



## SUMMARY OF FINDINGS AND RECOMMENDATIONS IN THE MATTER OF B-BBEE COMMISSION // MTN GROUP LIMITED

**CASE NUMBER: 3/4/2017**

**Summary:** *Allegations - B-BBEE Commission initiated the investigation on allegations that the MTN Zakhele-Futhi Scheme does not appear to meet the requirements for black ownership and may not be compliant with the B-BBEE Act – investigation was to determine whether MTN Zakhele and the MTN Zakhele Futhi B-BBEE schemes meet the requirements for black ownership element and comply with the B-BBEE Act – Findings – MTN Zakhele-Futhi Scheme is contrary to the objectives of the B-BBEE Act – Recommendations – include amendments of the scheme to comply with the B-BBEE Act, training on B-BBEE and corporate governance, development of compliance programme, amongst other things – B-BBEE Commission may implement any action in terms of the B-BBEE Act if adverse findings are not remedied*

### **1. Introduction**

- 1.1 The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”) within the administration of the Department of Trade and Industry (“**the dti**”).
- 1.2 The B-BBEE Commission is empowered to conduct investigations on any matter arising from the application of the B-BBEE Act, including any B-BBEE initiative or a category of B-BBEE initiatives, in terms of section 13F (1) (d) and section 13J (1) of B-BBEE Act, read with regulation 15 of the Regulations Regulating the Administration and Implementation of the B-BBEE Act and the Functions of the B-BBEE Commission, 2016 (“B-BBEE Regulations”).

- 1.3 Without limiting the powers of the B-BBEE Commission, in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, the B-BBEE Commission may make a finding on whether any B-BBEE initiative involves a fronting practice.
- 1.4 In terms of regulation 15 (13) of the B-BBEE Regulations, before making its final findings, the B-BBEE Commission must notify the respondent in writing of the details of the adverse finding(s) and afford them an opportunity to respond to each or any finding within thirty (30) days, which on merit can be extended by a maximum period of ten (10) days.
- 1.5 In terms section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (a)-(c) of the B-BBEE Regulations, the finding(s) or recommendation(s) made by the B-BBEE Commission must be in writing, communicated to the complainant and published in a manner it may deem fit or appropriate, subject to section 13J (7) (b) of the B-BBEE Act.
- 1.6 This publication is therefore issued in line with these provisions of the B-BBEE Act and in the interest of the public.

## **2. *Brief description of the complaint***

- 2.1 The Minister of Trade and Industry issued the B-BBEE Regulations on 06 June 2016 which prescribe the process for complaints in terms of the B-BBEE Act. Regulation 15 specifically outlines the process from submission to resolution of a complaint, and further provides for both instances where the B-BBEE Commission responds to a complaint and where it investigates a complaint on its own initiative.
- 2.2 On 12 September 2016 MTN Group Limited launched the new B-BBEE Scheme named MTN Zakhele-Futhi Scheme, a broad-based black economic empowerment initiative which the company proposed to put in place when the existing MTN Zakhele Scheme that was launched in 2010 unwinds on 24 November 2016. The MTN Zakhele Futhi Scheme was valued at R9.9 billion which was intended to afford qualifying individuals and groups the opportunity to apply for shares in MTN Zakhele-Futhi (RF) Limited. In turn, MTN Zakhele-Futhi (RF) Limited would acquire approximately 4% equity in MTN Group Limited at a 20% discount.

- 2.3 The announcement of this B-BBEE Transaction raised a few questions from members of the public, relating to compliance with the ownership scorecard and overall negative impact on B-BBEE. After much consideration, the B-BBEE Commission in keeping with the requirements of the B-BBEE Act, decided to request a meeting with MTN Group Limited to discuss in detail the contents of this ownership transaction, to exclude speculations regarding non-compliance with the B-BBEE Act.
- 2.4 There were correspondences to MTN Group Limited followed by a meeting held between the B-BBEE Commission and MTN Group Limited on the 25<sup>th</sup> January 2017, which was also attended by MTN Group Limited's administrators of the MTN Zakhele-Futhi Scheme and legal advisors. This meeting was after a letter outlining concerns of the B-BBEE Commission with regard to the MTN Zakhele-Futhi Scheme was addressed to the Chairperson of MTN Group Limited on the 07<sup>th</sup> October 2016.
- 2.5 After the meeting of 25 January 2017, the B-BBEE Commission resolved to initiate an investigation in accordance with section 13F (1) (d) and section 13J (1) of the B-BBEE Act read with regulation 15 (8) of the B-BBEE Regulations, culminating in the issuance of a Notice to Investigate in the prescribed form on the 09 May 2017.
- 2.6 The investigation was to determine whether the MTN Zakhele and the MTN Zakhele Futhi B-BBEE schemes meet the requirements for black ownership elements and comply with the B-BBEE Act.
- 2.7 As required in terms of the B-BBEE Regulations, MTN Group Limited was afforded an opportunity to respond to the allegations during the investigation and to provide relevant information and documentation relating to the matter under investigation consistent with the rules relating to fair administration of justice processes applicable to investigations in line with regulation 15 (17) of the B-BBEE Regulations.
- 2.8 Further, regulation 15 (13) of the B-BBEE Regulations requires the B-BBEE Commission to afford the respondent in a matter an opportunity of **30 (thirty)** days to respond to any adverse findings, and MTN Group Limited was afforded the opportunity to respond to adverse findings in this regard.

### **3. Findings of the B-BBEE Commission**

3.1 Having investigated the allegations in terms of the mandate under section 13F (1) (d) and section 13J (1) of the B-BBEE Act, and after considering the response of MTN Group Limited submitted in respect of preliminary findings pursuant to regulation 15 (13) of the B-BBEE Regulations and subsequent meetings to clarify the responses, the B-BBEE Commission in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, has found that:

3.1.1 as a consequence of the unwinding of MTN Zakhele Scheme 2010, had the 2016 MTN B-BBEE Transaction i.e. the MTN Zakhele-Futhi Scheme not proceeded, the ownership through Historically Disadvantaged People (HDP) (as measured under the ICT Charter) in MTN Group Limited through MTN South Africa (Pty) Ltd, would have fallen to below the 30%;

3.1.2 as a result of the above, MTN Group Limited Board (supported by the views of the Board of MTN South Africa (Pty) Ltd) considered that it was in the best interests of the MTN Group Limited to implement the MTN Zakhele-Futhi Transaction in order to place it to meet (or position itself expeditiously to be able to meet, as the case may be), the on-going HDP requirements which apply to material Licenses and/or prospective Licenses in the MTN Group Limited through MTN South Africa (Pty) Ltd;

3.1.3 in the absence of a new B-BBEE transaction, MTN Group Limited's B-BBEE ownership, through MTN South Africa (Pty) Ltd, would fall below the 30% ownership target under applicable legislation (including the Electronic Communications Act), as well as the ICT Charter that requires the 30% black ownership, which would have adverse operational and regulatory consequences for MTN Group Limited;

3.1.4 the primary reason for the MTN Zakhele-Futhi transaction was to enable MTN Group Limited to meet its B-BBEE ownership target for its operation through MTN South Africa (Pty) Ltd and hence comply with its licensing and regulatory

requirements, and this is clearly articulated in all scheme documentation considered;

- 3.1.5 MTN Group Limited's B-BBEE scorecard, through MTN South Africa (Pty) Ltd, issued by Empowerdex Proprietary Limited dated 13 September 2016, MTN South Africa (Pty) Ltd.'s black ownership was 46.22 % (2015: 38.75%) and the black women ownership was 8.19 % (2015: 6.74%), which indicated that it exceeded the targeted ownership score by acquiring 21.28 points;
- 3.1.6 about 25% of the MTN Zakhele-Futhi Transaction was funded by equity from the black public and the balance is a mixture of vendor finance and third-party debt and the shares held by black people in MTN Group Limited through MTN Zakhele-Futhi (RF) Limited;
- 3.1.7 the current transaction was based on market value at a 20% discount; it is also predicated on the ability to service the debt on cash flow generation rather than the value of shares which can be influenced by things outside the business fundamentals and the provision of vendor financing demonstrates a level of commitment from the vendor;
- 3.1.8 the cash contribution by B-BBEE investors demonstrates commitment on their part which is a basis for building B-BBEE that can last and achieve intended objectives;
- 3.1.9 the MTN Zakhele Transaction of 2010 did not pay any dividends to its black shareholders for the duration of the scheme, but only paid the preference dividend to settle the preference share funding, and the MTN Zakhele-Futhi Transaction continues to place restrictions on the dividends for black shareholders;
- 3.1.10 based on the financial history of the MTN Zakhele Transaction in determining the ability to repay the debt by the black shareholders of MTN Zakhele-Futhi, the annual return received was above the average of 11.55% during 2010-2016,

but as the MTN Zakhele-Futhi Transaction is a fairly new transaction, previous return can be used as an indicator;

- 3.1.11 the control over the only asset of MTN Zakhele-Futhi (RF) Limited i.e. MTN shares, by its shareholders and directors, is severely restricted, notwithstanding that black people hold 100% of the voting rights of MTN Zakhele-Futhi (RF) Limited, in that there is no opportunity to exercise these rights in a manner that influences decision making, and the decisions are largely a function of MTN Group Limited through the Relationship Agreement and the Memorandum of Incorporation (MOI);
- 3.1.12 the cash flows emanating from that investment are entirely out of the MTN Zakhele-Futhi (RF) Limited shareholder's control as it is dependent on the performance of MTN Group Limited; and they are not involved in the operations of MTN Group Limited or MTN South Africa (Pty) Ltd, as there is no MTN Zakhele-Futhi (RF) Limited director who sits on MTN Group Limited Board, and the only control over MTN Group Limited's operations that is possibly exerted by MTN Zakhele-Futhi (RF) Limited is through the voting of its 4% shares at a MTN Group Limited general meeting;
- 3.1.13 the control or decisions in respect of the cash flow to MTN Zakhele-Futhi (RF) Limited are also largely beyond the control of MTN Zakhele-Futhi (RF) Limited shareholders and directors as they are governed by the Relationship Agreement and the MOI, and the prioritised debt repayment terms, and in addition, any decision by the MTN Zakhele-Futhi (RF) Limited Board in respect of dividends to shareholders, must first be ratified by MTN Group Limited;
- 3.1.14 the participation of black people in MTN Zakhele-Futhi (RF) Limited itself and in MTN Group Limited and MTN South Africa (Pty) Ltd is limited in that black people do not have decision making or voting rights that can substantially influence either entity and this includes the decision making powers of MTN Zakhele-Futhi (RF) Limited directors, which are also largely restricted by the Relationship Agreement and the MOI;

- 3.1.15 there is no scope for black shareholder involvement other than through the purchase and holding of MTN Zakhele-Futhi shares and ordinary shareholders are essentially passive investors in the scheme;
- 3.1.16 the MOI further restricts appointment of the Chairperson of the Board of MTN Zakhele-Futhi (RF) Limited only to persons appointed by MTN Group Limited on the board of MTN Zakhele-Futhi (RF) Limited during the empowerment compliance period;
- 3.1.17 the MOI also restricts the exercise of authority and powers under certain provisions to require the consent of at least one MTN Group Limited director on the board of MTN Zakhele-Futhi (RF) Limited; and
- 3.1.18 as a consequence, the transaction in its current form contains elements of fronting, in that the black shareholders and directors of MTN Zakhele-Futhi (RF) Limited, are restricted or inhibited from participating in the activities of MTN Zakhele-Futhi (RF) Limited, and consequently of MTN Group Limited and MTN South Africa (Pty) Ltd, which are at odds with the requirements of the B-BBEE Act.
- 3.2 MTN Group Limited has in its response to preliminary findings provided for in regulation 15 (13) of the B-BBEE Regulations expressed that it disagrees with the findings to the effect that the MTN Zakhele-Futhi Transaction constitutes a fronting practice or otherwise contravenes the B-BBEE Act, and stated further that it considers the MTN Zakhele-Futhi Transaction to comply with both the letter and the spirit of the B-BBEE Act, the then applicable B-BBEE ICT Sector Codes and the amended ICT Sector Codes promulgated on 7 November 2016.
- 3.3 MTN Group Limited provided reasons to substantiate their responses, which were further interrogated and discussed in a meeting prior to final findings being issued by the B-BBEE Commission.

#### **4. Recommendations of the B-BBEE Commission**

4.1 Despite disagreeing with the preliminary findings of the B-BBEE Commission, MTN Group Limited expressed willingness to remedy the concerns that were raised in the preliminary findings and presented the B-BBEE Commission with proposals to do so as part of its response to the findings. It being noted that the B-BBEE Commission's preliminary findings did not include any remedial recommendations when issued to MTN Group Limited.

4.2 Based on the above-mentioned findings of the B-BBEE Commission, taking into account MTN Group Limited's expressed willingness to amend certain aspects of the MTN Zakhele Futhi Scheme after preliminary findings were issued, and considering the need to address the apparent violation of the B-BBEE Act in a manner that advances transformation in the interest of the public, as well as measures to prevent similar transgressions from occurring in future, the B-BBEE Commission resolved to make the following recommendations:

4.2.1 MTN Group Limited must undertake that it shall within **30 (thirty)** days of these findings:

4.2.1.1 ensure that the MTN Zakhele-Futhi (RF) Limited Board has the ability to exercise shareholder's rights in a manner that influences decision making through amendments to the Relationship Agreement and the MOI, such rights to be exercised in respect of MTN Group Limited and its operating entity MTN South Africa (Pty) Ltd as the measured entity;

4.2.1.2 ensure that the MTN Zakhele-Futhi (RF) Limited Board has the right to nominate one of its members for appointment to the MTN Group Limited Board;

4.2.1.3 ensure removal of MTN Group Limited's veto with respect to the trickle dividend and the general dividend, which should only be subject to liquidity and solvency considerations and fiduciary obligations as allowed by company law, and ensure participation in control or decisions regarding to the cash flow to MTN Zakhele-Futhi (RF) Limited shareholders and directors;

- 4.2.1.4 engage with the MTN Zakhele-Futhi (RF) Limited Board with respect to MTN Group's financial results, strategy and other operational matters;
- 4.2.1.5 ensure that MTN Zakhele-Futhi (RF) Limited is allowed to appoint the chairperson among its members who need not be any of the MTN Group Limited directors;
- 4.2.1.6 ensure removal of restrictions imposed by MOI that the exercise of authority and powers under certain provisions by MTN Zakhele-Futhi (RF) Limited requires the consent of at least one MTN Group Limited director;
- 4.2.1.7 ensure that MTN Zakhele-Futhi (RF) Limited Board is appointed by the shareholders of MTN Zakhele-Futhi (RF) Limited, and not by MTN Group Limited; and
- 4.2.1.8 ensure removal of the requirement for the quorum on the board meeting of MTN Zakhele-Futhi (RF) Limited to require the MTN Group Limited director to be present;
- 4.2.2 MTN Group Limited and its operating entity, MTN South Africa (Pty) Ltd, must within **30 (thirty)** days institute disciplinary proceedings against its officials who were previously advised by the Compliance Division of the B-BBEE Commission in 2016 that the MTN Zakhele Futhi Scheme was non-compliant with B-BBEE Act but defied the advice and failed to align the MTN Zakhele Futhi Scheme with B-BBEE Act, leading to the initiation of the investigation by the B-BBEE Commission in 2017;
- 4.2.3 MTN Group Limited must within **30 (thirty)** days issue a public apology for defying the advice of the B-BBEE Commission by continuing with the MTN Zakhele Futhi Scheme that was non-compliant while recognising B-BBEE points, particularly as the initial correspondence to MTN Group Limited

regarding the concerns was sent directly to its Chairperson of the Board, which board is responsible for governance in the company, and such public apology must also be placed on the homepage of the website of MTN Group Limited for a period of **30 (thirty)** days;

4.2.4 MTN Group Limited must within **60 (thirty) days** of these final findings, ensure that its specified senior managers and the board of MTN Group Limited undergo training on the B-BBEE Act and corporate governance, respectively, with any institution accredited to provide such training under the laws of South Africa, and provide proof thereof to the B-BBEE Commission;

4.2.5 MTN Group Limited must within **60 (sixty) days** at its own cost also ensure that the board of MTN Zakhele-Futhi (RF) Limited undergo similar training on the B-BBEE Act and corporate governance, respectively, to enable the board members to be empowered to exercise the rights and duties flowing from the role as fiduciaries in MTN Zakhele-Futhi (RF) Limited, but also as fiduciaries in a broad-based scheme that has multiple participants;

4.2.6 MTN Group Limited must within **60 (thirty) days** develop a compliance programme for B-BBEE which must be approved by the B-BBEE Commission, and must report annually for the next **2 (two)** years on how MTN Group Limited is complying with the B-BBEE Act in respect of this scheme; and

4.2.7 MTN Group Limited must for a period of **2 (two)** years submit any future B-BBEE ownership scheme to the B-BBEE Commission for an advisory opinion before implementation to ensure compliance.

4.3 In the event that MTN Group Limited is not agreeable to implementing the recommendations made by the B-BBEE Commission above, which in the view of the B-BBEE Commission would remedy the adverse findings made, the B-BBEE Commission may implement any or all of the following actions:

4.3.1 refer the MTN Group Limited and its directors on the basis of B-BBEE fronting and/or misrepresentation of B-BBEE status to the appropriate division of the

South African Police Services or the National Prosecuting Authority in terms of section 13J (5) of the B-BBEE Act, for contravention of section 13O (1) (a), (c) and (d) of the B-BBEE Act, and any other law;

- 4.3.2 consider instituting proceedings in court to restrain any breach of the B-BBEE Act, including seeking an order to declare the B-BBEE transaction of MTN Group Limited a fronting practice or invalid, declare their current B-BBEE certificate invalid, and/or to obtain appropriate remedial relief, in terms of section 13 J (4) of the B-BBEE Act;
- 4.3.3 refer findings on this matter to National Treasury for the purposes of invoking processes outlined in the Preferential Procurement Policy Framework Regulations, as amended, or enter MTN Group Limited and MTN South Africa (Pty) Ltd, in the register of tender defaulters, so that they are barred from contracting or transacting any business with an organ of state or public entity for a period of up to 10 (ten) years;
- 4.3.4 refer the matter to the Independent Communication Authority of South Africa (ICASA) for an investigation of the conduct of MTN Group Limited and its directors and to recommend withdrawal of its licenses through its operating entity MTN South Africa (Pty) Ltd on the basis of misrepresentation and/or false B-BBEE credentials, without prejudice to other remedies under the law; and
- 4.3.5 refer findings to all organs of state and public entities to consider their discretion to cancel and contracts, awards or authorisations awarded to MTN Group Limited and its operating entity, MTN South Africa (Pty) Ltd in terms of section 13A of the B-BBEE Act.

## **5. Implementation of recommendations**

5.1 Reference to 'days' in the recommendations above means calendar days unless stated otherwise. The B-BBEE Commission is monitoring the implementation of recommendations. The B-BBEE Commission may adjust timelines as may be necessary to give effect to the recommendations.

## **6. Status of this publication**

6.1 This publication is prepared only for the purpose of publishing the findings and recommendations of the B-BBEE Commission on this matter in the interest of the public, but does not constitute an investigation report.

## **7. Conclusion**

7.1 The B-BBEE Commission has taken all due care in preparing this publication, and should there be any errors you wish to bring to our attention or should you require any clarity regarding the contents of this publication, please do not hesitate to contact us immediately.

7.2 This publication will also be available on the website of the B-BBEE Commission from the date of its release and it will be circulated to the public through channels that the B-BBEE Commission deems fit.

7.3 For any queries or further clarity on this publication, kindly feel free to contact us at the following contact details:

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Issued by the B-BBEE Commission  
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