

BusinessDay



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| 53824.28 | N/A | 9.27 | N/A | 15.351 | ▼ 0.47 | 1252.10 | ▼ 1.14 | 17602.30 | N/A |
| 47 812.41 | N/A | 8.75 | N/A | 22.105 | ▲ 0.05 | 1243.63 | ▼ 0.75 | 2 049.58 | N/A |
| 76591.77 | ▲ 1.55 | 7.28 | ▲ 0.00 | 17.315 | ▼ 0.55 | 41.22 | ▲ 0.44 | 6186.69 | ▼ 0.05 |
| 30511.70 | ▼ 0.77 | N/A | N/A | 1.128 | ▼ 0.04 | 972.00 | ▼ 1.62 | 16724.81 | ▲ 0.00 |
| 2054.83 | ▼ 6.55 | N/A | N/A | 111.440 | ▲ 0.00 | 589.50 | ▲ 0.43 | 10 000 | ▼ 0.49 |



BEE starts running into flak from private sector

THE implementation and interpretation of the total spectrum of black economic empowerment (BEE) legislation is entering an interesting phase. The functionaries and executives in the government over the years have had their own ideas and often interpreted rules in ways that are not reconcilable with the rule of law. In the past, the private sector swallowed this for the sake of transformation, but all the signs are pointing to major disputes and long court battles over the way that BEE is being applied.

The prognosis is that the authorities are at risk of killing off substantial long-term progress for the sake of short-term political points. This shortsightedness might also lead to the authorities overplaying their hands with court rulings eroding and reducing BEE and transformation rules to such a degree that they become counterproductive to the objectives they are designed to achieve.

A similar situation prevailed as far as employment equity policies are concerned in the public service.

Despite the Constitution's provision that employment must broadly represent the demographic composition of SA, policy makers have followed a narrow approach of quotas and percentages, down to the very decimal, to achieve representivity. Such an artificial system has led to absurd, impractical consequences, such as leaving positions open for months and years in the search for

appropriate candidates. This has been to the detriment of the efficiency of the public service.

While these employment equity policies have been applied for more than 15 years, only recently have applications to the highest courts by aggrieved individuals and unions seen some sanity prevailing, with subsequent appointment of non-black employees and amendments to the employment equity policies.

The same scenario is now starting to unfold in the BEE fraternity. The mineral resources minister is tangled in a case with the Chamber of Mines on the once empowered, always empowered principle.

Although the BEE codes are quite clear on the subject, the minister is of a different opinion as far as the Mineral and Petroleum Resources Development Act is concerned. The once empowered principle entails giving credit to companies after they have lost black shareholding to prevent continuous diluting of shares and loss of value to existing shareholders who paid for shares.

A rights issue in a BEE transaction is in essence a financing of a shareholding transaction by existing shareholders. To expect shareholders indefinitely to finance these transactions would lead to devaluation of mining shares and subsequent large disinvestment in a capital-intensive industry. Such a situation goes directly against the grain of corporate investment. I



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would never buy any shares in such an uncertain environment, as my equity and return should be based on the performance of the company. Should the courts give favour to the minister's wish, it would be a short-lived victory as the long-term battle to transform would be lost in the further disinvestment in the industry.

For privately owned companies, this situation is normally regulated by a first-right-of-refusal arrangement as part of the

pre-emptive conditions in a sale of shares or subscription agreement.

Existing shareholders would then retain the right to be offered these shares initially and only on turning the offer down would the BEE shareholders offer the shares under the same terms to a third party. Some pre-emptive conditions would also require the BEE third party to have the same BEE credentials as the existing BEE shareholder to prevent the endless conveyor-belt of issuing and dilution of value. Most of these transactions would also have a lock-in period, preventing BEE shareholders from selling the shares.

The above constitute normal contractual and corporate law measures to protect the shareholders and the company.

They apply to all shareholding transactions and not only BEE transactions. Very few people are even aware of the Companies Act provision for trusts to hold shares or employee incentive schemes, or Section 8B, 8C, 10 (1) (Nc), and 11 (1A) of the Income Tax Act and the restriction allowed for certain shareholding transactions.

Of concern is the shocking lack of knowledge about these issues within the Department of Trade and Industry and certain rating agents. Some suggest that any form of restriction on shareholding under the pre-emptive conditions mentioned above would constitute fronting. Legislation makes provision for certain justifiable

restrictions to make a transaction possible, especially where an interested shareholder cannot pay market value on those shares.

Some reckon dividends are declarable and payable at the whim of the board. Very few are aware of the limitation in Section 4 and 46 of the Companies Act to pay out any dividends.

With the establishing of the BEE Commission, these issues would be scrutinised much more closely. One would hope that whoever gets appointed to the commission has the relevant experience in all the fields of expertise. The recent repealing of the Construction Sector Charter, with retrospective effect, is a good example where authorities have unnecessarily exposed themselves to legal challenges from the construction industry as to the validity and constitutionality of retrospective legislation.

Many disputes will emanate from the BEE Commission's investigations. We are heading for a similar situation with BEE to that which followed the application of employment equity.

■ Gideon Gerber is an attorney and founder and director of Serr Synergy, specialising in BEE structuring and compliance. He has been involved in BEE legislation since its inception in 2004, serving on working committees, giving inputs to the technical committees on drafting of the BEE Codes and consulting with entities.