

Proposed Amendments

by

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BBBEE Amendment Bill

CLAUSE 1

1. On page 3, from line 3, to omit "black people" and to insert on page 4, from line 21:

"[black people] previously disadvantaged individuals (PDI's)"

Alternatively to insert on page 4, from line 6:

"[black people] designated groups"

Comment:

The rationale for this amendment is to bring the BBBEE Act in line with the Employment Equity Act. Since the employment equity component of compliance with the BBBEE codes is founded upon the Employment Equity Act itself, it is proper and rational to use the same terminology in both Acts. This also allows for movement away from race labels.

2. To omit "Africans, Coloureds and Indians" in the above definition and to substitute:

[Africans, Coloureds and Indians] persons classified as Black, Brown, Indian or Chinese under Apartheid laws, including women and people with disabilities in general-

Comment:

The rationale for this amendment is as follows:

- By using the word “African” to refer to black people, it is implied that all other peoples (Coloureds, Indians, Chinese, Whites etc) are not African and not entitled to the rights afforded to Africans;
- The name Coloured is regarded derogatory by many people who rather regard themselves as Brown;
- The inclusion of “women and people with disabilities” brings the Bill in line with the Employment Equity Act as they are included as part of the designated group for affirmative action appointment. It is also important to note the following with regard to the Codes of Good Practice that provide the detailed prescriptions for empowerment:
 - While the existing BBBEE Act does not explicitly provide for women and people with disabilities to be included and counted towards BBBEE score cards, the Code of Good Practice of 2007 provides in Paragraph 9 of Statement 000 (General Principles and the Generic Score Card) for percentages of black women and people with disabilities etc to be applied throughout all elements of the generic score card. These percentages are not so high as to prohibitively exclude the employment of white women and people with disabilities or prohibit their inclusion with respect to the Socio-Economic Development Element.
 - Paragraph 7.3 of the Code of Good Practice of 2007 states with regard to the Employment Equity Element, that it “measures initiatives intended to achieve equity in the workplace under the Act, and the Employment Equity Act”. This means that the Employment Equity Act is the guiding light together with the BBBEE Act. As last mentioned is silent on the details of employment equity itself, one must have regard to the Employment Equity Act, which includes women and people with disabilities in general as beneficiaries. Considering Clause 63 of the EE Act, no other interpretation of beneficiaries can be entertained other than the definition of “designated groups”. More on that later below.
 - However, in the proposed Code of Good Practice of 2012 that was since then withdrawn, the Employment Equity Element was dropped and the Socio-Economic Development Element was increased to contributions made towards 100% black beneficiaries only.
 - This arbitrariness of the Codes is not addressed in the BBBEE Bill and thus necessitates amendments to protect rights and ensure fairness.
 - It is thus advised that either the BBBEE Act is aligned with the EE Act or the arbitrariness of the Codes be addressed in the BBBEE Act itself. For instance, minimum prescribed principles must be adhered to and any Code must first be passed by the PC on Trade and Industry as is the case with normal legislation.

3. To omit “black people” in the whole of the BBBEE Bill and the BBBEE Act and to substitute:

[black people] PDI’s

Alternatively

[black people] designated groups

Comment:

To provide conformity with regard to the amendments proposed above.

4. On page 4, from line 17, to insert:

“people with disabilities” means people who have a long-term or recurring physical or mental impairment which substantially limit their prospects of entry into, or advancement in, employment;

Comment:

This definition from the Employment Equity Act provides further clarity about the designated groups for use in the BBBEE Bill.

SECTION 3 OF ACT 53 OF 2003

1. The amendment of the trumping clause by adding the following words at the end:

“..., subject to Section 63 of the Employment Equity Act 55 of 1998”.

Comment:

If one has regard to Section 63 of the EE Act, it is upon simple reading quite clear that it contemplates that no existing or future legislation can trump it, save if it is in conflict with the Constitution (which can be amended in future) or any parliamentary legislation specifically amending it (which may be then current or future legislation). The BBBEE Act does not specifically amend the EE Act, and therefore the proposed trumping clause of the BBBEE Act is clearly in conflict and in contravention with the EE Act. Any amendment to Section 63 of the EE Act can only be amended by specific legislation which must have the consent of the Minister of Labour.

Therefore, despite the proposed trumping clause in the BBBEE Act, the EE Act will still be the principle statute whereby beneficiaries for the Employment Equity Element can be measured. This means that by law, women and people with disabilities must be included and any exclusion for score card purposes is unlawful.