

Opinion

Introduction

1. The Practice Guide 1 of 2017 (“the Guide”) issued by the B-BBEE Commission (“the Commission”) on 31st March 2017 refers.
2. Pertinent to the effect of the Guide are the comments contained in clause 2 and 3. The Commission therein makes it clear that the Guide is issued as a non-binding guide and that it does not constitute a legal document or a ruling of the Commission. It is therefore nothing other than a view taken by the Commission.
3. In clause 11 to 13 of the Guide the Commission states as follows:
 - ‘11. *The Minister of Trade and Industry as the custodian of the B-BBEE Policy in its efforts to reduce the cost of compliance on micro and qualifying small businesses in South Africa has relieved black owned and controlled Exempted Micro-Enterprise (EME) and Qualifying Small Enterprise (QSE) from B-BBEE verification. Such entities are only required to obtain a sworn affidavit on an annual basis or a Companies and Intellectual Property Commission (CIPC) certificate in the case of an EME proving their B-BBEE Status.*
 12. *The introduction of this intervention brought about an exception to the extent to which entities can rely on the modified flow through principle to calculate black ownership. It is our view that this limits the calculation of 51% and 100% black ownership for EMEs and QSEs only through the application of the flow through principle, in line with the B-BBEE objectives outlined in section 2 of the B-BBEE Act.*
 13. *While we do recognise that the Codes have not explicitly provided limitations of the applications of the modified flow through principle in claiming the enhanced recognition status for black owned and controlled EMEs and QSEs, it must not be applied to circumvent the policy objectives. Therefore, it is the effect of the application of the principle that in our view limits its application to the extent that it would undermine the objectives of the Act.*
 14. *Therefore, the B-BBEE Commission in accordance with the requirements to advice (sic) on the interpretation of any provision of the Act as per section 13F(1)(a) and (3)(b) (ii) of the B-BBEE Act, hereby concludes that the modified flow through principle cannot be used to benefit from the enhanced recognition status reserved for 51% and 100% black owned EMEs and QSEs. Any contrary advice would be regarded as a misrepresentation of Entity B’s B-BBEE status which is an offence in terms of section 13O (1) (a) of the Act.’*

The Law

4. Section 13O(1)(a) of the *Broad-Based Black Economic Empowerment Act*, No. 46 of 2013 (“the Act”) provides as follows:

'A person commits an offence if that person knowingly misrepresents or attempts to misrepresent the broad-based black economic empowerment status of an enterprise; ...'

5. The term 'knowingly' is defined as follows:

“Knowing”, “knowingly” or “knows”, when used with respect to a person, and 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.'

6. The Codes of Good Practice Promulgated (“the Codes”) under section 9(1) of the Act set out, inter alia, the Framework for measuring Broad-Based Black Economic Empowerment. Statement 000 is apposite in this regard.

7. A stated objective of Statement 000¹ relating to the framework of broad-based black empowerment measurement is, inter alia, that the Statement indicates the qualifying thresholds to qualify as Exempted Micro-Enterprises (“EME”) or Qualifying Small Enterprises (“QSE”).

8. The criteria that set out the general measurement principals for measuring ownership are contained in paragraph 3 of Statement 100 which provide, inter alia, as follows:

3 KEY MEASUREMENT PRINCIPLES

3.1 General principles:

3.1.1 An Entity receives points for participation by Black people in its rights of Ownership, using the Ownership scorecard in paragraph 2. Black people may hold their rights of Ownership in a Measured Entity as direct Participants or as Participants through some form of Entity such as:

3.1.1.1 a Company as defined in the Companies Act of 2008 (as amended);

9. It is clear from this statement that Black people may hold their rights of ownership through, inter alia, a company.

10. The Eligibility of Qualifying Small Enterprises (“QSE”) is dealt with in paragraph 5 of Statement 000. In particular, paragraph 5.3.2 provides that '[a] *which is at least 51% Black*

¹ Paragraph 1.3

owned qualifies for Level Two B-BBEE recognition level.’ In terms of paragraph 5.1 a ‘Measured Entity with an annual Total Revenue of between R10 million and R50 million qualifies as a Qualifying Small Enterprise’.

11. Paragraph 3 of Statement 100 sets out, inter alia, the measurement principals when rights of ownership in Measured Entities are held through entities as contemplated in paragraph 3.1.1.1. In this regard two principles are apposite, i.e. the Flow-Through Principle and the Modified Flow-Through Principle, the contents of which are set out below:

3.3 FLOW-THROUGH PRINCIPLE

3.3.1 As a general principle, when measuring the rights of Ownership of any category of Black people in a Measured Entity, only rights held by natural persons are relevant. If the rights of Ownership of Black people pass through a juristic person, then the rights of Ownership of Black people in that juristic person are measurable. This principle applies across every tier of Ownership in a multi-tiered chain of Ownership until that chain ends with a Black person holding rights of Ownership.

3.3.2 The method of applying the Flow-Through Principle across one or more intervening juristic persons is as follows:

3.3.2.1 Multiply the percentage of the Participant’s rights of Ownership in the juristic persons through which those rights pass by the percentage rights of Ownership of each of those juristic persons successively to the Measured Entity; and

3.3.2.2 The result of this calculation represents the percentage of rights of Ownership held by the Participant.

3.4 MODIFIED FLOW-THROUGH PRINCIPLE

3.4.1 A Measured Entity applying this Modified Flow-Through Principle cannot benefit from the Exclusion Principle.

3.4.2 The Modified Flow-Through Principle applies to B-BBEE owned or controlled company in the Ownership of the Measured Entity.

3.4.3 In calculating Exercisable Voting Rights under paragraph 2.1.1, and Economic Interest under paragraph 2.2.1 of the Ownership scorecard the following applies:

3.4.3.1 Where in the chain of Ownership, Black people have a flow-through level of participation of at least 51%, and then only once in the entire

ownership structure of the Measured Entity, such Black participation may be treated as if it were 100% Black.

- 3.4.4 The Modified Flow-Through Principle may only be applied in the calculation of the indicators in paragraphs 2.1.1 and 2.2.1 of the Ownership scorecard. In all other instances, the Flow-Through Principle applies.
13. The Flow-Through Principle makes it clear that it applies if the ownership of Black people passes through juristic persons. It specifically states that if the rights of ownership of Black people pass through a juristic person, then the rights of ownership of Black people in that juristic person is measurable.
14. Item 3.4.2 makes it clear that the Modified Flow-Through Principle applies to B-BBEE owned or controlled companies. Item 3.4.3.1 makes it clear that where in the chain of ownership, people have a flow-through level of participation of at least 51% *'and then only once in the entire ownership structure of the Measured Entity, such Black participation may be treated as if it were 100% Black'*. [emphasis]
15. The use of the word *'may'* in the emphasized italics immediately above poses the question whether any party to the measurement process has any discretion in that regard. In my view no such person has any discretion whatsoever as the provision entails a mechanical power, which is in fact more in the nature of a duty. This can be illustrated by comparing the power to issue a dog license on payment and the power to grant it 'in deserving cases.' In the first case the purely mechanical power gives the licensing official no choice in the matter — and this means that the official is actually under a duty to issue a licence on payment of the fee. In the second, the power to identify 'deserving cases' entails choice, and is therefore discretionary.² In my view, in the event that the modified flow-through principle applies in the circumstances, any party to the measurement process has a duty to recognise the entity as 100% Black owned.³
16. O'Reagan J of the Constitutional Court summarised the position as such with regard to the common law requirements for criminal liability in the case of *S v Coetzee and Others*⁴ held as follows:

'The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the actus reus and

² Cora Hoexter *Administrative Law in South Africa* Second Edition p47

³ It is submitted that the BEE Commission and any verification agent with authority to verify scorecards under the auspices of an administrator is required to act in the public interest and that they perform a crucial public function and as they play a public role Administrative Law applies to them (see *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3)SA 344(W)

⁴ [1997] CC 2; 1997 (3) SA 527 (CC)- The constitutionality of two provisions of the *Criminal Procedure Act* 51 of 1977 were challenged, i.e. sections 245 and 332(5). The applicants attacked section 332(5) on the basis that it requires a director or servant of a corporate body that has committed an offence to prove, on a balance of probabilities, that he or she did not take part in the commission of the offence and could not have prevented it. The court unanimously held that the provision was unconstitutional as it altered the rights to presumption of innocence.

mens rea). This principle is ordinarily expressed in the Latin maxims **actus non facit reum nisi mens sit rea** and **nulla poena sine culpa**. At common law, the fault requirement is generally met by proof of intent (**dolus**) in one of its recognised forms, and, in rare circumstances, by the objective requirement of negligence (*culpa*). (See **Burchell and Milton, Principles of Criminal Law** (Juta, Cape Town, 1991) at 71 - 5; **Snyman Criminal Law 2 ed** (Butterworths, Durban 1989) at 25 - 9; **De Wet and Swanepoel Strafreg 4e uitgawe** (Butterworths, Durban 1985) at 103). As Kentridge AJ has mentioned in paragraph 94 of his judgment, the requirement of fault or culpability is an important part of criminal liability in our law. This requirement is not an incidental aspect of our law relating to crime and punishment, it lies at its heart. The state's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment. This principle has been acknowledged by our courts on countless occasions. For example, in **R v Wunderlich** 1912 TPD 1118, De Villiers JP held that:

*"There is no doubt that as a general rule a person is not criminally liable unless he has what is called mens rea. This is usually expressed by the maxim: **actus non facit reum nisi mens sit rea**. This is a sound rule, for a person is not to be subjected to the stigma and other consequences of a crime unless he had what is sometimes called a guilty mind. And from this it follows that in general a person is not criminally liable for an act or omission, unless he himself has committed or omitted the act or has authorised it."* (At 1121; cited with approval in **R v Weinberg** 1939 AD 71 at 82; **Ex parte Minister of Justice: in re R v Nanabhai** 1939 AD 427 at 429")

In the last hundred years, however, the legislature has enacted many provisions which stipulate that criminal liability will arise upon proof that a person has committed, or omitted to do, a particular act. These provisions contain either no mental element and are referred to as offences of absolute liability or provide the accused with a defence of due diligence, or something similar, in which case they are referred to as offences of strict liability (see Snyman, cited above, at 242 - 9; Burchell and Milton, cited above, at 315 - 8). The most important justification for these new forms of criminal offence is that their purpose is to ensure compliance with regulatory norms which may not otherwise be observed.

...

The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the state. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the state may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule. Where culpability is established, and the conduct is legitimately deemed unlawful, then no such breach arises.

What is also clear however, from an examination of our law and that of foreign jurisdictions is that it is widely recognised (both in our common law and in the law of other countries) that the culpability required to establish criminal liability need not in all circumstances be evidenced by direct intent (**dolus directus**) on the part of the accused to commit a criminal act. In our own law other forms of intent, such as **dolus eventualis**, have been recognised as sufficient to meet the requirement of

culpability, and in certain circumstances, the law has recognised that even negligence or culpa, can be sufficient to give rise to criminal liability. It is not necessary for the purposes of this case for us to determine the level of culpability required by section 11. Indeed the appropriate form of culpability may well be affected by the nature of the criminal prohibition as well as other factors. In addition, it should be borne in mind that significant leeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge. [emphasis]

18. In order for the provisions of section 130(1)(a) of the Act to apply, the accused must in the first instance have performed an unlawful Act and in the second instances must have intended to make a misrepresentation. In *R v Davies*⁵ Stratford JA held that an essential element of the *crimenfalsi* is 'a wilful perversion of the truth made with the intent to defraud.'
19. Thus in order to constitute a crime under the provisions of section 130(1)(a) of the Act, the accused must intend to wilfully pervert the truth with an intent to misrepresent the true state of affairs.

Application of the Law to the Guide

20. It is clear that the Codes sets out as an objective, inter alia, the Qualifying thresholds for QSE's. It is also clear from the Codes that an entity '*which is at least 51% Black owned qualifies for Level Two B-BBEE recognition level*'. It is also clear from the Codes that where in the chain of ownership, people have a flow-through level of participation of at least 51% '*and then only once in the entire ownership structure of the Measured Entity, such Black participation may be treated as if it were 100% Black*'. There is nothing ambiguous about this wording. In fact those dealing with measurement have a duty to treat such entities as 100% Black owned in the appropriate circumstances.
21. In terms of item 5.3.3 of Statement 000 a measured entity a QSE is only obliged to obtain a sworn affidavit on an annual basis confirming the follows: (1) annual Total Revenue of R50 million or less; and (2) level of Black Ownership.
22. I am of the view that where a person deponent an affidavit in circumstances where the turnover of the QSE concerned is less than R50 million and that QSE has a flow-through level of participation of at least 51% Black ownership and then only once in the entire ownership structure of the Measured Entity, and where in terms of the Codes the level of such Black participation in the QSE may be treated as if it were 100% Black, such deponent of an affidavit that the QSE is a Black controlled entity would not be committing a crime on the basis of a misrepresentation as there is no intent to make any misrepresentation outside of the parameters of the Codes and there is no unlawful act as the affidavit is made in accordance with the requirements of the Codes.

⁵ 1928 AD 163 at 170

23. The mischief that the Commissioner sought to deal with by the introduction of the affidavit procedure was to obviate the costs associated with the preparation of scorecards, nothing more nothing less.
24. Furthermore, nothing is contained in the Codes that render the modified flow-through principle void in circumstances where the enhanced recognition status reserved for 51% and 100% black owned EMEs and QSEs is granted. A QSE, in fact in terms of the Codes, qualifies for level 2 recognition level if *'it is at least 51% Black owned'* and its *'Black participation may be treated as if it were 100% Black'* in terms of the Codes.

Conclusion

25. It follows that in my opinion that the Guide is erroneous in law and that the Commission is misinformed for the reasons outlined above.
26. In light of the above any charge brought against any deponent of an affidavit to the effect that his or her company qualifies as a 51% black owned company using the modified-flow through principle would, in my opinion, be unsustainable.
27. I suspect that the Guide is a spurious attempt by the Commission to induce owners of QSE's to increase the effective ownership level of black participants in ownership structures. This suspicion is supported by the Commission's own wording in the Guide, viz. *'While we do recognise that the Codes have not explicitly provided limitations of the applications of the modified flow through principle in claiming the enhanced recognition status for black owned and controlled EMEs and QSEs, it must not be applied to circumvent the policy objectives.'*[emphasis] The policy objectives are set out in the Act and in the Codes and based on the principle of legitimate expectation⁶ the public are entitled to rely on the express provisions of the act and the Codes and not some capricious statement by the Commission on its views concerning the proper application of the Codes. It is for this very reason, I suspect that the Commission has sought to distance itself from a firm opinion on the matter by stating the following with respect to the application of the Guide: *'This Practice Guide is issued as a non-binding guide purely to assist with the interpretation to ensure consistency in the application of the Act.'*
28. In the premises, it is my opinion that the contents of the Guide are published with improper motive and there would be no reasonable or proper cause for instituting criminal proceedings against any person that is a deponent of an affidavit for misrepresentation in circumstances where the turnover of the QSE concerned is less than R50 million and, the QSE has a flow-through level of participation of at least 51% Black ownership in the ownership structure of the Measured Entity, and where in terms of the Codes, the level of such Black participation in the QSE may be treated as if it were 100% Black. This is the only legitimate policy that any deponent may rely on and not some capricious statement by the Commission.

⁶ Section 3(1) of the Promotion of Administrative Justice Act, No. 3 of 2000, says that administrative action which *'materially and adversely affects the rights or legitimate expectations of any person'* must be procedurally unfair.

29. I also note that if someone, actuated by an improper motive, sets the law in motion against another 'without reasonable or probable case', causing that person to be undeservedly prosecuted for a crime or to have to defend a civil suit (even if the action is not accompanied by an arrest or a seizure of property), the victim's reputation may be compromised.⁷ The law recognises this by making the '*actio iniuriarum*' available for what is known as '*malicious legal proceedings*'.⁸ In the appropriate circumstances the Commission may find itself with a claim for damages for malicious legal proceedings.
30. In the light of the Commission's Guide, however, I would suggest that the deponent of an affidavit should make it clear that the modified flow-through principal has been used in measurement of the QSE concerned and it is his or her sincere belief that the QSE qualifies as a level 2 B-BBEE recognition level.
31. I advise accordingly.

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⁷*Moaki v Reckett Coleman (Africa) Ltd* 1968 (3) SA 98 (A)

⁸Wille's *Principles of South African Law* 9th Edition p 1192