



SUMMARY OF FINDINGS AND RECOMMENDATIONS IN THE MATTER OF Tebogo Dlamini // Jardine Lloyd Thompson (Pty) Ltd

CASE NUMBER: 4/2/2017

Summary: Complainant is Mr Tebogo Dlamini – Respondent is Jardine Lloyd Thompson (Pty) Ltd – Allegations - Mr Tebogo Dlamini, alleged inter alia that he was promised that he would be an indirect shareholder through an employee trust that is created for previously disadvantaged persons by Jardine Lloyd Thompson (Pty) Ltd, which has 5% shares in Jardine Lloyd Thompson (Pty) Ltd - Findings - No tangible proof and/or evidence was found to show that Mr Tebogo Dlamini was nominated and/or appointed as a beneficiary of the JLT Employee Share Trust as per his claim that he was made a beneficiary – however Jardine Lloyd Thompson (Pty) Ltd had misrepresented its B-BBEE status for the period 2015/2016 and 2016/2017, claiming to be 25.77% which was not the case using mandated investments - further found that D. Kalmin & Company, an entity that verified the B-BBEE status of Jardine Lloyd Thompson (Pty) Ltd issued 2 (two) B-BBEE certificates to Jardine Lloyd Thompson (Pty) Ltd without following procedures outlined in the Verification Manual - Recommendations – remedial recommendations made, including public apology.

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”).
- 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 30 (thirty) days, which on merit can be extended by a maximum period of 10 (ten) 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 Mr Tebogo Dlamini (hereinafter also referred to as Complainant) lodged a complaint with the B-BBEE Commission on or about the 06 February 2017 against Jardine Lloyd Thompson (Pty) Ltd (hereinafter also referred to as Respondent) alleging practices that in his view are contrary to objectives of the B-BBEE Act.
- 2.2 The nature of Mr Tebogo Dlamini’s complaint is summarised for the purposes of this publication as follows:

- 2.2.1 that on about 28 October 2011 the Complainant entered into a contract of employment as an Internal Broker with Jardine Lloyd Thompson SA (Pty) Ltd (herein referred to as Respondent) a company duly registered in accordance with the company laws of South Africa under registration number **2010/018585/07**, represented by a certain Mr Kenneth Bowden, who informed the Complainant that he would become an indirect shareholder in the Respondent through the employee's trust ownership scheme;
- 2.2.2 that on or about June 2016 the Complainant was dismissed as an employee of the Respondent, alternatively on the 25 July 2016 the Complainant and Respondent settled their employment relationship wherein, they agreed to terminate their employment relationship and the Complainant was no longer an employee of the Respondent;
- 2.2.3 that upon conclusion of the termination of employment agreement, the Complainant demanded that the Respondent pay him his benefits in respect of him as a beneficiary of the employee trust that owns 5% in the Respondent;
- 2.2.4 that the Complainant was never provided with any documentation recording his rights and or benefits as a beneficiary of the employee trust to the day of his dismissal, however the Respondent's tender documents presentation indicates the employee trust as having a 5% equity ownership in the entity;
- 2.2.5 that the Complainant on about 29 August 2016 through his attorney, Biccari Bollo Mariano INC, addressed correspondence to Mr Danny Buitendach, in his capacity as Executive Director of the Respondent and Mr Andrew Chislett, in his capacity as Chief Executive Officer of the Respondent, requesting reasons why the Complainant has not been conferred any benefits due to him as a beneficiary of the employee trust, which held 5% equity ownership in the Respondent;

- 2.2.6 that in response to the correspondences alluded above, Mr Buitendach indicated to the Complainant that he was never promised to be the beneficiary of the employee trust;
- 2.2.7 that as a results of the response received from the representative of the Respondent, Mr Buitendach, the Complainant instructed his attorneys to institute legal action against the Respondent. Summons were issued against the Respondent and the matter is still pending in court; and
- 2.2.8 the Complainant is of the opinion that the Respondent has been misrepresenting its B-BBEE status to the public by presenting its self as having a 5% equity ownership for previously disadvantages employees through an employee trust.
- 2.3 On assessment, the allegations pointed to a possible fronting practice, an initiative which is defined as any transaction, arrangement or any other act or conduct that directly or indirectly undermines or frustrates the achievement of the B-BBEE Act, or the implementation of any of its provisions and misrepresentation of B-BBEE status of Jardine Lloyd Thompson (Pty) Ltd. It was concluded that there is merit to investigate the matter in line with regulation 15 (4) (a) of the B-BBEE Regulations.
- 2.4 The investigation ensued and Jardine Lloyd Thompson (Pty) Ltd was notified of the complaint in accordance with regulation 15 (4) (d) of the B-BBEE Regulations, and afforded an opportunity to respond to the allegations made and to provide specified information and/or documentation for the purposes of the investigation. Jardine Lloyd Thompson (Pty) Ltd cooperated with the investigation and the response and information submitted were duly considered.
- 2.5 During the investigation, it was identified that the verification certificates of Jardine Lloyd Thompson (Pty) Ltd were issued by D. Kalmin and Company and this formed part of the investigation in terms of which information was obtained and assessed to determine the source of ownership points that were allocated to Jardine Lloyd Thompson (Pty) Ltd for the relevant verification periods.

- 2.6 Preliminary findings were formulated and issued to Jardine Lloyd Thompson (Pty) Ltd in terms of which Jardine Lloyd Thompson (Pty) Ltd was afforded a period of thirty (30) days to respond to the adverse findings as required in terms of regulation 15 (13) of the B-BBEE Regulations. Jardine Lloyd Thompson (Pty) Ltd provided a response to the findings.
- 2.7 Further, as the B-BBEE Commission did not find evidence to support that Mr Tebogo Dlamini was a beneficiary in the employee share trust of the Respondent, Mr Tebogo Dlamini was also notified in writing of this preliminary outcome and afforded an opportunity to respond and provide additional information, if any, to this effect. Mr Tebogo Dlamini duly responded.
- 2.8 During the investigation process, the B-BBEE Commission was informed that there was a transaction involving the acquisition of Jardine Lloyd Thompson (Pty) Ltd and this was noted, however, it did not affect the process and/or the cooperation of the parties with the investigation.

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, considered the discussions in the meeting held with the Respondent on the 14th of May 2019 and response of the Respondent to the preliminary findings in a letter dated 07th May 2019 in line with regulation 15 (13) of the B-BBEE Regulations, the B-BBEE Commission in terms of section 13J (3) read with regulation 15 (4) (g) of the B-BBEE Regulations made the following final findings:
- 3.1.1 There is no evidence that Mr Tebogo Dlamini and or the Employee Share Trust were used for any B-BBEE points allocated to Jardine Lloyd Thompson (Pty) Ltd for black ownership during any of the B-BBEE verification periods of the entity since 2014 to date;
- 3.1.2 There is no evidence that the Complainant, Mr Tebogo Dlamini was entitled to be a beneficiary at the time he commenced work due to the fact that when he

commenced working at Jardine Lloyd Thompson (Pty) Ltd on about 28 October 2011, the entity had not yet established any employee trust nor entered into any B-BBEE transaction. Furthermore, the contract of employment entered into by Mr Tebogo Dlamini and Jardine Lloyd Thompson (Pty) Ltd does not indicate any provision wherein Mr Tebogo Dlamini would become an automatic beneficiary of any employee trust of Jardine Lloyd Thompson (Pty) Ltd;

- 3.1.3 The allegation that The Employee Share Trust owned 5% shareholding in Jardine Lloyd Thompson (Pty) Ltd and that Mr Dlamini was a beneficiary of said trust, points to a contractual and shareholder dispute in that it allegedly arises from a tacit conduct, which can be referred to courts as it falls outside the jurisdiction of the B-BBEE Commission, primarily as the said employee trust was not used by Jardine Lloyd Thompson (Pty) Ltd to claim B-BBEE ownership points;
- 3.1.4 Jardine Lloyd Thompson (Pty) Ltd misrepresented its B-BBEE status through the B-BBEE certificates issued by D. Kalmin & Company for the verification period 2015/2016 and 2016/2017 in that it claimed to be 25.77% black owned while in fact it had only 20% black ownership, as such, the conduct of which points to misrepresentation of B-BBEE status in a manner described in section 13O (1) (a) and (b) of the B-BBEE Act, which attract criminal sanctions;
- 3.1.5 Jardine Lloyd Thompson (Pty) Ltd used the exclusion principle for Mandated Investments to claim the additional 5.77% black ownership contrary to paragraph 7.1.9.6.2 of the Verification Manual, which requires specific information to substantiate their claim, therefore, the failure by Jardine Lloyd Thompson (Pty) Ltd to provide the required information to D. Kalmin & Company renders both B-BBEE certificates issued for 2015/2016 and 2016/2017 invalid on the basis that the certificates were issued by D. Kalmin & Company contrary to the Verification Manual which prescribes the procedure for validating the exclusion principle for Mandated Investments;

- 3.1.6 The legal opinion provided to Jardine Lloyd Thompson (Pty) Ltd by Mr Janisch of the Caird Group regarding the use of the exclusion principle for Mandated Investments was issued on 01 December 2016 and confirmed on 4 December 2016, two months after the 2016/2017 B-BBEE certificate was issued and a year following the issuing of the 2015/2016 B-BBEE certificate. Therefore, it cannot be argued that any reliance to the use of Mandated Investments was based on the legal opinion of Mr Janisch in that at the time the legal opinion was issued, Jardine Lloyd Thompson (Pty) Ltd had already been issued and trading with both the 2015/2016 and 2016/2017 B-BBEE certificates;
- 3.1.7 Jardine Lloyd Thompson (Pty) Ltd traded with both the 2015/2016 and 2016/2017 B-BBEE certificates issued by D. Kalmin & Company, which certificates are invalid for the purposes of compliance with the B-BBEE Act on the basis that D. Kalmin & Company failed to obtain confirmation of all Mandated Investments and also inspect share register for all Mandated Investments as required by the Verification Manual when claiming black ownership through the exclusion principle for Mandated Investments;
- 3.1.8 Jardine Lloyd Thompson (Pty) Ltd may have unduly benefited financially using black ownership through Mandated Investments that is non-existent or was not substantiated as required;
- 3.1.9 Although no B-BBEE ownership points were claimed from the Employee Share Trust, Jardine Lloyd Thompson (Pty) Ltd has been misleading the market, its employees and or clients by including 5% of the Employee Share Trust on its ownership structure despite not having legally transferred the 5% shares to the Employee Share Trust prior to the 1st of January 2017, which is/was the date on which the Employee Share Trust was supposed to be fully effective;
- 3.1.10 Even though no ownership points were claimed from the Employee Share Trust, the B-BBEE Commission has found that the terms and conditions of the Employee Share Trust deed are contrary to the objectives of the B-BBEE Act requirements set out in Codes of Good Practice for ESOPS, notwithstanding the

fact that the current owners of Jardine Lloyd Thompson (Pty) Ltd intend to dissolve the trust in question; and

3.1.11 The 2015/2016 B-BBEE certificate issued to both Jardine Lloyd Thompson (Pty) Ltd and Eikos Risk Applications (Pty) Ltd were invalid on the basis that the entities have separate legal persona and they were required to undergo separate B-BBEE verification process and be issued with two separate B-BBEE certificates.

3.2 Further to the above in respect of this investigation, the B-BBEE Commission identified the following on the part of D. Kalmin & Company as the verification agency and/or professional that conducted the verification in respect of the Respondent:

3.2.1 that the issuing of the two B-BBEE certificates to Jardine Lloyd Thompson (Pty) Ltd for the verification periods 2015/2016 and 2016/2017 without proper verification, is contrary to SASAE 3502 which bestows a duty upon Auditors to fully conform to ethical requirements and to plan and perform their engagements in a manner that would ensure that they obtain limited assurance about whether the issued B-BBEE certificate is free from material misstatement; an obligation that Mr. D. Kalmin, as an Auditor affiliated to the IRBA, and D. Kalmin & Company ought to have known;

3.2.2 that Mr. D. Kalmin and D. Kalmin & Company, failed to use and apply professional scepticism and due diligence in performing verification function, assessing the information and issuing the apparent invalid B-BBEE certificates to Jardine Lloyd Thompson (Pty) Ltd, in a manner that displays a total disregard of the transformation ideals and objectives of the B-BBEE Act as well as the verification methodology prescribed by the verification manual;

3.2.3 that Mr. D. Kalmin and D. Kalmin & Company failed to consider the guidance as well as the methodologies for verification of B-BBEE Codes of Good Practice which would have ensured that they perform their verification in accordance with the applicable criteria and minimised any information that would lead to the

issuance of an invalid B-BBEE certificates to Jardine Lloyd Thompson (Pty) Ltd, and failed to verify the 25.77% black ownership claimed by an entity that is obviously 20% black owned;

3.2.4 that the conduct of Mr. D. Kalmin and D. Kalmin & Company may amount to an offence in terms of 13O (2) of the B-BBEE Act, which provides that a *verification professional who becomes aware of the commission of, or any attempt to commit, any offence referred to in sub-section (1) and fails to report it to an appropriate law enforcement agency, is guilty of an offence;*

3.2.5 that the conduct of Mr. D. Kalmin and D. Kalmin & Company may further amount to an offence in terms of section 13O 1 (a) of the B-BBEE Act, in that they have misrepresented the B-BBEE status of Jardine Lloyd Thompson (Pty) Ltd in issuing the B-BBEE certificates for the verification periods 2015/2016 and 2016/2017 without properly verifying the information submitted;

3.2.6 that the conduct of Mr. D. Kalmin and D. Kalmin & Company falls short of meeting the required standard for verification professionals and is contrary to the objectives of the B-BBEE Act; and

3.2.7 that Mr D Kalmin and D. Kalmin & Company issued the same B-BBEE certificate to Jardine Lloyd Thompson (Pty) Ltd and Eikos Risk Applications (Pty) Ltd for the period 2016/2017 without following proper processes of consolidation of B-BBEE certificate.

3.3 Ordinarily the B-BBEE Commission would issue preliminary findings to implicated parties which in this matter is the late Mr Kalmin of D. Kalmin & Company, who is the person that issued the certificates, however, it did not deem it necessary at the time to notify Mr Kalmin and/or D. Kalmin & Company of the preliminary findings on the basis that Mr Kalmin has since passed away and the B-BBEE certificates in question have expired.

3.4 However, due to the fact that the conduct of Mr Kalmin led to Jardine Lloyd Thompson (Pty) Ltd having to trade with invalid B-BBEE certificates, it is only fair that D. Kalmin &

Company as the entity is made aware of this to also assist the entity to ensure that measures are put in place to prevent similar conduct from occurring in future within the entity.

4 Recommendations of the B-BBEE Commission

4.1 Based on the final findings outlined above, the B-BBEE Commission made the following remedial recommendations, which are considered appropriate to address this matter, in the interest of the prejudiced party, the public and the objectives of the B-BBEE Act:

4.1.1 Jardine Lloyd Thompson (Pty) Ltd must within **10 (Ten) days** of the findings issue a written apology to all its employees and entities which it misrepresented the ownership structure of Jardine Lloyd Thompson (Pty) Ltd reflecting 5% shareholding of the Employee Share Trust, which was never legally transferred to the Employee Share Trust, the contents of which must be approved by the B-BBEE Commission;

4.1.2 Jardine Lloyd Thompson (Pty) Ltd must within **10 (Ten) days** of the findings issue a written public statement apologising that the entity traded with invalid B-BBEE certificates for the measured periods 2015/2016 and 2016/2017 which reflected the entity as 25.77% black owned, while in actual fact it was 20% black owned, the contents of which must be approved by the B-BBEE Commission, and must place the public statement on the website of Jardine Lloyd Thompson (Pty) Ltd for a minimum period of **30 (Thirty) days**; and

4.1.3 Jardine Lloyd Thompson (Pty) Ltd must make a written undertaking under oath that it will fully abide by the B-BBEE Act and seek advice from the B-BBEE Commission in respect of ownership initiatives relating to B-BBEE, and such undertaking must be submitted to the B-BBEE Commission within **10 (Ten) days** of the findings.

- 4.2 As the remedial recommendations are aimed at addressing the offending conduct, it was made clear that in the event that Jardine Lloyd Thompson (Pty) Ltd is not willing to effect the remedial recommendations made by the B-BBEE Commission above, which in the view of the B-BBEE Commission are reasonable given the adverse findings, the B-BBEE Commission will consider an appropriate cause of action in pursuit of the objectives of the B-BBEE Act, which may include, instituting proceedings in a court in terms of section 13J (4) of the B-BBEE Act and or referring this matter to any regulatory body or law enforcement authority for action to be taken against Jardine Lloyd Thompson (Pty) Ltd. Jardine Lloyd Thompson (Pty) Ltd has agreed to implement the above remedial recommendations.
- 4.3 In line with regulation 15 (12) (a)-(c) of the B-BBEE Regulations, any findings or recommendations made by the B-BBEE Commission in respect of an investigation must be in writing, communicated to the complainant, and published in a manner that the B-BBEE Commission deems appropriate, including on its website. Mr Tebogo Dlamini has been notified in writing of the outcome of this complaint.
- 4.4 The B-BBEE Commission has resolved to publish the findings in accordance with section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (c) of the B-BBEE Regulations in the interest of the public.

5. *Implementation of recommendations*

- 5.1 Reference to 'days' in the recommendations above means calendar days unless stated otherwise. The B-BBEE Commission may adjust timelines as may be necessary to give effect to the recommendations. The final findings, with recommendations, were issued on 06 September 2019. The B-BBEE Commission monitored the implementation of 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 highlight 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

17 October 2019