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BLACK MANAGEMENT FORUM (BMF) SUBMISSION TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY ON OUR RECOMMENDATION TO THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT (BBBEE) AMENDMENT BILL [B2-2012]

The BMF is a non- racial, thought leadership organisation founded in 1976, with the main purpose of influencing socio-economic transformation of our country, in pursuit of socio-economic justice, fairness and equity. Our vision is to be the foremost organisation in the development of managerial leadership and advancing socio-economic transformation of organisations in Southern Africa and beyond. Over the past two decades, the BMF has been at the forefront of debates around economic transformation and has influenced the development of government policies in areas such as employment equity and Broad-Based Black Economic Empowerment (BBBEE). In 1993, the BMF developed a blueprint for affirmative action, the “Basotho Hat” model which put forward a compelling argument for employment equity targets as the only way to transform apartheid workplaces. Later, BMF members were at the forefront of drafting the Employment Equity act of 1998.

In 1997, the BMF conference in Stellenbosch called for the establishment of a BEE Commission, which was established in 1998 under the auspices of the Black Business Council (BBC). The view at the Conference was that black people should direct and take charge of a new vision for BEE, a process which, until then, had been conceptualised, controlled and driven by the private sector. In 2001, the BBC submitted the landmark BEE Commission report to former president Thabo Mbeki. The report paved the way for the current BEE policy framework, which includes the BEE Strategy (2003) and the BBBEE Codes (2007). Over the past few years, the BMF has been in constant engagements with government on the evolving BEE policy framework.

1. INTRODUCTION

The BMF welcomes the invitation to submit its recommendation to the Portfolio Committee on Trade and Industry relating to the Broad-Based Black Economic Empowerment Amendment Bill.

Since 2003, there have been a number of challenges related the implementation of this socio-economic legislation. This is a critical legislation aimed at redressing the imbalances of the past by seeking to substantial transfer ownership and management control of economic resources to the country's majority.

The relevance and importance of this legislation has to be traced to our liberation struggle since redressing the imbalances resulting from a violent system of apartheid is a continuation of the peoples struggle for true liberation. Therefore this initiative of empowering the black majority is critical for both the economic and political stability of the country should never be relegated into just another piece of legislation for the vestiges of apartheid are still glaring.

We see this legislation not as an end in itself but rather a tool to break the structural conditions created by apartheid which conditions continue to perpetuate inequality both in terms of race and class. Only once those conditions are broken we will we see the our economy operating at an optimum level achieving higher levels of economic growth, high productivity, high employment, creation of more black entrepreneurs/industrialists, etc.

BMF in the main fully supports to this Broad-based BEE Amendment bill particularly the following:

- a. Aligning the Act with other legislation impacting on B-BBEE and with the codes of good practice;
- b. Establishment of the Broad-Based Black Economic Empowerment Commission to serve as an institutional environment for monitoring and evaluating B-BBEE;
- c. Dealing with non-compliance and circumvention by, inter alia, introducing offences and penalties.
- d. The monitoring, evaluation and reporting of BBEE compliance by organs of state
- e. The inclusion of local content but it must be premised on BEE

We are also encouraged as the BMF that the proposed legislative amendments seek to give effect to a socio-economic policy aimed at the reduction of inequality, defeating poverty and job creation and its possible alignment with New Growth Path.

The BMF is however concerned and disappointed that in this amendment bill

- the **development of sector charters and/or codes** is still encouraged in spite of our experiences with some sector codes including those that are still at drafting stage like the Financial Services Sector.
- The Trumping Provision is absent. We believe the B-BBEE Act to take precedence over conflicting provisions in legislations dealing with empowerment.

Within the private sector, many companies adopted a “tick-box” and minimalist approach to compliance. There were loopholes within the Codes that allowed companies to game the system. Companies adopted a “pick-and-choose” approach to implementing BBEE. They could ignore poor performance in one area and still have an overall high level of compliance. This was partly due to low targets in areas such as skills development, preferential procurement, enterprise development and socio-economic development, where companies could get “free points.”

2. Specific Proposal and Comments

1. Sec 1 (c) - Definition of Broad Based Black Economic Empowerment (BBEE)

BMF is encouraged and support the insertion of, “in particular” to emphasise or prioritise women, workers, youth, people with disabilities and people living in rural areas. However, we propose that there should be no ambiguities in the legislation and the definition should clearly indicate BLACK women, BLACK workers, BLACK youth, BLACK people with disabilities and BLACK people living in rural areas after all this is BLACK Economic Empowerment.

2. Sec 1 (c) (e) - Definition of Broad Based Black Economic Empowerment (BBEE)

As part of the strategy to advance BBBEE the legislator has introduced promotion of 'Local Content' in procurement. We support this amendment but propose that local content should never be prioritised over preference to BEE compliant companies.

3. Sec 2 (g) and (h) Objectives of the Act

Both these clauses refer to Black owned and managed enterprises or black start-up, Black medium enterprises. However, there is no definition for black owned enterprise provided. We propose that this be clearly defined in the legislation

4. Sec 10- Status of the Codes of Good Practice

We support the amendment to this section particularly that it eliminates the ambiguity with regards to whether organs of state have a choice to apply the codes or not.

5. Sec 10 (e) - Status of the Codes of Good Practice

The section reads "Determining criteria for awarding of incentives, grants and investment schemes in support of Broad-based Black Economic Empowerment"

We propose that the part that states, "in support of broad Based Black Economic Empowerment" be removed and not confine the requirement to only those incentives that relates to BBBEE.

6. Sec 11- Strategy for BBBEE

We welcome and support the amendment in this section and further propose that provinces should be compelled to develop and implement their sub-strategies feeding to the national strategy. This is critical to ensure that economic transformation is driven bottom up and that it permeates every sector and every part of the country.

7. Sec 12 Transformation charters

BMF has long taken a position on this matter and on numerous occasions have submitted to the DTI that transformation charters and sector codes should be done away with as they are used as an excuse to avoid compliance with the Codes or to lock stakeholders in perpetual negotiations.

We propose once again that this clause must be scrapped failing which it must be stated in no uncertain terms that sector codes should only be approved if they better the targets and weightings of the codes.

8. Sec 12 A Transformation Policy

We commend and support this amendment however we propose that the approval by the Minister of such transformation policies shall only be on condition that it better the codes in all material fronts. Whilst we acknowledge that this section may have the unintended consequence of increasing the cost of compliance since there will be multiple compliance requirements from different organs of state. It is our considered view that certain organs of state may find the codes to be restrictive in their endeavours to advance transformation and therefore the benefits of this progressive amendment far outweigh the cost.

9. Sec 15 -Establishment and status of the BBBEE Commission

We fully support the amendments but feel strongly that they fall short in ensuring the independence of the commission. We therefore propose that this commission be a Chapter 9 or at least the principles guiding its formation must guarantee its independence in that it must:

- 1) It must report directly to parliament
- 2) Term/tenure- must be non-renewable
- 3) Be empowered to require relevant organs of state to provide the commission with information on measures taken in advancing BBBEE and be empowered to shame those organs of state who fail to advance BEE

10. Sec 20 – Offences and penalties

We welcome and support these amendments and actually applaud the ministry for taking such a bold move by introducing offences and penalties to deal with fronting and circumvention. This we believe will go a long way in discouraging fronting practices which poses a greatest threat to economic transformation.

11. Sec 21 – Monitoring, Evaluation and Reporting

We welcome and support these amendments but further propose that the organs of state should only report independently verified information and that non-compliance to set targets should attract an adverse audit opinion.

12. Sec 22 - BEE Verification Professional Regulator

We support the amendments

3. RECOMMENDATIONS: THE BBEE AMENDMENT BILL

WE RECOMMEND THAT:

3.1. The BEE Act must supersede all other laws and policy tools that seek to achieve economic transformation. It must be the country's trumping legal and policy framework. The Department of Trade & Industry (DTI) must lead and champion economic transformation in the country and align all sectors of the economy with the BEE Act.

We note with disappointment the fact that mining, a critical sector of the economy that employs 500 000 people and generates more than 30% of merchandise exports, is the only industry in South Africa that has made no attempt to align with the BEE Act and that the DTI as the champion of economic transformation has not publicly taken steps to address this issue. The mining charter should align itself with the amended BEE Codes. In its current form, it betrays every principle of empowerment that is contained in the BEE Codes. Mining is the only sector of the economy where there is no requirement for independent verification of BBEE contributions. None of the mining companies has a BEE certificate. It is the only sector that has made no attempt to align with the BEE Act. We also note with disappointment that the government continues to approve unnecessary sector codes.

So far there are seven sector codes: Information and Communications Technology (ICT); Transport; Property; Construction; Forestry; Tourism; and Chartered Accountancy. In addition, on November 14, the minister of trade and industry released Phase 2 of the Financial Sector Charter (FSC) for public comment. If the FSC charter becomes a sector code, the majority of JSE-listed companies by value will not be measured against the generic BEE Scorecard. We believe that all sector codes should be abolished. The sector codes have arbitrary deviations from the BEE Codes, which have no rationale. For example, in the ICT sector a company becomes compliant if it has concluded a transaction worth R7.5bn. The sector codes exclude large sectors of the economy from implementing the codes. They introduce added complexity and make it impossible to have cross-sector comparisons of BBEE performance.

3.2. The government must invest resources and capacity in monitoring the implementation of BBBEE on an ongoing basis.

The proposed BEE Commission should have the resources and capacity to monitor and evaluate the implementation of BBBEE in the public and private sector on an ongoing basis. The Commission should publish an annual report on the State of BBBEE Implementation within the public and private sectors, which is similar to the Commission for Employment Equity (CEE) report. Each organ of state should submit an annual BBBEE report using a consistent template to enable comparisons. The government should also consider making the monitoring of BBBEE compliance across all levels of the public sector part of the mandate of Auditor General's office. We also call upon the JSE to make it mandatory (part of listing requirements) for companies to report on BBBEE implementation. It must introduce BBBEE reporting guidelines to enable comparisons across sectors. Each listed company must publish its verification certificate and report for public scrutiny.

3.3. There should be consequences for companies that do not comply with BBBEE. Non-compliant companies must be published in a public register and have meaningful fines imposed on them.

BBBEE is still voluntary, although there is a business imperative to transform. We bring to the government's attention the experience of Norway. In 2003, Norway legislated a 40% quota for women on company boards. Implementation was slow during the initial voluntary phase. The successful implementation of the quota was due mainly to sanctions, the toughest of which was the forced dissolution of non-compliant companies. Companies were given four years to meet the quota, which they did achieve. The success of the Norwegian model has sparked a Europe-wide debate about quotas, according to a recent report.