



MEDIA RELEASE

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THE SUPREME COURT OF APPEAL RULING ON THE VALIDITY OF THE PPPFA REGULATIONS OF 2017 HAS NO EFFECT ON THE B-BBEE ACT AND ITS REQUIREMENTS

The B-BBEE Commission has noted the ruling by the Supreme Court of Appeal that declared the PPPFA Regulations of 2017 invalid and confirms that the ruling has no effect on the B-BBEE Act, as amended, and its requirements. The B-BBEE Act permits organs of state or public entities to set B-BBEE qualification criteria for procurement and other economic activities and to exceed the criteria set in the Codes of Good Practice through section 9 (6) of the B-BBEE Act.

The declaration of the PPPFA Regulations of 2017 as invalid is not a blow to the B-BBEE requirements for tenders as reported. The invalidity of the PPPFA Regulations of 2017 does not invalidate the B-BBEE Act, and the PPPFA Regulations were not issued under to the B-BBEE Act. The framework for the B-BBEE Act and how it is applied is clear and thus not affected by the ruling of the Supreme Court of Appeal.

In terms of section 10 (1) of the B-BBEE Act, all organs of state and public entities **must** apply any relevant Codes of Good Practice issued by the Minister of Trade, Industry and Competition in terms of section 9 of the B-BBEE Act in:

- Determining qualification criteria for the issuing of licenses, concessions or other authorisations in respect of economic activity in terms of any law;
- **Developing and implementing a preferential procurement policy;**
- Determining qualification criteria for the sale of state-owned enterprises;

- Developing criteria for entering into partnerships with the private sector; and
- Determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.

Section 10 (1) of the B-BBEE Act is therefore mandatory, and not optional for organs of state and public entities. The Minister of Trade, Industry and Competition has in terms of section 9 of the B-BBEE Act approved and issued eleven (11) Codes of Good Practice, which is the Generic Codes of Good Practice that are applicable to all sectors that do not have a specific sector code approved and gazetted by the Minister, and ten (10) sector codes, that must be applied in the relevant sectors for which they were approved.

The following are the sector codes that have been approved and issued by the Minister of Trade, Industry and Competition, Information and Communication Technology, Tourism, Construction; Integrated Transport (non-aligned 2009 Version), Property, Forestry, Financial Services, AgriBEE, Marketing, Advertising and Communication, and Defence.

These 11 Codes of Good Practice have set targets for black ownership and other elements, however, which must be applied by organs of state and public entities for procurement and other economic activities. However, organs of state or public entities are allowed to set the qualification criteria that exceed those set in these Codes of Good Practice with the approval of the Minister of Trade, Industry and Competition under section 9 (6) of the B-BBEE Act.

Section 9 (6) of the B-BBEE Act provides that “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).” Any organ of state or public entity may therefore set the 51% qualification criteria for tenders with the permission of the Minister of Trade, Industry and Competition, and the ruling has no implications for this process under the B-BBEE Act.

Further, section 10 (2) of the B-BBEE Act states that “The Minister may, after consultation with the relevant organ of state or public entity, exempt an organ of state or public entity from a requirement contained in subsection (1) or allow a deviation there from if particular objectively verifiable facts or circumstances applicable to the organ of state or public entity necessitate an exemption or deviation.” Similarly, in this case, the Minister of Trade, Industry and Competition must publish such exemption or deviation in the *Gazette*.

The ruling by the Supreme Court of Appeal in relation to the PPPFA Regulations of 2017 therefore does not prevent any state entity or department from pursuing and accelerating economic transformation by setting qualification criteria of 51% black ownership under the B-BBEE Act, it simply means that the PPPFA Regulations cannot be used as a basis to set such qualification criteria. The PPPFA and B-BBEE Act processes should not be confused, noting that section 3 (2) of the B-BBEE Act also introduced the trumping effect to address any possible conflict of legislation.

The B-BBEE Commission urges stakeholders to follow the prescripts in the B-BBEE Act in respect of measures and initiatives to advance economic transformation in a manner envisaged in the B-BBEE Act. The B-BBEE Commission provides free advice on the application of the B-BBEE Act to all stakeholders, including organs of state and public entities, free of charge.

The B-BBEE Commission was established in terms of Section 13B of the amended B-BBEE Act No 46 of 2013 effective from 6 June 2016. The Commission's mandate, amongst others, is to supervise and encourage adherence to the B-BBEE Act in the interest of the public, to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of the objectives of broad-based black economic empowerment.

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