

Forum Shopping

Making the 'glass slipper' fit

Stella Nolan is the founder and Editor of TFM Magazine. She has unique insight into the B-BBEE space through her direct interaction with corporates, B-BBEE Professionals and government regulators over the last decade. Stella's unique skill lies in simplifying the complexities of the B-BBEE Act, The Codes and peripheral legislation into user-friendly content to expand the knowledge base of the TFM Magazine readership.

The second sphere represents B-BBEE Consultants, who guide organisations in developing and implementing initiatives to feed their B-BBEE Scorecard. A B-BBEE Rating Agency then verifies these results based on the evidence provided.

The third and last sphere in the B-BBEE space consists of The Department of Trade, Industry and Competition (dtic), specifically the B-BBEE Policy Unit that establishes B-BBEE Policy; SANAS, who oversees the standards to which B-BBEE Rating Agencies operate; and the B-BBEE Commission, whose mandate is to oversee the fair, meaningful and sustainable implementation of B-BBEE in line with the B-BBEE Act (The Act).

Essentially, organisations are held accountable for their B-BBEE claims by the B-BBEE Commission. B-BBEE Rating Agencies are accountable to SANAS. However, what is evident is that B-BBEE Professionals are not held accountable by any governing body, but only their ethics and South African law.

How is 'forum shopping' initiated, or what is the process to make the 'glass slipper' fit?

'Forum shopping' takes place in both the first and second spheres of the B-BBEE space. The process begins when an organisation poses a query on an interpretation by their B-BBEE Consultant or B-BBEE Rating Agency. For the sake of this article, both parties will be referred to as 'consulting parties'. In turn, more often than not, the 'consulting parties' endeavour to settle the issues between themselves, or else seek clarity on an interpretation with the dtic's B-BBEE Unit, SANAS and/or the B-BBEE Commission.

What is the process of 'forum shopping', or how many parties try to manipulate their foot into the 'glass slipper'?

Due to a general lack of B-BBEE knowledge at a corporate level, when facing challenges on an interpretation, clients immediately contact their 'consulting parties' for their opinion on specific interpretations, hoping that it aligns with their B-BBEE Strategy. In sphere 1, the following typically occurs:

- > Organisations contact 'consulting party number 1' who provide their interpretation on an issue. The outcome translates to a realignment of the organisation's B-BBEE Strategy. *The organisation is not happy with the feedback from 'consulting party number 1'.*

- > To make the 'glass slipper' fit, the organisation seeks an opinion from 'consulting party number 2'. The response is the one they were seeking. Subsequently, the organisation chooses to use the second opinion on the interpretation in question to align with its B-BBEE Strategy. A claim is made based on the more suitable interpretation provided by 'consulting party number 2'. Justification for using the opinion provided by 'consulting party number 2' is that it was generated by what the organisation deemed to be a qualified party.

The same tactic applies in sphere 2 when 'consulting parties' need clarity on an interpretation presented by their client. The scenario generally follows one or all of the following processes when clarity on an interpretation is required:

- > An organisation's 'consulting parties' are summoned to a meeting. The challenge regarding an interpretation is put forward. Both parties frantically analyse The Codes to find the most advantageous clarity. However, both parties realise that the clarity the organisation seeks crosses an ethical line, either significantly or marginally. The meeting adjourns as consulting parties commit to investigate the matter further.
- > When the 'consulting parties' seek affirmation on the interpretation that they presented to their client, they approach the third sphere. A request for an opinion is put forward to the B-BBEE Commission, the B-BBEE Unit at the dtic and SANAS.

Unfortunately, more and more organisations take the advice that makes the 'glass slipper' fit to benefit their scorecard. One should always bear in mind that an interpretation that benefits an organisation's scorecard does not always filter through to empower 'Black' People or align with The Act.

When does an unethical decision become Fronting Practice, or when does the 'glass slipper' shatter?

An unethical decision is implementing a B-BBEE initiative that does not align with the expectations of The Codes. It remains just that, an unethical decision until such a time as a claim is made and accepted during a B-BBEE Verification and an organisation trades with misrepresented B-BBEE Credentials.

Therefore, an organisation can reverse any unethical decisions until the time they make a claim. Hence, a 'knowing person' who moves from making an unethical decision to engaging in Fronting Practice should be fully aware of the consequence of doing so, which may be imprisonment or a hefty fine.

Whose interpretation counts, or who wears the 'glass slipper'?

As the basis of B-BBEE legislation is the interpretation of The Act, the Codes, issued Guidelines, Clarification Statements and Practice Guides, organisations must understand where the buck stops and who wears the 'glass slipper'. In other words, who has the jurisdiction to have the final say about the real meaning of an interpretation?

Let's take a closer look at the roles, mandates and power of all parties who form part of the process of 'forum shopping'.

SPHERE 1 | An organisation or the measured entity

An organisation measured on its B-BBEE performance seeks or challenges an interpretation on a matter in The Code against which it is measured. Ultimately it is the directors, managers and employees of an organisation who are personally responsible and accountable for the evidence featuring in its B-BBEE verification file. Those responsible for preparing a B-BBEE verification file, and any 'knowing people', will ultimately face the consequences of using an invalid interpretation as part of their claim on their scorecard, irrespective of where it came from.

SPHERE 2 | The B-BBEE Rating Agency

This party's role is to independently verify the data and evidence provided by an organisation to validate its B-BBEE Scorecard. Bear in mind that the R47-03 prohibits a B-BBEE Rating Agency from advising an organisation on their B-BBEE Strategy or its implementation. Its role is only to verify the evidence provided.

SPHERE 2 | The B-BBEE Consultant

This party guides organisations on their B-BBEE Strategy and implementation methodology before their B-BBEE Verification. They are allowed to assist an organisation in preparing their B-BBEE verification file. They may not, however, participate in a B-BBEE Verification in any manner whatsoever.

SPHERE 3 | SANAS

This party's responsibility is to accredit B-BBEE Rating Agencies to ensure that they conduct B-BBEE Verifications according to the R47-03 requirements. SANAS holds B-BBEE Rating Agencies accountable for their actions and issues non-conformances for not aligning with the R47-03. In effect, SANAS does not interface with organisations or hold them directly accountable for invalid evidence put forward in a B-BBEE Verification.

SPHERE 3 | The dtic's B-BBEE Policy Unit

The B-BBEE Policy Unit within the dtic directs B-BBEE Policy regarding drafting, gazetting and repealing any B-BBEE Legislation. Its role is to draft legislation to address the economic empowerment objectives on behalf of the Minister. Its role ensures that legislation incorporates and supports the National Development Plan. In effect, the B-BBEE Policy Unit does not interface with organisations or hold them accountable for interpreting the legislation it drafts.

SPHERE 3 | The B-BBEE Commission

The B-BBEE Commission's role is to ensure accurate, fair and transparent implementation of B-BBEE initiatives in line with The Act. The B-BBEE Commission has the infrastructure and resources to provide an organisation with support on interpretational issues. Processes are in place to allow for challenges should an interpretation not align with that of an organisation. The B-BBEE Commission's role is to interface with all organisations. It is the only party with the ability to initiate an investigation and direct a matter to the National Prosecuting Authority or the South African Police Service.

As The Act provides for one regulator only, the B-BBEE Commission is the only party that can provide clarity for an organisation challenging an interpretation; however, such an interpretation is non-binding as per The Act. The same legislation mandates that any matter investigated by the B-BBEE Commission, which uncovers a criminal offence, must be referred to the National Prosecuting Authority or an appropriate South African Police Service division. A Memorandum of Understanding entered into between the B-BBEE Commission and the South African Revenue Services (SARS) in May 2018 allows the same response from SARS.

The B-BBEE Commission was established as an office within the dtic administration, directed by section 13B of the Amended Act 2013. Since its establishment, it has gained purpose and momentum, whereby its capacity increases year-on-year.

Taking all parties' roles and responsibilities in all three spheres in the B-BBEE chain into account, it is evident that the B-BBEE Commission wears the 'glass slipper'.

For many operating in Sphere 1 and 2 in the B-BBEE space, 'forum shopping' for the perfect fit for the 'glass slipper' is more about continuing learned behaviours, which precede the establishment of the B-BBEE Commission. Final accountability for an organisation's scorecard lies with it alone. Unfortunately, interpretations are not always black and white as they must incorporate the expectations of The Codes and the intent of The Act. Therefore, when considering all opinions on interpretations, an organisation must weigh up the pros and cons on their scorecard, bearing in mind who wears the 'glass slipper'.