

# THE CONSEQUENCES OF SECTION 13 OF THE B-BBEE ACT



John Rankin  
B-BBEE Specialist & Business Development Manager  
Engeli Enterprise Development

John Rankin is a B-BBEE Specialist and the Business Development Manager at Engeli Enterprise Development with more than 14 years of experience driving development across many sectors. He holds a BPsych Degree specialising in Development, coupled with an ingrained passion for tangible transformation. During his time in-the-field, John has successfully developed tailor-made B-BBEE Strategies and guided their implementation to meet the unique needs and wants of his clients.

The B-BBEE Industry was not spared at the State Capture inquiry earlier this year as the dirty laundry of one of the most prominent Verification Agencies was aired. SANAS action was swift and demonstrated no tolerance for Verification Agencies that cross the line of ethics. As this dirty laundry was so publically divulged, mainstream media gave this issue airtime. However, the airtime was primarily used to minimise the breach of ethics as accountability was placed firmly on the shoulders of one rogue employee. This is despite a B-BBEE Audit file being reviewed by more than one party before the issue of the B-BBEE Certificate. Unfortunately, the hard reality of the real consequences of manipulating the outcome of a B-BBEE Certificate was widely overlooked. One has to take the following into account to ascertain the impact any manipulated B-BBEE Certificate in circulation will have, for example:

- > What elements of the B-BBEE Certificate were manipulated to ensure a more favourable Status Level?
- > Was it the Ownership element? If so, it robbed people of real opportunities to own and participate in a business.
- > Perhaps it was the Skills Development element? If so, it robbed people of the opportunity to gain or develop their skills and secure employment.
- > How about the Enterprise Development element? If so, it robbed businesses of the opportunity to grow and contribute to the economy.
- > Or the Socio-Economic Development element? If so, it robbed people of the opportunity to uplift themselves and become self-sustainable.

Food for thought: a manipulated B-BBEE Certificate may have been what qualified an organisation for a Discretionary Grant or the overall determining factor in the awarding of a tender. In both instances, other organisations committed to meaningfully meeting the goals outlined in their B-BBEE Strategy were robbed. Similarly, the Beneficiaries were deprived of the opportunity to develop their skills, employment, infrastructure development and entrepreneurship, to name but a few.

Therefore, it is evident that the focus of this breach of ethics should not have been on one rogue employee, but the overall impact of willfully manipulating an organisation's B-BBEE Certificate. As highlighted on page 41, SANAS has stringent audits of Verification Agencies; however, a person with a will to breach the line of ethics will find a way to bypass the system, for a while anyway. Section 13 of the B-BBEE Act was published to hold those operating in the B-BBEE arena to account. Hereunder is a non-exhaustive breakdown of Section 13 of the B-BBEE Act of 2003 as Amended by Act 46 of 2013 (The Act).

## Accountability and Non-Adherence

The Act aims to promote the achievement of the constitutional right to equality; increase the broad-based and active participation of 'Black' People in the economy to boost growth; increase employment and more equitable income distribution; and establish a national policy on B-BBEE to promote the economic unity of the nation, protect the common market, and advance equal opportunity and access to government services.

The Act covers various aspects and outcomes pertaining to the B-BBEE Industry. Section 13 highlights different forms of non-adherence and associated penalties for contravening the Act.

## 13N | Offences in connection with the B-BBEE Commission

- ① It is an offence to disclose any confidential information concerning the affairs of any person obtained:
  - > in carrying out any function in terms of this Act; or
  - > as a result of initiating a complaint with the B-BBEE Commission (Commission), or participating in any proceedings in terms of this Act.
- ② Subsection (1) does not apply to information disclosed;
  - > for the purpose of the proper administration or enforcement of this Act;
  - > for the purpose of the proper administration of justice;
  - > at the request of the Commission or a court entitled to receive the information; or
  - > when required to do so by any court under any law.
- ③ A person commits an offence if that person:
  - > hinders, obstructs or improperly attempts to influence the Commission when it is exercising a power or performing a duty in terms of the Act;
  - > does anything calculated to improperly influence the Commission concerning any matter connected with an investigation by the Commission;
  - > knowingly provides false information to the Commission;
  - > anticipates any findings of the Commission in a way that is calculated to influence the proceedings or findings improperly;
  - > does anything in connection with an investigation of the Commission that would have been contempt of court if the proceedings had occurred in a court of law; or
  - > refuses to attend when summoned or, after attending, refuses to answer any questions or produce any document as required by the summons, other than as contemplated in section 13K(4)(a).

## 13O | Other offences and penalties

- ① A person commits an offence if that person knowingly:
  - > misrepresents or attempts to misrepresent the B-BBEE status of an organisation;
  - > provides false information or misrepresents information to a B-BBEE verification professional to secure a particular B-BBEE status or any benefit associated with the compliance with this Act;
  - > provides false information or misrepresents information relevant to assessing the B-BBEE status of an organisation to any organ-of-state or public entity; or
  - > engages in Fronting Practices.
- ② A B-BBEE verification professional or any procurement officer or other officials of an organ-of-state or public entity who becomes aware of the commission of, or any attempt to commit any offence referred to in subsection (1) and fails to report it to an

appropriate law enforcement agency, is guilty of an offence.

- ③ Any person convicted of an offence in terms of this Act is liable:
  - > in the case of a contravention of subsection (1), to a fine or to imprisonment for a period not exceeding ten years or to both a fine and such imprisonment or, if the convicted person is not a natural person, to a fine not exceeding ten percent of its annual turnover; or
  - > in the case of a contravention of subsection (2) or section 13N, to a fine or to imprisonment for a period not exceeding 12 months or both a fine and such imprisonment.
- ④ To determine a fine to be imposed for an offence in terms of subsection (1), the court must take into account the value of the transaction which was derived from or sought to be derived from the commission of the offence.
- ⑤ A court in which any person is convicted of an offence in terms of subsection (3) must report the conviction:
  - > to the B-BBEE Verification Professional Regulator, if that person is a B-BBEE verification professional; and
  - > in any other case, the Council and to that person's employer.
- ⑥ Despite anything to the contrary contained in any other law, a magistrates court has jurisdiction to impose any penalty provided for in this Act.

## 13P | Prohibition on business with organs-of-state following conviction under this Act

- ① Any person convicted of an offence in terms of this Act may not, for a period of ten years from the date of conviction, contract or transact any business with any organ-of-state or public entity and must for that purpose be entered into the register of tender defaulters which the National Treasury may maintain for that purpose.
- ② Where the convicted person is not a natural person, the court may in its discretion restrict the order contemplated in sub-section (1) to only those members, directors or shareholders who contravened the provisions of this Act.

Section 13 aims to instil accountability for circumventing the Act. Verification Agencies specifically must have robust processes and cross-checks in place, otherwise be held accountable for such a shortfall. Without consistent monitoring and attention to detail, a Verification Agency's accreditation will be shortlived.

Contracting the services of a Verification Agency with a SANAS accreditation should create peace of mind that the agency conforms to the stringent requirements. To maintain the credibility of the industry, Verification Agencies must uphold their duties to audit without fear or favour. A Verification Agency's role is to document, based on evidence, the real rate in which an organisation is transforming as per the intent of the Act and subsequent legislation.