

July 3, 2019

Employees participating in Trusts and other B-BBEE collective ownership programmes - by Gideon Gerber



Due to the ambiguity of the B-BBEE Codes, a question that often arises is: *“How many employees or what percentage of the workforce must be able to participate in a programme before it is deemed an ESOP programme?”*

A programme allowing only 2 or 5 employees out of a staff complement of 100 employees to participate cannot be compared to a measured entity that allows, for instance, 80 staff members to participate. In order to find guidance on how many staff members need to participate in order to establish an ESOP, one should look wider for a more lucid and logical understanding of *the characteristics and nature of a typical or classic employee share ownership programme*.

Firstly - What are the objectives of employee ownership programmes?

The global and local aim and purpose of employee ownership or incentive schemes are fairly universal and can be summarised as follows:

- Employees are allowed to contribute towards the profitability of the enterprise;
- They act as one voice representing staff in general as a collective group;
- Shareholder activism is enhanced;
- Creates employee cohesion;
- Stakeholder involvement, with all stakeholders having a shared vision; and
- Coincides with the broader employee benefits and rights derived from the employment relationship.

Secondly - What are the other workplace schemes already in place?

Other schemes and programmes in the workplace, such as pension, provident, medical, savings, loan and funeral benefit programmes, have rules which are by nature inclusive, meaning they allow as many participants into the programme as possible to promote staff wellness, benefits and wealth, as well as the interests of the enterprise.

Thirdly - What are collective ownership programmes in the broader legal framework and government policy?

- The Companies Act, 2008 (Act No. 71 of 2008) encourages involvement in employee schemes by exempting employee schemes from certain restrictions in respect of the Securities of the Company. Section 97 of the Companies Act contains qualifying criteria for an employee share scheme to be recognised. Although the Companies Act does not provide for a percentage of employees who need to be involved, from a proper reading of the provisions, it can be reasonably concluded that a “significant portion of staff” must participate in an employee scheme to meet the definition and purpose of such schemes and to avoid abuse of the leniency provided to such schemes by the Act.
- Section 8B and 8C of the Income Tax Act, which relate to tax benefits to the company and the acquiring employee(s), also distinguish between shares acquired by employees in a share scheme representing **at least 80%** of all employees (section 8B) and shares acquired as individuals by virtue of employment, to which section 8C would apply.
- A further cue can be found in the Labour Relations Act and case law interpretation, which deem a “significant representation” of workers, depending on the circumstances of each workplace, to also include a percentage below the majority threshold.

Based on the abovementioned commercial use of employee ownership schemes, the objectives of legislation and in line with other legislative and broader government policy considerations, an ESOP trust to which Annexure 100(C) of the Codes applies should be a programme **representing a significant portion** of staff to coincide with the commercial meaning and purpose of an ESOP and to be inclusive or fairly inclusive and broad based in nature congruous with the objectives of section of the B-BBEE Act, namely “to increase the extent to which communities, workers, cooperatives and other collective enterprises own and manage existing and new enterprises ...”

A trust or collective employee structure is only regarded as an ESOP if it represents such a significant percentage of the workforce to reasonably fulfil the objectives of a **collective** ownership programme. The percentage representation by employees may vary depending on the nature of the measured entity and is suggested to be approximately 30% of staff. If it is less than 30%, the programme may be regarded as consisting of individual employees who form an **exclusive** group of individuals by virtue of their employment. This hand-picked or selective portion of staff as beneficiaries in a trust would constitute a conventional trust (Annexure 100(B)). Such a small section or elite group can still qualify for B-BBEE ownership purposes (Statement 100 of the Codes) but would not suffice as an employee ownership scheme (ESOP) for the 3 points on the B-BBEE ownership scorecard or qualify for the leniency and incentives in terms of the Companies Act or Income Tax Act.

In conclusion

One needs to distinguish between a true and genuine employee scheme, on the one hand, and merely individual employees selected as beneficiaries in a trust acting collectively without representing the interests of a significant portion of the workers in the workplace, on the other.

SERR Synergy specialises in unique structuring of collective ownership schemes to suit each entity's requirements to achieve the objectives of B-BBEE. We introduced *Empowerment Training and Development Programmes* to identify and develop black beneficiaries to obtain the required skills to ultimately participate as fiduciaries and not only as beneficiaries.

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