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Share Options for the subscription of shares as a form of BEE ownership

There is much uncertainty surrounding the nature and use of share options, especially where they can be used for B-BBEE purposes.

Firstly, we need to clarify what a Share Option is. A ***Share Option is a form of equity instrument and falls under the definition of "securities" in terms of section 1 of the Companies Act, 71 of 2008.***

Securities include shares, debentures and instruments relating to the shareholding as a form of "shareholding" in a profit company. Section 42 of the Companies Act regulates the use of Options for subscription of securities.

- A Share Option in an agreement in terms of which the company (as grantor) would grant a grantee the right to acquire shares to be issued by the company at a future date based on certain conditions. Should the grantee be unable to meet the conditions or requirements to exercise the option on the exercisable date, the option would expire. No transfer of shares takes place before or during the option period unless the option is exercised.
- The option holder pays a premium to acquire such right (option). This gives the option holder the right to have the shares reserved for him/herself via the option giver (grantor) until such time in future when the option holder (grantee) exercises his/her right to acquire the shares. The premium has nothing to do with the share value and is merely the purchase price for acquiring and establishing the right to acquire the shares (option).
- In order for the grantee to acquire the shares attached to the option, the grantee will pay a consideration for the issue of shares based on the underlying value of the share premised on a valuation by an auditor depending on the nature and conditions of the option agreement.

To qualify for B-BBEE purposes, section 57(1) of the Companies Act also includes within the broader definition of a "shareholder", an option holder with voting rights. Option holders are seen as a form of shareholding in terms of the Companies Act because option holders acquire certain rights associated with shares. This is also the reason *why the B-BBEE Codes recognise share options under Ownership* (referred to as *Rights of Ownership* in the Codes), paragraph 3.13 of Statement 100, provided that for the option period, the voting rights" and "economic interest" must be *irrevocably* transferred or ceded to the option holder. The net value of the share option is calculated as per Annexe 100(E) of Statement 100 of the BEE Codes which refers to an "Equity Instrument" to include a share option.

Share options for BEE purposes in conclusion

A share option is a viable ownership transaction recognised by the Companies Act and the B-BBEE Codes, regardless of the consideration paid, given that the option holder should exercise the "voting rights" and hold the "economic interest" attached to the shares without any restrictions within the option period. In order to cede these rights, the option in respect of an issue of shares in a B-BBEE context is coupled with an option to be exercised in respect of already issued shares, with the existing shareholders as co-grantors with the company.

Share options play an important role in achieving the objectives of the BEE Act as they provide an opportunity for black people to acquire rights of ownership in businesses while looking for finance and funding to acquire the shares outright. *SERR Synergy specialises in unique solutions for implementing ownership transactions, including Share Options.*

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