 12% to 40%;

12.5 The significant decrease in waited recognition on enterprise development matrix for almost all contributions;

12.6 All these amendments as contained in the revised codes represents a departure from government's existing formal policies on B-BBEE as embodied by the strategy document and the national growth path. In accordance with the expectation created as far back as 2011 to the extent that the existing codes of good practice is in need of technical revision, business in South Africa expected the revision of the codes to be an exercise with a purpose of addressing technical and drafting errors in the existing codes. However, the revised codes appears to be quite the contrary.

13. **VAGUENESS OF REVISED CODES:**

13.1 Another alarming characteristic of the revised codes is the fact that on critical issues, its contents appear to be vague and should be declared void on this issue alone. In what follows, writer will briefly refer to some vague provisions that are critical.

13.2 The effective date of the revised codes remains uncertain. If one has due consideration to the notice page of gazette no. 36928 which reads as follows:

“I, Dr Rob Davies, Minister of Trade & Industry, hereby:

(a) Issue the following codes of good practice (‘the codes’) under section 9(1) of the Broad-Base Black Economic Empowerment Act, 2003 (Act 53 of 2003); and

(b) Determine that these codes will come into operation within twelve months from date of this publication.”

13.3 Paragraph (b) referred to in 13.2 *supra* implies that the revised codes is not effective until such date *“within twelve months”* from 11 October 2013 that it will become effective. This date remains uncertain even though the Minister, in government gazette no. 37453 (notice 226 of 2014) extended the transitional period provided in paragraph 10 of the amended codes by 6 months until 30 April 2015. In the interim, or at least until such time as the Minister gazettes the date within the aforementioned period to mark the effective date, none of the revised codes is effective. The aforementioned state of affairs renders section 10 of statement 000, which appears to introduce a transitional clause, meaningless and will undoubtedly create immense confusion in the market place.

13.4 As already stated hereinabove, the measurement period for which enterprises are to be measured, has still not been defined by the codes and as such it creates uncertainty as to which set of codes will be applicable. Although a general rule against retrospective application of legislation exists, it must be noted that B-BBEE compliance in general is measured over a 12 month period. In view of the fact that the effective

date of the revised codes will probable fall somewhere within a twelve month period, it raises a question as to whether such measured entity would be measureable under the old or revised codes for that relative period.

13.5 Both the existing codes and the revised codes makes provision to the extent that any codes of good practice will remain effective until amended, substituted or repealed. Although several codes have been amended, it does not necessarily mean that all statements contained in those codes have also been amended. It is uncertain as to whether such statements still exist or not. Examples of the aforementioned confusion and uncertainty are statements 003, 004, 005, 102 and 103. To further add to the aforementioned confusion, both the Minister and the Director-General of the Department of Trade & Industry stated on different public podiums that some of these statements are still effective even though they failed to reach consensus on the list of statements that are still effective.

13.6 It is to be noted that some codes (example code 800 dealing with QSE's) have not expressly been repealed, substituted or amended.

13.7 The revised codes further introduces a concept called “*empowering supplier*“, which is defined as follows:

“An empowering supplier within the context of B-BBEE is a B-BBEE compliant entity, which is a good citizen South African entity, comply with all regulatory requirements of the country and should meet at least three if it is a large enterprise or one if it is a QSE of the following criteria:

(a) *At least 25 % of cost of sales excluding labour cost and depreciation must be procured from local producers or local supplier in SA, for service industry labour cost are included but cut to 15%.*

(b) *Job creation – 50% of the jobs created are for black people provided that the number of black employees since the immediate prior verified B-BBEE measurement is maintained.*

(c) *At least 25% transformation of raw material / beneficiation which include local manufacturing, production and/or assembly, and/or packaging.*

(d) *Skills transfer – at least spent 12 days per annum of productivity deployed in assisting black EME's and QSE's, beneficiaries to increase their operation or financial capacity.”*

13.8 In accordance with the aforementioned provisions, a measured entity in order to enjoy any recognition under preferential procurement has to qualify as an empowering supplier, irrespective of its B-BBEE recognition level. However, the definition of empowering supplier is vague and in some respects totally immeasurable. For example, the term “*good citizen South African entity*” is not defined and as such immeasurable. The obligation to comply with all regulatory requirements is in the absence of a list or definition of all regulatory requirements in South Africa, with all due respect, vague and embarrassing.

13.9 The provisions of sub-paragraph (c) as referred to in paragraph 15.7 *supra* does not specify what the 25% is measured against and as such it creates uncertainties as a result of its vagueness.

13.10 The formula for management control and skills development alluded to hereinabove contains several variables which are open for one or more potential interpretations. There are further no separate formula provided for the calculation of the black women indicators which makes the formula of no use for those indicators. The potential achievement of a measured

entity with respect to each separate race group is not expressly limited to the target for that race group which also makes the formula of no use. The entire logic to referring to the *ex post facto* position of economical active people (EAP) as per the commissioner of employment equity's annual report as the target for each race and gender grouping is fatally flawed as they do not represent targets but rather factual historical positions. In the premises, writer is of opinion that both the intention and the formula itself is set out in such ambiguous terms that it renders such provisions voidable. It is to be noted that the errors in logic in these formulas were pointed out in comprehensive fashion at the commentary phase and despite such comprehensive remarks dealing with the discrepancies, the Minister and the DTI failed to address such discrepancies appropriately. In fact they appeared to have been totally ignored.

13.11 Further in view of the fact that legitimate training expenses are capped at 15% of the skills development spent it is impossible to obtain a full score for skills development.

13.12 It is further unclear for what or for whom a supplier development plan should be developed in order to claim the exclusion of imports. It cannot reasonably be argued that the supplier to be developed is the overseas suppliers as a consequence of which, the only reasonable conclusion to be made is that the Minister intended for the measured entity to create or facilitate the creation of a local intermediary supplier that is black owned. It follows that the problem is merely deferred to the newly created local suppliers as it still needs to import the goods which are not locally available. This will inevitably lead to an increase in cost of product and contrary to the principle of economic growth as a result of increased cost of product.

13.13 In addition to those already mentioned, there are a number of terms used in the body of the revised codes that are not defined at all. To illustrate the aforementioned statement reference is made to the following terms:

13.13.1 “*Industry entity*” which appears in the bonus point indicator of the skills development scorecard. (No definition of industry entity).

13.13.2 “*Value adding*” which is used in the definition of supply development contribution. Although the term “*Value adding*” is defined in the existing codes the definition has been removed in the revised codes. This omission can only lead to further confusion and is as such vague.

13.13.3 “*Net value date*” is not used in the codes but is nonetheless properly defined.

13.14 The following definitions in schedule 1 contradicts definitions of the same term in the body of the revised codes:

13.14.1 “*Employee*” is still defined with reference to the Labour Relations Act and not the Employment Equity Act, even though the entire basis for measuring the management control scorecard is the classification and the “*targets*” as per the Employment Equity Act;

13.14.2 “*Qualifying enterprise and supply development beneficiary*” is not consistent with the definitions in the body of the Act or with the definitions of “*enterprise development contribution*” and “*supply development contributions*”. In the one it refers to 30% black women owned businesses and in the others to 50% black women owned businesses;

13.14.3 The definition of “*Socio-economic development*” refers to “*income generating activity*” in the body of the code and to “*access to the economy*” in the definition in schedule 1.

13.15 To add to the abovementioned submissions pertaining the vagueness of the revised codes, a number of the paragraphs in the revised codes are also incorrectly numbered.

13.16 For the reasons as summarised hereinabove, writer is of opinion that a proper case can be made out against the revised codes on the basis of its vagueness.

14. **INFRINGEMENT OF THE PUBLICS CONSTITUTIONAL RIGHTS:**

14.1 As already alluded to hereinabove, the Minister’s total disregard for the requirements of section 9 has resulted in an infringement of the public’s right to just administrative action as set out in section 33 of the Constitution.

14.2 In addition to the aforementioned disregard to just administrative action it appears that the revised codes and the mechanism for implementation and maintenance of the same has completely ignored the principle of a separation of powers relating to the three distinct spheres of government (legislative, executive and judiciary).

15. Lastly it would appear that the narrow-base approach which appears to have been adopted in the revised codes, will effectively lead to an exclusion of white owned businesses from the economy at large. The disproportionate amount of points attributable directly to black ownership of businesses read together with the B-BBEE recognition levels and accompanying points in terms of the PPPFA 2011 regulations effectively excludes white owned businesses from business

opportunities emanating from government business which appears to now be reserved exclusively for black owned businesses. This marginalization is patently unfair, inequitable and definitely not in the best interest of the economy at large. As a consequence, it is contended that this undesirable and unfair state of affairs emanating from the revised codes is a transgression of section 217 of the Constitution.

16. **CONCLUSION:**

For the reasons as set out hereinabove, writer is of opinion that the implementation of the revised codes as it stands, will undoubtedly result in the death of economic transformation in South Africa. In the premises it is contended that for the reasons properly ventilated in this document, the revised codes should not be left uncontested.

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