

THE GAMBLE OF A SPECIAL POWER OF ATTORNEY



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An audit or verification takes place when an organisation contracts an independent inspection of the evidence, whether it be for financial or B-BBEE purposes. The process tests, then reports on, the validity of evidence. In doing this, those responsible for the independent audit or verification are held accountable for the published results. Transparency in an audit or verification is paramount. As with a financial audit, those responsible for verifying B-BBEE evidence must be aware of false reporting implications, otherwise known as Fronting Practices, in the B-BBEE scheme of things.

Therefore, an organisation must equip those implementing a B-BBEE Strategy to complete the task from start to finish. For example, as in other professional fields, Human Resources or those operating in the financial sector are qualified and versed in applying law applicable to their professions. Therefore, irrespective of the persons' field of expertise, legislation guides compliance in most cases.

Unlike most pieces of legislation, B-BBEE compliance is optional; however, law guides organisations that choose to embark on a B-BBEE journey. Thus, organisations should consider the rules of engagement when embarking on and implementing a B-BBEE Strategy. However, many organisations neglect to recognise the risk associated with an unqualified team driving their B-BBEE Strategy. The lack of overall knowledge about B-BBEE legislation necessary to drive a successful B-BBEE Strategy results in an over-reliance on B-BBEE Consultants. Furthermore, without dedicated resources, vital elements that feed into an organisation's evidence for a B-BBEE Verification, are undertaken by people not qualified to do so. For example, employees feeding into an organisation's B-BBEE Strategy from the Human Resources or Finance Departments frequently undertake the task outside their normal job function. Although these departments are a natural fit for implementing a B-BBEE Strategy, the legislation does not form part of the curriculum for either Human Resources or Finance degrees.

Considering the enormity of the financial investment made to drive a B-BBEE Strategy, in-house expertise should be non-negotiable. Nonetheless, the complexity of and continued amendments to B-BBEE legislation, and a lack of confidence to drive a B-BBEE Strategy effectively, result in an over-reliance on B-BBEE Consultants. Many organisations do not realise that there is no regulatory body that oversees a B-BBEE Consultant's conduct, qualifies them or holds them accountable for their performance (see page 10).

Subsequently, the amendments in the R47-03 document attempt to separate those leading a B-BBEE Verification for an organisation, verifying evidence, from those who consult. Thus this puts the onus on organisations to take ultimate responsibility for their B-BBEE Verification.



The amendments that oblige an organisation to interact directly with its B-BBEE Rating Agency without third-party interception appear in section 10.2.4 of the R47-03. The most consequential amendment is that organisations must pay a B-BBEE Rating Agency directly and not through any third party. Both amendments support accurate and reliable results, encouraging no conflict of interest by any party.

As a result of the amendments to the R47-03 and the lack of in-house B-BBEE knowledge, many organisations find themselves in a predicament. They are not prepared to take a B-BBEE Verification from start to finish independently. As a result, many organisations are granting a Special Power of Attorney (PoA) to their B-BBEE Consultant to lead their B-BBEE Verification. However, in doing this, some organisations are not taking into account the risks involved. Likewise, B-BBEE Consultants act with a Special PoA without considering the risk to themselves.

What does a Special PoA allow?

A PoA generically is a legal document that allows a person, known as a grantee, to act on a grantor's behalf legally. For the purposes of this article, the reference to a 'Grantor' will hereon mean 'an organisation' and 'Grantee' a third party. A third party for B-BBEE purposes may refer to an organisation's B-BBEE Consultant. South African law provides for two types of PoA:

- > A General PoA; and
- > A Special PoA.

A General PoA	A Special PoA
A General PoA allows a third party to make broad decisions and perform various acts on behalf of the grantor.	A Special PoA confines a third party to a specific responsibility and limits the power of particular tasks.
If the reason for a General PoA is to assist a third party with facilitating a B-BBEE Verification, this option goes above and beyond the power necessary for a third party to achieve this.	If the reason for a Special PoA is for a third party to assist with facilitating a B-BBEE Verification, this option is the suitable one.

Entering into a Special PoA is legally binding, attaching implications for all parties involved. Thus, all parties must be fully aware of the repercussions of entering into a Special PoA for a B-BBEE Verification.

Organisations must make an informed, independent decision before granting a Special PoA, instead of looking at it as a document to make the B-BBEE Verification process easier. Essentially, an organisation must abide by decisions made by a third party when granting a Special PoA. Notably, a B-BBEE Rating Agency must be aware that a Special PoA is not embedded in the R47-03 requirement, but is legally accepted.

Entering into a Special PoA agreement

A mere letter does not trigger a Special PoA, as it is a legally binding document that must conform with the following requirements:

- > Clearly describe and identify all parties;
- > Extend the power to areas where a third party may act;
- > All parties must sign;

The Special PoA must be signed by two witnesses. However, such witnesses may not derive any benefit from the PoA.

What does a Special PoA mean during a B-BBEE Verification?

A legally enforceable Special PoA can only exist between the third party and the organisation. A Special PoA will remain valid until an organisation revokes it or when the mandate is complete. An organisation's B-BBEE Rating Agency must be aware of the requirements and nature of a PoA to ensure that they do not just accept mere letters where an organisation simply permits a third party to facilitate its B-BBEE process.

Therefore, when an organisation procures a B-BBEE Rating Agency's services, it is the third party and not the organisation that takes control of the B-BBEE Verification; but the contract remains between the B-BBEE Rating Agency and the organisation.

Who must be aware of a Special PoA to facilitate a B-BBEE Verification?

Upon an organisation opting to go the Special PoA route, its mandated representative must present a copy of the Special PoA to the B-BBEE Rating Agency.

Once that has happened, the B-BBEE Rating Agency may interact with the organisation and the third party. The nature of the powers at the outset of the B-BBEE Verification must be clear.

Who is accountable for an offence when a Special PoA for B-BBEE purposes is in place?

Third parties granted with a Special PoA must be aware of the responsibility and risk they are undertaking when acting on behalf of an organisation. The consequence of any misrepresentation of information or evidence resulting in Fronting Practices will legally implicate a third party as if they were the party who committed the offence.

The B-BBEE Act (The Act) indicates that an offence occurs when a 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 partial B-BBEE status or any benefit associated with compliance to The Act;

- > provides false information or misrepresents information relevant to assessing the B-BBEE status of an organisation; or
- > engages in a Fronting Practice.

A B-BBEE verification professional, procurement officer, an official of an organ of state or public entity who becomes aware of the committing, or 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.

The following consequences apply to a person convicted of contravening The Act:

- > Violating subsection (1) exposes that person to a fine or imprisonment for a period not exceeding ten years, or both. If the convicted person is not a natural person, a fine not exceeding 10% of its annual turnover could be imposed; or
- > Contravention of subsection (2) or section 13N could lead to a fine or imprisonment for a period not exceeding 12 months, or both.

To determine the value of a fine relating to an offence in subsection (1), the court will consider the value of the transaction relating to the offence. A court, after convicting a person in terms of subsection (3), must report such to:

- > The B-BBEE Verification Regulator - currently SANAS - if that person is an accredited B-BBEE verification professional;
- > The B-BBEE Commission; or
- > The council relevant to an organisation outside the B-BBEE space which regulates the sector in which an organisation operates.

Despite anything to the contrary, a magistrates court has jurisdiction to impose any penalty provided for in The Act.

Responsibility and accountability apply to people or a person who:

- ① Had actual knowledge of that matter; or
- ② Were in a position in which the people/person reasonably ought to have:
 - > had actual knowledge;
 - > investigated the matter to the extent that would have provided the person with actual knowledge; or
 - > taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.

What are the risks to an organisation when instituting a Special PoA?

It can be challenging to hold a third party accountable for wrongful conduct as a Special PoA is governed by a contract and not a court. A third party may:

- > Have a vested interest in a specific B-BBEE Verification outcome;

- > Provide false information, exclude relevant evidence required, or amend details or evidence without the organisation's knowledge
- > Lack the necessary skills and expertise to successfully oversee the B-BBEE Verification, impacting the outcome.

What risk factors does a Special PoA hold for a third party?

If an organisation commits, or has previously participated in, Fronting Practices, the third party will be deemed a 'knowing person'. Consequently, any party investigating a matter will include a third party in any subsequent investigations. A guilty conviction would include the third party in the penalty phase.

What costs are attached to a Special PoA and roll-out of duties?

There would be legal costs for drafting a valid and enforceable Special PoA. If the third party is conducting work over and above their regular duties, it may incur additional costs for the organisation's account. Third parties, therefore, will ask for a fee to carry out the mandate contained in the Special PoA.

What is the process if a B-BBEE Rating Agency witnesses a third party not acting in an organisation's best interest?

Although an organisation grants a Special PoA, a B-BBEE Rating Agency must continue to interact directly with the organisation and report on their progress, especially if the third party is not acting in an organisation's best interest.

If a B-BBEE Rating Agency becomes aware of the committing of, or any attempt to commit, any offence, it must report it to the B-BBEE Commission immediately.

Even with a Special PoA in place, an organisation remains ultimately accountable for its B-BBEE Credentials. It must ensure that it involves itself in every aspect of their B-BBEE Verification.

In conclusion, organisations deciding to appoint a third party utilising a Special PoA must do proper due diligence. More so, organisations must equip those feeding into their B-BBEE Strategy to carry out their functions diligently and with appropriate cognisance of the B-BBEE requirements. If opting to use a third party for a B-BBEE Verification, it is imperative that the person is fully versed, vetted and in good standing. Such a person must demonstrate the ability and knowledge to address every aspect of a B-BBEE Verification, such as the Code on which an organisation is measured regarding all aspects of the scorecard, the interpretations, calculations and linked pieces of legislation.



The BEE Chamber, through consultation with Cliffe Dekker Hofmeyr Inc, created the following template as a reference point for granting a Special PoA.

SPECIAL POWER OF ATTORNEY TEMPLATE

I, the undersigned,

NAME & SURNAME: _____

IDENTITY NUMBER: _____

COMPANY NAME: _____

COMPANY REGISTRATION NUMBER: _____

Do hereby nominate and appoint (Consultant Company Name), represented by (Consultant Company Representative Name – ID Number) with a Special Power of Attorney, to be my lawful Agent in my name, to:

- 1 Manage the B-BBEE Verification process on my behalf;
- 2 Engage with the B-BBEE Rating Agency on matters pertaining to the B-BBEE Verification of (Measured Entity Name) on my behalf;
- 3 Make decisions and provide B-BBEE Verification documentation to the B-BBEE Rating Agency for B-BBEE Verification purposes only on my behalf; and
- 4 The duration of the Special Power of Attorney will commence from date of signature until a B-BBEE Verification Certificate is received by (Measured Entity Name).

SIGNED AT _____ ON THIS THE _____ DAY OF _____

SIGNATURE (BEHALF OF ORGANISATION) _____

SIGNATURE (BEHALF OF CONSULTANT) _____

WITNESSES

NAME _____ SIGNATURE _____

NAME _____ SIGNATURE _____

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