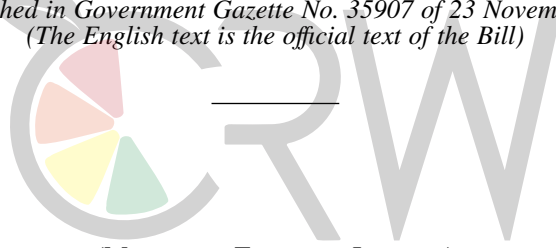


REPUBLIC OF SOUTH AFRICA

BROAD-BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill published in Government Gazette No. 35907 of 23 November 2012)
(The English text is the official text of the Bill)*



(MINISTER OF TRADE AND INDUSTRY)

[B 42—2012]

ISBN 978-1-4850-0058-7

No. of copies printed 1 800

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Broad-Based Black Economic Empowerment Act, 2003, so as to insert certain definitions and to amend others; to clarify interpretation; to provide for the remuneration of Council members; to promote compliance by organs of state and public entities and to strengthen the evaluation and monitoring of compliance; to include the creation of incentive schemes to support black owned and managed enterprises in the strategy for broad-based black economic empowerment; to provide for the cancellation of a contract or authorisation; to establish the Broad-Based Black Economic Empowerment Commission to deal with compliance of broad-based black economic empowerment; to provide for offences and penalties; and to provide for matters connected therewith.

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

Amendment of section 1 of Act 53 of 2003

1. Section 1 of the Broad-Based Black Economic Empowerment Act, 2003 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion before the definition of “black people” of the following definitions:

“ **‘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;

‘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 for a rating agency accredited in terms of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 2006 (Act No. 19 of 2006);

‘B-BBEE Verification Professional Regulator’ means the South African National Accreditation System established by the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 2006 (Act No. 19 of 2006);”;

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- (b) by the substitution for the definition of “black people” of the following definition:
- “**‘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 but were precluded from doing so by Apartheid policies;”;
- (c) by the substitution for the definition of “broad-based economic empowerment” of the following definition:
- “**‘broad-based black economic empowerment’** means the viable economic empowerment of all black people [including], 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, including the promotion of local content procurement; and
 - (f) investment in enterprises that are owned or managed by black people;”;
- (d) by the insertion after the definition of “broad-based black economic empowerment” of the following definition:
- “**‘Commission’** means the Broad-Based Black Economic Empowerment Commission established by section 13B;”;
- (e) by the insertion after the definition of “Council ” of the following definitions:
- “**‘Department’** means the Department of Trade and Industry;
- ‘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;
- '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;
- (f) by the insertion after the definition of “organ of state” of the following definition:
- “**'premises'** includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;”;
- (g) by the insertion after the definition of “public entity” of the following definition:
- “**'sector charters'** means sectoral transformation charters referred to in section 9;”.

Amendment of section 2 of Act 53 of 2003

2. Section 2 of the principal Act is hereby amended—

- (a) by the substitution for paragraph (f) of the following paragraph:

“(f) empowering rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills; **[and]**”;
- (b) by the substitution for paragraph (g) of the following paragraph:

“(g) promoting access to finance for black **[economic empowerment]** start-ups, small, medium and micro enterprises, co-operatives and black entrepreneurs, including those in the informal business sector; and”;
- (c) by the addition of the following paragraph:

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

Amendment of section 3 of Act 53 of 2003

3. Section 3 of the principal Act is hereby amended by the substitution for paragraph (a) of the following paragraph:

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

Substitution of section 8 of Act 53 of 2003

4. The following section is hereby substituted for section 8 of the principal Act:

“Remuneration and reimbursement of expenses

8. Council members **[will not]** must be remunerated for their services[, **but will**] 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.”.

Amendment of section 9 of Act 53 of 2003

5. Section 9 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (e) of the following paragraph:
 - “(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]**”;
- (b) by the insertion in subsection (1) after paragraph (e) of the following paragraph:
 - “(eA) the interpretation and definition of, and indicators to measure, local production and content; and”;
- (c) by the addition of the following subsections:
 - “(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). 15
 - “(7) A code of good practice remains in effect until amended, replaced or repealed.”.

Amendment of section 10 of Act 53 of 2003

6. The following section is hereby substituted for section 10 of the principal Act: 20

“Status of codes of good practice

- 10.** (1) Every organ of state and public entity must take into account and, as far as is reasonably possible, 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; 25
 - (b) developing and implementing a preferential procurement policy;
 - (c) determining qualification criteria for the sale of state-owned enterprises; **[and]** 30
 - (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. 35
- (2) 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.
- (3) 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.”. 40

Amendment of section 11 of Act 53 of 2003

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7. Section 11 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph:

- “(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;”.

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Insertion of sections 13A, 13B, 13C, 13D, 13E, 13F, 13G, 13H, 13I, 13J, 13K, 13L, 13M, 13N, 13O and 13P in Act 53 of 2003

8. The following sections are hereby inserted in the principal Act after section 13:

“Cancellation of contract or authorisation

13A. Any contract or authorisation awarded on account of false information 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. 5

Establishment and status of Broad-Based Black Economic Empowerment Commission 10

13B. (1) The Broad-Based Black Economic Empowerment Commission is hereby established as a trading entity within the administration of the Department. 15

(2) The Commission is headed by a Commissioner appointed by the Minister. 15

(3) The Commission—

- (a) has jurisdiction throughout the Republic;
- (b) must be impartial and perform its functions without fear, favour or prejudice; and 20
- (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. 25

(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. 30

Appointment of Commissioner

13C. (1) The Minister must appoint a person with suitable qualifications and experience to be the Commissioner for a term of not more than five years. 35

(2) The Minister may re-appoint a person as Commissioner at the expiry of that person's term of office. 35

(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— 40

- (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. 45

(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. 45

(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— 50

- (a) serious misconduct;
- (b) permanent incapacity;
- (c) engaging in any activity that may undermine the integrity or standing of the Commission; or 55
- (d) any other legitimate ground that justifies the removal of the Commissioner.

Appointment of Deputy Commissioner and staff of Commission

13D. (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, 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.

Finances of Commission

13E. (1) The Commission is financed from—

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

(2) The Commissioner is the accounting authority of the Commission for purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999).

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

Functions of Commission

13F. (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) 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 5
- (c) conducting research relating to its mandate and activities and, from time to time, publishing the results of that research.
- (3) The Commission may liaise with any regulatory authority on matters of common interest and, without limiting the generality of the foregoing, may— 10
- (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. 15
- (4) 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. 20

Reporting

- 13G.** (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). 25
- (2) All public companies listed on the Johannesburg Stock Exchange must provide to the Commission—
- (a) in such manner as may be prescribed, a report on their compliance with broad-based black economic empowerment; and
 - (b) any other prescribed information. 30
- (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. 35

Delegation and assignment

- 13H.** (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. 40
- (2) Notwithstanding subsection (1), the Commissioner may not delegate the powers referred to in section 13D(1) or (4) or 13E(2).
- (3) A delegation or assignment under subsection (1) must be in writing and— 45
- (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. 50

Specialist committees

- 13I.** (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). 55

- (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.

Investigations by Commission

- 13J.** (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 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) 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.

Summonses

- 13K.** (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.

Confidential information

- 13L.** (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) 15 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 10 court days before publishing those reasons. 5
- (7) Within five 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. 10

Conflicting interests of employees

- 13M.** 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— 15
- (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 20
 - (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. 25

Offences in connection with Commission

- 13N.** (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. 30
 - (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; 35
 - (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; 40
 - (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; 45
 - (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 50
 - (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).

Other offences and penalties

- 13O.** (1) A person commits an offence if that person knowingly— 55
- (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.

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

13P. (1) Any person convicted of an offence in terms of this Act may not 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.”.

Substitution of section 14 of Act 53 of 2003

9. The following section is hereby substituted for section 14 of the principal Act:

“Regulations, guidelines and practice notes

14. (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 [in order to ensure] 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.”.

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Short title and commencement

10. This Act is called the Broad-Based Black Economic Empowerment Amendment Act, 2012, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.



MEMORANDUM ON THE OBJECTS OF THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT AMENDMENT BILL, 2012

1. PURPOSE

This Memorandum sets out the amendments that the Broad-Based Black Economic Empowerment Amendment Bill, 2012 (“the Bill”), proposes to the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) (“the Act”).

2. BACKGROUND

2.1 In 2003 the Act was promulgated into law and in 2007 codes of good practice were issued and gazetted in terms of the Act.

2.2 Although the codes of good practice remain in full effect until replaced or amended in terms of section 9 of the Act, the Minister of Trade and Industry may conduct annual reviews in order to monitor the implementation of broad-based black economic empowerment (“B-BBEE”).

2.3 Following various meetings by the Black Economic Advisory Council whereby four sub-committees were established, each sub-committee received presentations from various institutions and commissioned several researches. All four sub-committees then tabled their reports to the Black Economic Advisory Council, and made the following recommendations which would require legislative adjustments:

- (a) The amendment of the primary and secondary B-BBEE legislative framework to address, inter alia, circumvention, regulatory mechanism and compliance;
- (b) alignment of the B-BBEE primary legislation with other key pieces of legislation and policy instruments; and
- (c) monitoring, evaluating and reporting (consistent application across all spheres of Government and sectors).

3. OBJECTS OF THE BILL

3.1 The proposed amendments to the Act intend to achieve the following objectives:

- (a) Align the Act with other legislation impacting on B-BBEE and with the codes of good practice;
- (b) establish the Broad-Based Black Economic Empowerment Commission to serve as an institutional environment for monitoring and evaluating B-BBEE; and
- (c) deal with non-compliance and circumvention by, inter alia, introducing offences and penalties.

3.2 The proposed legislative amendments seek to give effect to Government’s policy aimed at the reduction of inequality, defeating poverty and the creation of employment on a larger scale through the New Growth Path founded on the restructuring of the South African economy.

4. MATERIAL AMENDMENTS

4.1 Aligning the codes of good practice with the Act

- (a) Several amendments serve to align the Act with the codes of good practice and to clarify the application of the Act and the Minister’s powers to make codes. These amendments are the following:
 - (i) The incorporation of key definitions such as “B-BBEE initiative” and “fronting practice” in the Act (proposed section 1).
 - (ii) The Minister’s power to issue sector codes of good practice is clarified and the Minister is further empowered to define and interpret local production and content and establish indicators to measure local production and content (proposed section 9(1)(e)).
 - (iii) The Minister is empowered to allow organs of state and public entities to set criteria for procurement and other economic activities that exceed those set in the codes of good practice (proposed section 9(6)).

- (iv) The status of the codes of good practice is clarified by providing explicitly that they remain in effect until amended, replaced or repealed (proposed section 9(7)).
- (b) The status of the sector codes is further clarified by providing that an enterprise in a sector in respect of which the Minister has issued a sector code may only be measured for B-BBEE compliance in accordance with that sector code (proposed section 10(2)).
- (c) Enterprises in a sector are required to report annually on their compliance with B-BBEE to their sector council (proposed section 10(3)).

4.2 Broad-Based Black Economic Empowerment Commission (proposed sections 13B to 13M)

- (a) The Bill establishes a Broad-Based Black Economic Empowerment Commission (“the Commission”). The Commission will be a statutory body, operating as a trading entity within the administration of the Department, and headed by a Commissioner. The Commissioner will be assisted by a Deputy Commissioner and staff.
- (b) The functions of the Commission are to—
 - (i) oversee, supervise and promote adherence to the Act in the interest of the public;
 - (ii) strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of B-BBEE;
 - (iii) receive and investigate complaints relating to B-BBEE;
 - (iv) investigate any matter concerning B-BBEE;
 - (v) promote advocacy, access to opportunities, and educational programmes and initiatives of B-BBEE;
 - (vi) maintain a registry of major B-BBEE transactions, above a threshold determined by the Minister;
 - (vii) receive and analyse prescribed reports concerning B-BBEE compliance from organs of state, public entities and private sector enterprises;
 - (viii) promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of B-BBEE; and
 - (ix) exercise such powers which are not in conflict with the Act as may be conferred on the Commission by the Minister.
- (c) The Commission’s powers to conduct investigations are set out in considerable detail. The main features of these provisions are that the Commission may conduct an investigation into any matter concerning B-BBEE. Investigations may be conducted as a result of complaints received or on the Commission’s own initiative.
- (d) The Bill provides for the appointment of specialist committees by the Minister to advise the Commission on the management of its resources or the performance of its functions.
- (e) The Bill includes certain safeguards concerning confidential information which is submitted to the Commission and sets out provisions relating to conflict of interest of employees.

4.3 Monitoring, evaluating and reporting (proposed section 13G)

The core obligations of organs of state, public entities (including Sectoral Education and Training Authorities) and listed public companies to provide information to the Commission are specified.

4.4 Offences and penalties and prohibitions (proposed sections 13N and 13P)

- (a) As far as the exercise of the Commission’s powers is concerned, it is a criminal offence for a person acting on behalf of the Commission to disclose confidential information unless authorised to do so. Likewise, it is a criminal offence to hinder, obstruct or influence the Commission or to provide it with false information.
- (b) The Bill also introduces offences for the following:
 - (i) misrepresenting or attempting to misrepresent the B-BBEE status of an enterprise;

- (ii) providing false information or misrepresenting information to a B-BBEE verification professional in order to secure a particular B-BBEE status (see paragraph 4.5 below regarding B-BBEE verification professionals);
 - (iii) providing false information or misrepresenting information relevant to assessing the B-BBEE status of an enterprise to any organ of state or public entity;
 - (iv) engaging in a fronting practice; and
 - (v) failure by a B-BBEE verification professional or any procurement officer or other official of an organ of state or public entity to report offences to an appropriate law enforcement agency.
- (c) In addition, persons who engage in fraudulent practices to enhance the B-BBEE status of an enterprise may be charged with common law crimes such as fraud. The maximum penalty that can be imposed on an enterprise for an offence involving a deliberate misrepresentation of its B-BBEE status is imprisonment for a period not exceeding 10 years, a fine not exceeding 10 per cent of its turnover or both. In determining what fine to impose the court must take into account the value of any contract that the convicted enterprise obtained, or sought to obtain, as a result of the criminal conduct.
- (d) A B-BBEE verification professional, a procurement officer, or any official of the state or public entity, who fails to report an offence must be reported, where applicable, to the B-BBEE Verification Professional Regulator, the Black Economic Advisory Council or that person's employer.
- (e) A person convicted under the Act may not contract or transact any business with any organ of state or public entity.

4.5 B-BBEE verification professionals

- (a) The Bill seeks to introduce the concept of a "B-BBEE verification professional" and for certain offences relating to such professionals. A B-BBEE verification professional will be a person who performs any work in connection with rating the B-BBEE status of enterprises for a rating agency accredited in terms of the Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act, 2006 (Act No. 19 of 2006).
- (b) The proposed provisions relating to B-BBEE verification professionals seek to serve as interim measures strengthening compliance with the Act. It is envisaged that in future persons registered in terms of the Auditing Profession Act, 2005 (Act No. 26 of 2005), will render services as B-BBEE verification professionals and that the Independent Regulatory Board for Auditors will function as the verification agency regulator. The envisaged action will, however, require amendments to the Auditing Profession Act, 2005.

4.6 Regulations

The Minister's power to make regulations is clarified and extended. In particular, the Minister's powers to make regulations concerning the conduct of investigations by the Commission and the provision of information to the Commission are clarified.

5. CONSTITUTIONAL IMPLICATIONS

It is submitted that the provisions of the Bill are consistent with the Constitution of the Republic of South Africa, 1996.

6. BODIES AND ORGANISATIONS CONSULTED

6.1 The following bodies and organisations were consulted:

- (a) Presidential Advisory Council on B-BBEE;
- (b) Economic and Employment Cluster Departments;
- (c) Independent Regulatory Board of Auditors.

6.2 A draft Amendment Bill was published for public comment during December 2011. The majority of comments were broadly supportive of the Bill. The comments have been studied by the Department of Trade and Industry and substantial changes have been made to the Bill as a result of the comments received. The amendments that have

been introduced, include changing the terminology used in key definitions, adopting a different approach to applying the codes of good practice to organs of state and public entities, specifying the powers and functions of the Commission in greater detail and revising the provisions dealing with penalties and offences.

7. FINANCIAL IMPLICATIONS

To be accommodated within the current financial framework.

8. COMMUNICATION IMPLICATIONS

Discussed under “BODIES AND ORGANISATIONS CONSULTED”.

9. PARLIAMENTARY PROCEDURE

9.1 The State Law Advisers and the Department of Trade and Industry are of the opinion that the Bill must be dealt with in accordance with the procedure prescribed by section 75 of the Constitution since it does not contain any provisions to which the procedure set out in section 74 and 76 of the Constitution applies.

9.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law and customs of traditional communities.

