

Paul Janisch request for clarity of 36928 (19 October 2013)

19 October, 2013

The Minister of Trade and Industry – Dr Rob Davies

77 Meintjies Street

Sunnyside, Pretoria

0002

Request for Reasons

(Sec. 33 Constitution, sec. 5 Promotion of the Administrative Justice Act 3, 2000 (PAJA)

Reference No. Gazette Number 36928 _____

Your decision: _____

I am respectfully applying for a written explanation for the following

1. The reasons behind your rejecting my comments regarding the codes of good practice (attached).
2. In addition as a white business owner I request that you furnish me the reasons why my 100% black-owned counterparts who turnover less than R50m should be accelerated to a level one status without contributing to any form of nation building or empowerment.
3. It is respectfully requested for the Minister to explain why the current BEE codes of good practice (29617) are no longer adequate to address the empowerment needs of South Africa.
4. And finally would the Minister please explain to me in writing as to how he could have published a document that lacks the clarity that is needed to implement such dramatic changes in the empowerment arena.

I herewith request written reasons for the administrative action mentioned above (sec 5 (1) of the PAJA). I am of the opinion that the decision adversely affects my Constitutional Rights.

Kindly be informed that according to the Constitution and sec 5 (2) of the PAJA I am entitled to be given adequate reasons.

It is also stipulated in sec. 5 (3), that the decision you have made must be regarded as a decision with no good reasons if you fail to provide your decision with adequate written reasons. This is a reason for appeal or judicial review.

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With respect

Paul Janisch _____

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Paul Janisch

From: Xolisile Zondo <XZondo@thedti.gov.za>
Sent: 03 December 2012 12:39 PM
To: Paul Janisch
Cc: Lindiwe Madonsela
Subject: Re: Comments regarding the draft broad-based BEE codes (gazette number 35754)

Good day Paul,

This serves to acknowledge receipt of your comments.

Thank you.

Xolisile Zondo
BEE Unit
Tel: 012 394 1609

>>> "Paul Janisch" <paul@caird.co.za> 2012/11/27 09:35 AM >>>

To whom it may concern

Please accept these comments regarding the Minister's latest draft. They come from a perspective of a practitioner whose opinion differs diametrically to those opinions expressed in the codes.

Our comments are based on the amendments to gazette number 29617. We have noted that there are sharp contradictions between those aspects of 29617 that have remained unchanged and the amendments proposed by 35754. We do not feel that it is necessary to bring this to the DTI's attention as we are sure that the drafters of the new codes would be aware of this fact.

The codes are incomplete

The preamble informs us that a Technical Assistance Guide has been gazetted. This does not form part of gazette number 35754. The codes have not included the QSE code. We expect that these two documents will be published separately with their own 60 day comment period.

The premise that BEE has failed has not been adequately demonstrated

We are an active member of SEIFSA and as such are aware of the BEE performance of other members of the association. We can show the DTI that there has been a remarkable improvement in the BEE scorecards of members across the board. We can also show that the performance of our significant suppliers has improved steadily over the last five years. We invite the DTI to come to our offices and meet with our staff and other stakeholders to discuss our own BEE successes.

If the DTI is convinced that BEE has failed to deliver what it is supposed to we challenge them to demonstrate this across a variety of industries. We would encourage them to find an impartial third party (preferably an international organisation with no ties to government or South African industry) to conduct an objective study across the South African economic spectrum.

General observations – Code 000, Statement 000 (page 4)

Paragraph 3.1.3 – what is the difference between “*business with an organ of state*” and “*economic activity with an organ of state*”. This definition has not been included and it is unclear as to what the new term encompasses.

Paragraph 3.4 – Discounting of the scorecard (page 4)

It appears that ownership is a compulsory element for all companies that turnover more than R10 million. Has the DTI considered the constitutional implications of this type of forced integration. We are referring here to section 18. “*Everyone has the right to freedom of association*”. We recognise that section 36 of the constitution allows certain rights to be limited where the “*limitation is reasonable and justifiable*”. We suggest that by negatively discounting scores because of non-compliance with ownership this will be an unreasonable and unjustifiable limitation of section 18.

The next issue regarding discounting of scores is that there is a likelihood that companies may fall below the 40 point mark by having their levels discounted. This would be an incredible disincentive for companies to continue with their BEE implementation if they fall below the minimum mark. It could lead to corporate apathy and ultimately the failure of BEE altogether.

Recommendation – remove the discounting of priority elements as well as the sub-minimums for those elements. Paragraphs 4.3, 4.4 (page 6). Elevation of black-owned Exempt Micro Enterprises (EMEs) to a level 2 or level 1 contributor status depending on their ownership levels.

It is recognised that black businesses need assistance in growing. However such an elevation of BEE status for those entities has two implications.

i) Constitutional implications

Under the PPPFA a bid for a level one is a 5 point advantage under the 90/10 and 8 point advantage under the 80/20 systems. For clarity’s sake a level two EME has a 4 and 6 point advantage respectively. This is the advantage over a standard EME.

Contributor Level (current codes)	Draft codes	90/10	80/20
Level 1 Contributor (≥100)	≥100	10	20
Level 2 Contributor (≥85 - <99)	≥95 but <100	9	18
Level 3 Contributor (≥75 - <85)	≥90 but <95	8	16
Level 4 Contributor (≥65 - <75)	≥80 but <90	5	12
Level 5 Contributor (≥55 - <65)	≥75 but <80	4	8
Level 6 Contributor (≥45 - <55)	≥70 but <75	3	6
Level 7 Contributor (≥40 - <45)	≥55 but <70	2	4
Level 8 Contributor (≥30- <40)	≥40 but <55	1	2
Non-Compliant Contributor	<40	0	0

Section 217(1) says the following

217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

It identifies five principles of procurement namely fair, equitable, transparent, competitive and cost-effective. Promoting a business to such a high level on the basis of race cannot be viewed as being either fair or equitable. This section would be open to a constitutional challenge on this basis. Furthermore Treasury might reject this elevation on the basis of fairness and equitability.

ii) Fronting implications

Any EME could make itself available for fronting purposes, with 100% black-owned EMEs being the most attractive to potential fronting companies. The R10million EME turnover threshold elevates this likelihood. If the DTI is as averse to fronting as it publicly purports then it would surely reduce the potential for fronting. This elevation of status on the basis of race increases the potential.

Recommendation – the existing practice of elevating an EME by a single level covers all the bases and leaves little incentive to front.

Paragraph 5 (page 7) – Eligibility as a Qualifying Small Enterprise

We submit that it is grossly unfair and unreasonable to publish codes that elevate the turnover thresholds of QSEs and yet not publish the detail regarding these entities. The DTI is supposed to take a lead in the empowerment arena and this sends out a negative message about their ability and competence to lead such an initiative.

As mentioned above the QSE codes should have been published with gazette 35754. When it is published it must be given 60 days for comment.

Paragraph 5.1 (page 7) – EME status moved to turnover less than R10million

On the one hand this is a welcome adjustment. It allows more companies to get on with the business of business and not worry about empowerment requirements. However has the DTI considered the following:

- i) The implication of contributions under ED and SED. A large amount of money will no longer be contributed to these beneficiaries because the EME threshold has been raised. It's possible that the number of people approaching the government for social grants could increase because they are not receiving support from the private sector. Similarly, existing ED beneficiaries could be summarily dumped.
- ii) Continuing on the point above. A large number of companies will now no longer need to comply with any form of BEE which will have an impact on employment equity, skills development and procurement. The success of BEE hinges on requesting BEE scorecards from suppliers – the number of companies actually implementing BEE will be reduced and the impact across the economy will be felt.
- iii) When reading paragraph 5.2, which requires QSEs to comply with all five elements, in conjunction with paragraph 3.4, which discounts levels, it becomes very apparent that white-owned EMEs that might want to improve their BEE status by volunteering to comply with the QSE scorecard will not do so because their score is unlikely to improve.
- iv) There are a number of companies that might have made ED and SED contributions because their turnover was less than R10m but more than R5m. These contributions would come to an end

Recommendation – the EME threshold has been very successful as it is and should not be increased

Paragraph 6.4 (page 8) – start up enterprises and tenders

Could the DTI please provide a guideline on the implementation of this requirement. This paragraph is still not understood.

Paragraph 8.2 (page 10) – BEE recognition levels.

It is now very clear that the DTI is opting for a stick approach in the transformation of the economy. However if the DTI wishes to see some progress they have to give those entities that wish to comply a fighting chance to do so. By increasing the entry point to 40 points and negatively discounting levels and increasing targets in certain places the DTI is not assisting in the transformation of South Africa at all. All they are doing is discouraging companies from complying at all. To get 40 points on the proposed codes is incredibly difficult.

Recommendation – if the codes are gazetted with the discounted priority elements and they survive a constitutional challenge then the entry level should be brought down to 10 points.

Code series 100 – Ownership (page 12)

We have discussed priority elements above. There should be no priority elements included in the proposed amendments.

Paragraph 5 – Private Equity Companies (page 15)

It is ironic that the minister has been speaking about increasing the levels of ownership to reflect the demographics of the country and yet the new code devotes three pages to BEE owned private equity companies. These companies are an elite group who have access to large amounts of capital. This

will perpetuate the commonly viewed “fat cat” perception. When read with the increased threshold for black new entrants (to R50million – see page 58) one can easily draw a conclusion that a certain influential and affluent segment of society have been instrumental in the drafting of this code and this is to detriment of any broad-based ownership system.

Code series 200 – Management control (page 21)

Perhaps the drafters could consider correcting the large number of typographical errors contained in this code.

Paragraph 2.2 (page 23)

We interpret this paragraph as referring to the infamous economically active population (EAP) statistics. We submit that this is adequately covered by the employment equity act and should be excluded on the basis of perpetuating the levels of blackness that already exist informally within the country. As it stands the EAP targets are being challenged in the high court on the grounds of fairness. We also submit that by institutionally reducing people to their perceived population groups it would violation of section 10 of the constitution - *Everyone has inherent dignity and the right to have their dignity respected and protected.*

Code 300 – skills development (page 27)

We reiterate our point about priority elements. Priority elements should be removed.

As a general observation this code places too much emphasis on external training which must have an impact on productivity. Increasing the target spend is a case in points which we have discussed in more detail below.

Increasing the skills development spend to 6% of payroll (page 27)

Has the DTI considered how this will impact productivity in the workplace? This target is too high and unreasonable and if implemented in the spirit of the code will result in black staff members in training and not contributing to the economic success of the entity in question.

Inclusion of unemployed black people as learners

This is most welcome. But the SETAs need to improve their service delivery in this respect. There are numerous companies who have been forced to fund learnerships themselves even though they pay their SDL because the SETAs are not able to allocate the requisite number of learnerships. It must be pointed out that those companies that do fund their own learnerships are doing so because of the skills development requirement under gazette 29617 – perhaps the DTI could consider this as a success under the current codes.

If the SETAs do not allocate learners and learnerships then this element is rendered redundant.

Paragraph 2.2 – EAP (page 22)

Please see our comments under Management Control above. Also consider the administrative overheads that would be required to measure this. This is an unreasonable requirement.

Annex 300A – amended learning programme matrix (page 31)

Has the DTI conducted sufficient research to establish the efficacy of on-the-job training? On the job training is permitted under the current codes although in a watered-down form. Removing this and category F learning programmes as recognised training will have a negative impact on productivity.

Code 400 – enterprise and supplier development (page 38)

Again this is a priority element. Priority elements will be shown to be counterproductive in the short, and by implication, the long term.

On the note of it being a priority element, this element in its current guise can never work. The subminimum of 40% of the points is almost impossible to achieve and as such every large entity will drop two levels.

Value-adding suppliers (page 3) - means an Entity registered as a vendor under the Value-Added Tax of 1991, whose Net Profit Before Tax summed with its Total Labour Cost exceeds 25% of the value of its Total Revenue

Has the DTI ascertained as to the number of value suppliers operating within the economy? This information could definitely be obtained by examining all BEE certificates circulating the economy at the moment. Alternatively SARS would be able to provide the DTI with a list of VAT registered vendors and would probably be in a position to do the calculation.

Our assessment shows that 55% of suppliers are value-adding suppliers. With the requirement that only value adding suppliers apply in the procurement calculation this means 45% of all entities need not bother with any BEE accreditation because they are not value-adding suppliers and hence don't count under procurement.

In addition has the DTI established from SARS whether they have made the VAT registration process simple enough for those companies that fall below the VAT threshold? If they have they might find that this is a complicated process that is best done through a third party expert.

Recommendation – remove the value-adding supplier requirement or deal with the consequences of almost half of the companies that might want to comply with the codes not bothering because they don't count anyway.

Inclusions and exclusions in procurement

Paragraph 5.4.1 – scorecards from primary service providers that a local government authority resells. (pages 43 and 44)

This is an unfair requirement

- The entity has no say as to who this service provider is. And with many municipalities' current reputation for irregularities in procurement and corruption the possibility exists that the service provider might have been awarded the tender without demonstrating any empowerment credentials.
- This unfairness is exacerbated when one considers that the BEE Act is in fact binding on those local government entities and this paragraph absolves them from any responsibility in their own procurement implementation.
- Is it fair on the entity to interrogate their local authority to provide them with the details of the service provider? This adds to more administrative overheads.

Deletion of paragraph 6.6 (imports) (page 45)

This is a bizarre inclusion in procurement spend. Whilst we understand that the DTI would like to stimulate as much local production as possible, South Africa plays in a global economy which includes importing products and services.

Including imports against an increased target of 80% under procurement increases the likelihood of the 40% subminimum not being reached which will result in a discounting of the score by two levels - a further disincentive to implement any form of empowerment.

Increasing procurement targets (page 39 and 40)

This is something to aspire to. But there are no short term gains and could result in apathy and a rejection of the procurement element – which will ultimately end the BEE process altogether. Has the DTI ascertained whether these targets are achievable and if so, when will they be achievable.

Enterprise and supplier development (page 40)

The inclusion of suppliers in the enterprise development section is welcomed.

Annexe 400B - Benefit factor matrix (page 51)

We question as to why some of the benefits have been decreased, for instance outstanding loans. The real cost to the loaner increases every year whilst the beneficiary reaps the rewards of interest-free money. This is unfair on the measured entity.

Limiting prompt payment (page 52) to only 15% of the maximum amount recognised under the enterprise and supplier development programme is counterproductive. The management of cash flow is key to the survival of any business and prompt payment assists immeasurably in this process. The limitation offers too small an incentive to do this and as such could be neglected by measured entities which will not help smaller black businesses in the long term.

Code 500 – socio economic development (page 54)

Two issues need to be highlighted about the proposed code

- 1) Recognition for contributions to beneficiaries “*with the specific objective of facilitating sustainable access to the economy for those beneficiaries.*” (page 56)

This single definition removes a large number of beneficiaries that derive support under the current SED code. It removes humanitarian contributions to children, the elderly, the abused, the destitute to name but a few, all of whom would be black. The ultimate demise of these beneficiaries could be attributed to this very limited definition and would be carried on the DTI and the drafters of this code’s shoulders. For the sake of the poor in this country this definition must be removed.

- 2) Contributions will only be recognised if 100% of the beneficiaries are black (paragraph 3.2.2 , page 56)

It has been noted that this an absolute requirement and is not pro-rated as the current codes are. Has the DTI considered the 450,000 odd white people who live below the breadline who might be fairly benefiting under the current codes? Does the DTI wish to accept responsibility for their slide into starvation and ultimate death.

Recommendation – revert to the current socio-economic development code. It is fairer on all the poor in this country.

Conclusion

- The codes reduce the real number of beneficiaries substantially. This suggests that a very narrow segment of society were advising the minister.
- It is our opinion that BEE has not failed. We would need to be objectively convinced that this is the case. And if it has not failed we do not see the need for such a dramatic change to the codes
- In order to bring about the change that these codes are proposing there needs to be much greater involvement from all spheres of government. This ranges from SARS easing the requirements to register for VAT, through to SETAs delivering decent skills to the workplace and allocating learners. Without government’s partnership in this respect these codes can never succeed.
- The DTI cannot lean on the private sector alone to stimulate local production to the extent that the codes anticipate. The economy requires a harmonised process with correct incentives and

less red tape. It is unreasonable to expect the private sector to perform in this way with the hostile set of laws that it faces.

- BEE's success is dependent on private sector uptake. We must not lose sight of the fact that the constitution would frown upon any legislation that forced a company to comply with these codes. To get the private sector buy-in the codes need to allow for success which would include recognition of points for performance. These codes have opted for a stick approach and targets that are unlikely to be reached in the short term which will result in the private sector rejecting the process altogether. Once this has happened no amount of legislating will resurrect the programme.
- We submit that very little research has been conducted in the drafting of these codes. As such we recommend that the Minister resigns and that the BEE Council is disbanded and re-constituted with people that are representative of the companies that need to implement and BEE code.

We hope that you view our comments favourably and accept them in the spirit of the future success of the South African economy.

Paul Janisch

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