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COLLECTIVE OWNERSHIP STRUCTURES FOR B-BBEE PURPOSES - HOW TO MAKE IT WORK



The current B-BBEE Codes of Good Practice make provision for Indirect Black-Ownership structures such as Employee Share Ownership Programmes (ESOP) and Broad-based Ownership Schemes (B-BOS).

These can be housed in various forms such as Employee Trusts, Community Trusts and Non-Profit Companies (NPCs).

This form of Ownership has been embraced by many entities seeking to comply with the Ownership requirement of B-BBEE legislation.

The B-BBEE Commission

Recent questions raised by the B-BBEE Commission about the legitimacy of these structures have caused some uncertainity regarding their future. Of prime concern to the B-BBEE Commission is how some of them have been structured and how they operate, leading to suspicions of fronting.

Observations and concerns noted by the Commission include the following:

- Beneficiaries are not clearly identifiable
- No economic benefits flow to beneficiaries within sustained periods
- Beneficiaries have no or very little involvement in the scheme
- The schemes do not have bank accounts of their own
- Where beneficiaries are unable to participate meaningfully due to low levels of education, etc. no attempt is made to develop such beneficiaries
- No excercisable voting rights for black beneficiaries or shareholders.

It is worth noting that the Commission does not wish to delegitimise indirect ownership structures, but would rather see that they adhere to the rules in Statement 100 of the Codes. It is further emphasised that a test of ***Ownership*** is to determine whether certain specific requirements are met, including the following:

- ***Economic interest*** – Named beneficiaries are entitled to receive economic benefits for the duration of a transaction in the form of dividends or distributions if so declared by the company.
- ***Voting rights*** – The beneficiaries of these structures must exercise voting rights at meetings of the Trust or NPC and provide a mandate for trustees and fiduciaries to act on their behalf.

Ensuring Compliance of the Ownership Scheme

The question is *how do companies make sure that their ownership structures are compliant?* Procurement officers of government institutions and state-owned enterprises are increasingly asking for substantial evidence of the ownership which is being claimed. In fact, we are seeing large private organisations also becoming increasingly vigilant in this regard. They seek to establish “substance over legal form”, where consideration is firstly given to whether the structure’s formation is legally correct, and secondly, whether it is being operated properly in compliance with the BEE requirements.

How to set up a legally sound Ownership Structure - The Legal form

A properly structured Broad-based Scheme will incorporate the following:

- The scheme must be registered and founding documents such as a Trust Deed, Memorandum of Incorporation and Governing Rules must be in place
- Although not legally required, Shareholders Agreements signed by representatives of all parties are advisable
- Share certificates to be issued by the measured entity
- *Shareholders or Beneficiaries are clearly identifiable*, i.e. ID documents provided
- Confirmation that Beneficiaries are aware that they are included in the Ownership Structure by signing a Notice of Acceptance Form
- Race declaration by black shareholders
- *Eligible people chosen as fiduciaries*, i.e. Trustees, Non-Profit Company Directors, etc.

Practical Steps for Management of the Scheme - Substance over form

After the agreement has been signed, the following steps must be taken to ensure that it is properly managed and adheres to corporate governance principles.

- The scheme must be managed separately from its investee.
- A bank account must be opened for the scheme.
- Dividends need to be paid into that account and distributed to named beneficiaries.
- Donations – where an entity has not declared dividends, they are encouraged to make reasonable donations into the account of their chosen vehicle.
- A Fiduciary of the structure must represent the structure at Shareholders meetings and, in line with proper Corporate Governance practices, minutes of shareholders meetings should be kept.
- Annual General Meeting to be held to which all beneficiaries are invited
- Only eligible candidates may be appointed as Fiduciaries, Trustees or Directors. Such appointees must have a proper understanding of their fiduciary responsibilities in managing the scheme.
- Internal Corporate Governance, such as proper record keeping, is necessary to ensure that the scheme is not compromised.

Conclusion

Whilst indirect-ownership schemes offer a viable alternative to achieve ownership requirements, it shouldn't be seen as a shortcut and a way to avoid proper ownership compliance. Those who opt for this route should have genuine intentions of seeing it through and this means following through on the advice and guidelines given as per the Codes. Indeed, the extensive media reporting of the BEE Commission's statements has raised awareness of and placed the spotlight on *Ownership Structures.* We are now increasingly seeing large private companies and parastatals scrutinising the BEE credentials submitted by their suppliers and service providers, even requesting proof of their authenticity. However, this should be of no concern if all guidelines have been followed. A broad-based scheme that is properly structured and operated will successfully pass any scrutiny and ultimately be a viable solution benefitting all those involved.

SERR Synergy *assists clients with various B-BBEE-related solutions*, including *ownership structures such as B-BBEE Trusts, Employee Share Ownership Programmes and Broad-based Ownership Schemes.* As an industry leader, we keep abreast of the BEE legislative amendments and our unique solutions support the government's goal of Ownership structures that have a broad-based focus and thus seek to empower more black people.

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