



FINDINGS AND RECOMMENDATIONS IN THE MATTER OF B-BBEE COMMISSION // FRS WAREHOUSING CC T/A EPS COURIER SERVICES

CASE NUMBER: 10/6/2017

Summary: *Allegations - B-BBEE Commission initiated investigation pursuant to information received on possible misrepresentation of B-BBEE status by FRS Warehousing CC t/a EPS Courier Services – trading with B-BBEE certificate that indicates 100% black ownership when the entity is owned 100% by a white male South African - Findings – misrepresentation of B-BBEE status and use of false credentials for ownership to obtain higher B-BBEE level – Recommendations – referral to CIPC and SANAS, and pursue section 13J (4) of the B-BBEE Act for appropriate relief.*

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 Upon investigations, the B-BBEE Commission may in terms of section 13J (7) (a) of the B-BBEE Act, read with regulation 15 (12) (c) of the B-BBEE Regulations, publish any finding or recommendation it has made in such a manner as it may deem fit.
- 1.4 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 The B-BBEE Commission initiated an investigation for possible misrepresentation of B-BBEE status based on allegations and supporting information submitted by Mr Keith Levenstein of EconoBEE that FRS Warehousing CC t/a EPS Courier Services (“EPS Courier Services”) engaged in conduct that is contrary to the objectives of the B-BBEE Act by knowingly presenting FRS Warehousing CC t/a EPS Courier Services misleadingly as a 100% black-owned entity, and further that the entity fraudulently obtained a B-BBEE level 7 (seven) based on incorrect ownership credentials, when the entity is 100% owned by Mr Evert Philip Serfontein, a white South African male.
- 2.3 According to the B-BBEE Act, “**black people**” is a generic term which means Africans, Coloureds and Indians (a) who are citizens of the Republic of South Africa by birth or descent; or (b) who became citizens of the Republic of South Africa by naturalisation (i) before 27 April 1994; or (ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.
- 2.4 Based on the response provided to the B-BBEE Commission by Lee and McAdam Attorneys, legal representatives of EPS Courier Services, Mr. Evert Philip Serfontein was apparently informed by his mother that his real father is actually a coloured man and that his white father is not really his father. Following the meeting, Lee and McAdam Attorneys

stated and confirmed that they would provide the B-BBEE Commission with information and proof to substantiate their averment that Mr. Evert Philip Serfontein is actually a black man and is entitled to benefits under the B-BBEE Act.

- 2.5 However, EPS Courier Services failed to submit such proof even with sufficient time given and several reminders by the B-BBEE Commission. Therefore, the averment by Lee and McAdam Attorneys that Mr. Evert Philip Serfontein is a black man remains unsubstantiated with all documents indicating clearly that Mr Evert Philip Serfontein is a white South African male who does not qualify for a benefit under the B-BBEE Act.
- 2.6 Lee McAdam Attorneys had further indicated that Mr. Evert Philip Serfontein is in the process of seeking a declaratory order to confirm him as a black person and that they will cite the B-BBEE Commission in that process, however, that has to date not occurred.

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 responses to the preliminary findings from EPS Courier Services and Mr. Evert Philip Serfontein, 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, made the following findings:

- 3.1.1 EPS Courier Services and Mr. Evert Philip Serfontein claimed 100% black ownership in EPS Courier Services for the purposes of the B-BBEE certificate No. GEN/31/10/2016/001 issued by D. Kalmin and Company on 31 October 2016 for B-BBEE compliance, when such is not the case as Mr Evert Philip Serfontein is a white male South African, who according to the records of the Companies and Intellectual Property Commission (CIPC) was at the time of the issuance of the said B-BBEE certificate the sole member of EPS Courier Services;

- 3.1.2 EPS Courier Services and Mr. Evert Philip Serfontein traded with a B-BBEE certificate No. GEN/31/10/2016/001 issued by D. Kalmin and Company on 31 October 2016, which was based on false information, and the said B-BBEE

certificate is invalid for the purposes of compliance with the B-BBEE Act;

- 3.1.3 EPS Courier Services and Mr. Evert Philip Serfontein misrepresented the B-BBEE status of the entity through the B-BBEE certificate No. GEN/31/10/2016/001 issued by D. Kalmin and Company on 31 October 2016 and may have unduly benefitted financially using black ownership credentials that are non-existent;
- 3.1.4 EPS Courier Services and Mr. Evert Philip Serfontein misrepresented the B-BBEE status of EPS Courier Services in order to improve the entity's B-BBEE status;
- 3.1.5 EPS Courier Services and Mr. Evert Philip Serfontein knowingly operated on the false B-BBEE status for the 2016/2017 period, claiming that the entity has 100% black ownership notwithstanding the fact that Mr. Evert Philip Serfontein is a white male and does not fall within the definition of black people under the B-BBEE Act;
- 3.1.6 EPS Courier Services and Mr. Evert Philip Serfontein knowingly provided false information to the B-BBEE Commission when they claimed that Mr. Evert Philip Serfontein is black but have to date failed to provide proof thereof since the 30th of May 2017 when this claim was made to the B-BBEE Commission, thus confirming that Mr. Evert Philip Serfontein is a white male who is not entitled to benefit in terms of the B-BBEE Act;
- 3.1.7 EPS Courier Services and Mr. Evert Philip Serfontein provided false information to D. Kalmin and Company in order to secure an improved B-BBEE status and benefits associated with compliance of the B-BBEE Act;
- 3.1.8 EPS Courier Services and Mr. Evert Philip Serfontein acted dishonestly by continuing to use the B-BBEE certificate No. GEN/31/10/2016/001 issued by D. Kalmin and Company on 31 October 2016 even after it had been cancelled by D. Kalmin and Company, who communicated the cancellation in writing;

- 3.1.9 EPS Courier Services and Mr. Evert Philip Serfontein hindered and obstructed the B-BBEE Commission when it was exercising its powers and performing its duties in that they failed and neglected to cooperate with the B-BBEE Commission when it was assessing and investigating this matter;
- 3.1.10 Mr. Evert Philip Serfontein acted dishonestly, unethically and improperly with total disregard of his fiduciary duties as a member of in EPS Courier Services in a manner that may amount to a contravention of the Close Corporations Act, and points to him possibly being unfit to hold any membership or directorship in any entity; and
- 3.1.11 The conduct of EPS Courier Services and Mr. Evert Philip Serfontein outlined above is contrary to the objectives of the B-BBEE Act, and may amount to an offence in terms of section 13O (1) (a)-(b) of the B-BBEE Act for misrepresentation of B-BBEE status and misrepresenting or providing false information to the verification professional, as well as section 13N (3) (a) and (c) of the B-BBEE Act for hindering and obstructing the B-BBEE Commission and knowingly providing false information.
- 3.2 During the investigation of this matter the B-BBEE Commission identified conduct that is contrary to the B-BBEE Act on the part of the verification agency, and after communicating the issues to D. Kalmin and Company on the 22nd of February 2018 and afforded them the opportunity to respond, the B-BBEE Commission made the following conclusions on the part of D. Kalmin & Company:
- 3.2.1 that the issuing of a B-BBEE certificate No. GEN/31/10/2016/001 to EPS Courier Services on 31 October 2016 without proper verification, is contrary to South African Standard on Assurance Engagements 3502, Assurance Engagements on Broad-Based Black Economic Empowerment Verification Certificates (“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 D. Kalmin and Company ought to have known;

- 3.2.2 that D. Kalmin and 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 certificate No. GEN/31/10/2016/001 to EPS Courier Services, 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 dti's** Framework for Accreditation and Verification by all Verification Agencies, Government Gazette No. 31255 of 18 July 2008 ("Verification Manual");
- 3.2.3 that D. Kalmin and 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 certificate No. GEN/31/10/2016/001 to EPS Courier Services, and failed to verify the 100% black ownership claimed by an entity that is obviously white owned;
- 3.2.4 that the conduct of D. Kalmin and Company of failing to report the matter on becoming aware that the B-BBEE certificate No. GEN/31/10/2016/001 is based on incorrect information, and merely cancelling the said B-BBEE certificate, 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 D. Kalmin and Company may further amount to an offence in terms of section 13O 1 (a) of the B-BBEE Act, in that they may have misrepresented the B-BBEE status of EPS Courier Services in issuing the B-BBEE certificate No. GEN/31/10/2016/001 of 31 October 2016 without properly verifying the information submitted; and

- 3.2.6 that the conduct of D. Kalmin and Company falls short of meeting the required standard for verification professionals and is contrary to the objectives of the B-BBEE Act.
- 3.3 FRS Warehousing CC t/a EPS Courier Services and Mr. Evert Philip Serfontein did not cooperate during this investigation and they failed to produce the required information in a manner that hindered the investigation process resulting in significant delays in this matter. EPS Courier Services only started cooperating with the B-BBEE Commission when the investigation was advanced, with Mr Evert Phillip Serfontein expressing an apology for the conduct, that in his view was not intended to violate the B-BBEE Act.
- 3.4 The B-BBEE Commission may, if it is of the view that a matter can be resolved through alternative dispute resolution mechanism, facilitate a resolution of a matter or refer a matter for alternative dispute resolution to any appropriate dispute resolution process in terms of regulation 15 (11) of the B-BBEE Regulations.
- 3.5 The B-BBEE Commission did not consider this mechanism upon investigation on the basis that EPS Courier Services failed to cooperate with the B-BBEE Commission even prior to the investigation being initiated and later advanced reasons, including ill-health for not cooperating fully with the B-BBEE Commission.
- 3.6 Further, EPS Courier Services also did not request alternative dispute resolution in this regard, and instead indicated their intention to approach the High Court for a declaratory order as Mr Evert Phillip Serfontein still believes and maintains that he is a black man.

4. Recommendations of the B-BBEE Commission

- 4.1 Based on the above-mentioned findings, the B-BBEE Commission has made the following recommendations to advance the objectives of the B-BBEE Act in the interest of the public:
- 4.1.1 refer the matter to CIPC for an investigation to be conducted into the affairs of EPS Courier Services and the conduct of Mr. Evert Philip Serfontein, and the extent to which their conduct could be applicable to any other entity in which Mr. Evert Philip Serfontein is a member, with a view of also obtaining a declaration

of him as delinquent or unfit to hold directorship or membership in any entity without prejudice to other remedies under the law;

4.1.2 in terms of section 13J (4) of the B-BBEE Act, consider instituting proceedings in a court to restrain any breach of the B-BBEE Act or to obtain appropriate remedial relief arising from the conduct, including an order to declare invalid any contract entered into, between EPS Courier Services and any other parties on the basis of the B-BBEE information so misrepresented; and

4.1.3 refer D. Kalmin and Company as an entity to the regulatory body for auditors to investigate the practice and impose appropriate remedial action, noting that D. Kalmin and Company is not accredited with South African National Accreditation Systems (SANAS) and that it is no longer permitted to conduct any verification effective from 31 December 2016.

4.2 The B-BBEE Commission was notified that Mr D. Kalmin of D. Kalmin and Company has since passed away, therefore, the referral is for the entity D. Kalmin and Company to the extent that it may still be in operation and issuing B-BBEE certificates under this name.

4.3 In terms of section 13A of the B-BBEE Act, any contract or authorisation awarded on account of false information knowingly furnished by or on behalf of an enterprise in respect of its B-BBEE status, may be cancelled by the organ of state or public entity without prejudice to any other remedies that the organ of state or public entity may have.

4.4 The B-BBEE Commission considered the duration of the conduct and resolved that the recommendations above are appropriate. The B-BBEE Commission will monitor EPS Courier Services to ensure it does not pass itself as black owned for its B-BBEE compliance.

5. *Status of this publication*

5.1 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.

6. *Conclusion*

- 6.1 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.
- 6.2 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.
- 6.3 For any queries or further clarity on this publication, kindly feel free to contact us at the following contact details:

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