



The Mining Charter and BEE – step-by-step process

THE Mining Charter, published in August 2004, required all mining companies to achieve 26% black ownership within 10 years. The BEE Act and Codes followed in 2007 and applied to all sectors of the economy

Although first voluntary the BEE Act stipulates that the state is obliged to take the Codes into account when issuing licences or granting concessions. The Act was substantially amended in 2013 and this year, and the Codes have been updated.

Ownership provides 23.8% of the points. The new compliance target is that the voting rights of black shareholders are 25% plus 1.

Most of the large corporates have already been restructured. The focus has now turned to medium and smaller businesses. It will be a top priority for 2016.

How is this best achieved and what are the issues which need to be taken into account?

The first step is to choose a BEE partner: Should this be a black businessman who adds strategic value?

SPONSORED COLUMN

Michael Jackson



LAW TALK

If so, ideally it should be a black woman. Will the investor be active or passive? Should the employees be included through an employee trust? What about a charitable trust focused on black beneficiaries? New entrants attract more points.

Any trust, whether it be a family charitable or employee trust, needs to be carefully structured to comply with the Codes. Some trusts are formed to benefit communities, particularly if the company conducts operations in rural areas. In most cases, the BEE shareholders are best housed together in a company where the modified flow through principle of the Codes can be applied. This deems the company to be 100% black owned if the majority of the shares are indirectly held by black people.

The financing of a BEE transaction has become much more complicated. Vendor financing is required in many cases. Here the business provides financial support to the BEE investor: The debt attached to the investment held by the BEE shareholder needs to reduce, broadly, by 10% per year otherwise significant points are lost. The provisions of the Companies Act need to be carefully complied with if the company, itself, provides finance for the acquisition of its own shares.

Tax also has an important role to play. Selling shares incurs capital gains tax. Often, it is better to issue new shares. The corporate structuring provisions of the Income Tax Act can be used where the BEE shareholding is less than 30%. This can be achieved through the sale of a business between companies within a group, asset for share swaps and so on. Importantly, if employees receive dividends from an employee trust, the dividends are deemed to be income and income tax on the dividends must be deducted by the employer.

Whatever the structure, it needs to be flexible. Over the years, the BEE rules have changed and are likely to continue to change. The BEE participants must agree up front to any restructuring which may be required in the future to ensure that maximum points are earned

● Jackson is the managing partner at Cox Yeats Attorneys and head of the Commercial & Natural Resources Law Team. His specialist practice areas are Business Law, Natural Resources & Energy, and Empowerment & Transformation. He is a member of the International Bar Association and is listed in both the guide to the World's Leading Natural Resource Lawyers and the World's Leading Energy Lawyers. Call him at 031 536 8500, or e-mail mjackson@coxyeats.co.za.

COX | YEATS
attorneys