

THE MATRIMONIAL IMPACT ON ENTERPRISE DEVELOPMENT CONTRACTS

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Agreements are made binding by contracts. It is irrelevant whether one is entering into a business partnership or one with a life partner; a contract binds parties and highlights expectations. However, there is always a risk factor; for example, four out of ten marriages do not survive ten years, with a similar failure rate in business partnerships. Unfortunately, more often than not, the demise of such partnerships is not amicable. As a result, when entering into any partnership through a contract, one is essentially preparing for the worst-case scenario.

Therefore, whether in one's professional or private capacity, contractual foresight is vital. Of particular relevance is the potential impact on a B-BBEE Scorecard, from both a personal and professional perspective, for all parties involved. This article illustrates how contracts entered into in any facet of life can impact the B-BBEE Scorecard, specifically the Enterprise Development (ED) element.

ED is a sub-element of Enterprise & Supplier Development and is an identified Priority Element. It has a crucial role to play in the overall National Development Plan. Its objective is the deliberate and planned growth of a business through facilitation.

Onboarding a Beneficiary

ABC Traders is a Large Enterprise with an annual revenue of more than R50m. They enter into an ED agreement with Batho Inc, a manufacturer that is a 100% 'Black'-owned QSE. The founder and owner of Batho Inc is Themba Ndlovu, a recently married entrepreneur. The intent is to increase the capacity and infrastructure of Batho Inc to grow its market share over five years.

The desired outcome is for Batho Inc to be elevated to a Supplier Development Beneficiary. The expectations of this ED intervention are the result of a consultative process based on:

- > A Batho Inc needs analysis; and
- > A five-year Development Plan incorporating all quantifiable support outlined in the Benefit Matrix, under statement 400 of the Codes of Good Practice (Codes). The plan highlights the expectations of all parties, what support will be necessary to meet the objectives, and what action will achieve this.

Contractual Obligations

The comprehensive ED contract between ABC Traders and Batho Inc will be the evidence of an obligatory relationship at the time of ABC Traders' B-BBEE Verification. It covers all expectations and obligations, as well as risk factors.

- ① It confirms that Batho Inc met the qualifying criteria of an ED Beneficiary.
- ② It outlines that the intentions or expectations of the agreement are steering towards development, sustainability, operational and financial independence.
- ③ It outlines responsibility and accountability, as well as the obligations and consequences for not meeting the requirements by all parties.
- ④ It confirms the duration of the ED relationship.
- ⑤ It outlines the terms of the relationship.
- ⑥ It defines the nature of the support.
- ⑦ It substantiates the support to be provided based on the results of the needs analysis.



The contract ticks all the relevant boxes by meeting the legal requirements of a partnership and incorporating statement 400 outlined in the Codes.

Evidence required for a B-BBEE Verification

For ABC Traders to claim ED points for their intervention, both parties must produce the necessary evidence, which includes:

- > The intent of the ED intervention
- > A signed ED agreement;
- > The Needs Analysis, if available
- > The Development Plan;
- > B-BBEE Status which confirms that Batho Inc is a 100% 'Black'-owned QSE;
- > Evidence of the support afforded to Batho Inc, which must be provided by ABC Traders as per the requirement of the Scorecard; and
- > Quantifiable evidence of the support Batho Inc received and tangible impact resulting from ABC Traders' intervention, which must be provided by Batho Inc.

Year One of Five

Both ABC Traders and Batho Inc abide by their contractual agreement. Month-on-month the income of Batho Inc steadily increases. There is evidence that the capacity within the organisation has grown due to an increase in infrastructure.

At the time of the B-BBEE Verification, ABC Traders presents all the evidence, and Batho Inc confirms that the evidence is valid and credible. All is on track for ABC Traders to claim the allocated points on offer for ED.

Unintended Consequences

During the B-BBEE Verification, the Verification Analyst picks up that the ownership of Batho Inc changed six months after they entered into the ED contract with ABC Traders. Batho Inc, through the shift of ownership, is now only 50% 'Black'-owned. This does not meet the criteria of an ED Beneficiary. Therefore, ABC Traders' claim for ED points for their intervention with Batho Inc is disallowed.

ABC Traders immediately investigates the change of ownership with Themba Ndlovu. The investigation reveals that Themba did not sell the company, but got a divorce six months after entering into the contract. As Themba was married in 'community of property', part of the divorce agreement was that he had to sign over 50% ownership of Batho Inc to his spouse. Unfortunately for ABC Traders, his spouse is not a 'Black' Person as defined; hence Batho Inc does not qualify as an ED Beneficiary.

"An ED contract must be unique to the Beneficiary, their needs and their growth plan".

The Reality for ABC Traders

What recourse does ABC Traders have in this situation? Themba did not relay his divorce to ABC Traders as he deemed it to be a private matter. He did nothing outside the ED contract. The problem was a contractual oversight of the risk, posed by Themba's marriage being in 'community of property'.

Unfortunately, substance over legal form does not apply in this case. The reason is simple; Batho Inc no longer owns the asset. Thus, ABC Traders did not achieve its ED objective of sustainably developing Batho Inc to operational and financial independence.

In reflection

Apart from the ABC Traders/Batho Inc scenario, other challenges may show themselves during the term of an ED agreement, including conflict between parties. Therefore, all parties must be aware of the terms of a contract, as that is what is enforceable in the event of a breakdown between parties.

Furthermore, there are instances where, during a fallout or disagreement, a Beneficiary might refuse to provide an acknowledgement that they received support. There have been instances where an ED Beneficiary has tried to strong-arm an organisation into providing business opportunities in return for a disclosure of support for a B-BBEE Verification. Care should be taken to stipulate what support will be forthcoming, so that there is no misunderstanding that may cause conflict down the line.

The challenges brought about by having to address the risks of an ED contract can be insurmountable. As much as the intentions of all parties are noble, a situation may simmer, then get out of hand, thus causing reputational damage to a host organisation.

There is the matter of protection for both parties. A contract should provide clarity on the procedure when a host and Beneficiary use each other's brands. Confidentiality is critical and must be adequately addressed. At all costs, a contract must limit liability during the execution of an ED program in a prescribed manner and how parties will deal with the issue. It is essential to introduce an exit clause, outlining the processes for the recovery of an investment, if applicable.

An ED contract must not be a 'one size fits all'; each must adapt to the situation at hand, unique to a Beneficiary. The terms and conditions must be clear, direct and explicit, stating expectations, obligations, consequences and accountability.

Based on the scenario between ABC Traders and Batho Inc, a contract must protect all parties from marital obligations in the distribution of property due to divorce. The contract must obligate a Beneficiary to divulge a change in a marital status or any situation that may threaten the ED programme. An option could be an undertaking from the spouse of a Beneficiary that, in the event of a divorce, the Beneficiary's entity may not form part of a divorce settlement for the duration of the ED contract.

Contractual considerations to mitigate risks include:

- > The submission of evidence that confirms ED support;
- > Managing expectations;
- > Full disclosure of all contractual obligations of the ED Beneficiary, including how they are married;
- > Clarity as to whether assets of the Beneficiary are held as collateral for other debts;
- > Transparency as to the type of support that will be available to increase a Beneficiary's footprint;
- > Confidentiality clauses, including the processes to be followed when sharing information;
- > Clarity on the authority and procedures when either party wishes to use the brand name of the other;
- > A decision on the process should conflict between parties arise;
- > Clarity on the process should either party not meet its obligations; and
- > An exit clause which stipulates the process for such an event and the recovery of items.

During my time in the field, I have witnessed the best and the worst ED partnerships. The best produce tangible results and growth. Essentially an ED partnership is the starting point where a Beneficiary enters the supply chain and grows to be a prominent supplier. The worst-case scenario stems from contractual shortfalls that allow for unrealistic expectations that result in costly legal battles. Most importantly, an ED contract must be unique to the Beneficiary, their needs and their growth plan.