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Better to avoid falling foul of empowerment commission

THE Broad-Based Black Economic Empowerment Commission was established under section 13B of the Broad Based Black Economic Empowerment Act 53 of 2003, as amended with effect from October 14, 2014.

The commission is empowered to investigate any matter concerning broad-based black economic empowerment (B-BBEE), and is required to keep a registry of major B-BBEE transactions.

This article considers the requirement to notify the commission of major B-BBEE transactions. The regulations impose an obligation on the parties to a major B-BBEE transaction to submit the transaction to the commission for registration in the prescribed form. Notwithstanding that this requirement became effective in June 2016, confusion remains.

A major B-BBEE transaction refers to any transaction between entities that results in ownership recognition in terms of Statement 100 of the Codes of Good Practice, the value of which equals or exceeds R25 million.

The notification must be made to the B-BBEE Commission within 15



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days of concluding the transaction.

This is unusual in the arena of regulatory approvals which are ordinarily required before a transaction may be implemented.

This raises the question: what if, after implementing a major B-BBEE transaction, the commission raises concerns or refuses to register it?

COMMISSION'S POWERS

The commission is empowered under section 13J(4) of the act to institute proceedings in a court to restrain any breach of the act (which includes the regulations and, therefore, the obligation to register major B-BBEE transactions) or to obtain appropriate remedial relief.

In terms of regulation 18.3, the commission may, within 90 days

of the transaction being registered, assess the transaction to determine adherence to the act and advise the parties of any concerns.

A party issued with a notice is obliged to take steps to remedy the transaction within a reasonable period, failing which the commission may proceed to initiate an investigation in terms of section 13F(1)(d) of the act.

This effectively enables the commission to review and propose revisions to a transaction after it has been implemented. The consequences of this may be severe.

ACTIVE INVESTIGATIONS

Seventeen entities – including Eskom, MTN and Netcare – are being investigated by the commission for, among other things, possible violations of the act.

These investigations were initiated in 2017. No further information regarding them has been forthcoming, but they demonstrate that the commission is taking steps to enforce the B-BBEE Act.

In summary, the commission has extremely wide enforcement powers. Given its post-closing powers,

it would be advisable for parties considering B-BBEE transactions to engage reputable and experienced ratings agencies and legal and financial advisers before concluding such a transaction.

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