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The use of Non-Profit Companies in a B-BBEE context

Why are non-profit companies or NPC's getting more involved as initiatives in respect of the B-BBEE Codes?

Non-profit companies (NPCs) are becoming more involved as initiatives in respect of the B-BBEE Codes of Good Practice and Sector Codes (B-BBEE Codes) for two reasons:

- As shareholders of private companies;
- To obtain socio-economic development recognition for contributions as prescribed by Statement 500 of the B-BBEE Act.

Within the broader B-BBEE legal framework, the following provisions are relevant in respect of NPCs.

Requirements for qualifying as a shareholder in private companies

Paragraph 3.1 of Statement 100 of the B-BBEE Codes makes provision for a non-profit company or NPC as an indirect form of shareholding. The incorporation and legal requirements for the operation of NPCs are regulated by **Schedule 1 of the Companies Act 71 of 2008**. Under the previous revoked Companies Act, NPCs were referred to as section 21 companies. The current Companies Act specifically allows for NPCs to operate with or without members and to hold shares (securities) in a profit company.

All the B-BBEE Sector Charters recognise NPCs for the purpose of B-BBEE ownership concomitant with the provisions of the B-BBEE Codes.

An NPC that houses a Broad-based Ownership Scheme, or an Employee Share Ownership Programme that meets the criteria of **Annexe 100(B)** and **Annexe 100(C**) of Statement 100 of the Codes, respectively, or which is accompanied by a competent person's report, shall qualify for ownership recognition in terms of Statement 100 of the Codes.

The beneficiaries of the NPC, like beneficiaries in a trust, do not become individual owners of the shares, as the shares will be an asset of the NPC. Beneficiaries do not become directly involved in any operational activities of the incorporating business but rather indirectly via the fiduciaries whom the beneficiaries appoint. This form of shareholding is often referred to as "indirect shareholding'' where the **Flow-Through Principle** in terms of **paragraph 3.3 of Statement 100 of the Codes** applies.

Further, within the broader B-BBEE legal framework, the Minister of Trade and Industry published **Statement 004** in *Government Gazette* No. 38766 dated 06 May 2015 to deal specifically with ownership for Specialised Enterprises such as NPCs, Companies Limited by guarantee, etc. **Paragraph 2.4** of **Statement 004** reads: "Companies Limited by guarantee and Non-Profit Companies have no shareholding. They are not capable of evaluation of black ownership under Code series 100. **This does not imply that Companies Limited by guarantee and Non-Profit Companies sharing in the ownership of other enterprises cannot contribute towards black ownership of such enterprises as provided for in Statement 100**". Paragraph 2.5 of Statement 004 confirms the provisions of paragraph 2.4 of the Statement, namely that although NPCs generally do not have any beneficial ownership, **they are recognised** for "**sharing in the ownership of other enterprises as broad-based ownership schemes**".

It is also important to note that **Schedule 1 of the Companies Act** requires an NPC to apply all of its assets and income to advance its stated objectives and **may acquire and hold securities (shares) issued by a profit company** (Item 1(2)(b)(i) of Schedule 1).

This principle in relation to the activities of NPCs in terms of the Companies Act is incorporated and embedded in the B-BBEE Codes, B-BBEE Sector Codes, Verification Manual(s) and the specific Statement to the Codes published by the Minister of Trade and Industry.

Requirements for obtaining socio-economic development recognition

An NPC will qualify for socio-economic development contributions in terms of **Statement 500** of the Codes if **at least 75%** of the beneficiaries are black people and if its objective is to create economic sustainability for black communities, with at least 75% of the project beneficiaries being black communities or black people.

Examples for Socio-Economic Development projects:

- Development programmes for women, youth, people with disabilities and people living in rural areas;
- Support for healthcare and HIV/Aids programmes;
- Support for educational programmes, resources and materials at primary, secondary and tertiary education level, as well as bursaries and scholarships;
- Community training, skills development for unemployed people and adult basic education and training; or
- Support for arts, cultural or sports development programmes.

For this purpose, the non-profit company or N PC can, in respect of its own compliance, obtain a specialised affidavit prescribed by the Department of Trade and Industry to confirm its B-BBEE status. Specialised entities with a turnover of below R50 million will achieve level 1 B-BBEE status with 75% or more black beneficiaries.

Conclusion

It is important to clearly stipulate the incorporation objectives of non-profit companies or NPCs. An NPC established for B-BBEE ownership recognition purposes which operates as a collective share ownership programme should not be conflated with an NPC incorporated for SED purposes. The stated objectives in the MoI of such an NPC should clearly indicate whether the NPC would operate as an ownership programme or an SED project.

SERR Synergy specialises in unique ownership solutions, including the structuring of ownership NPCs. Our range of business solutions include business registrations and unique ownership structures.

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