

# BEE needs bite, but will it get teeth?

Empowerment advocates are disappointed by the state's preference for mediation over punishment

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**W**idespread concern about broad-based black economic empowerment's (BEE) failure to deliver has led to calls for a strong oversight body, with hopes centred on the broad-based BEE commission proposed in an amendment Bill — but the government has other plans.

Submissions to Parliament by various organisations and the views of individuals interviewed by the *Mail & Guardian* make it clear that many would like the new commission to have “teeth” and to be independent of the department of trade and industry.

But, according to the department's director general, Lionel October, it envisages a commission based in the department with a championship, mediation and advisory role rather than the more “judicial” approach of a body like the Competition Commission.

There will be a lot of disappointed faces if this is the end result.

The spokesperson for the Black Business Council, Sandile Zungu, said he wants to see a commission with powers to subpoena and investigate. “[I]t must have teeth. It must have the power to subpoena and to call people to account. South Africa needs a commission that can break cartels.

“The commission must receive representations from parties with a grievance and where necessary take corrective action,” he said.

“If the commission was set up properly we would know who the 73 unnamed individuals are who benefited from the Goldfields share deal, and we could prevent share deals where black shareholders are tied in to ownership and cannot benefit from their shareholding for 15 to 20 years. It would also be able to investigate and deal with fronting.”

October said the department is in favour of a commission that used the carrot rather than the stick, because

it sees BEE as more of a social and transformational issue than an economic one. From the department's perspective the commission's task would be to monitor and assist with compliance, he said. “The presidential Broad-Based Black Economic Empowerment Council was set up to investigate BEE and to suggest areas for refinement or improvement.”

One of the challenges for BEE has been the lack of regulation in the BEE verification industry, which has led to confusion about the allocation of scorecard points.

“BEE has been adopted by the majority of companies, but the problem is that we have different scorecards being used, so we are not seeing a proper standard,” October told the *M&G*. “The commission would address that by providing guidance around the scorecards.”

He said the commission should also provide clarity on legislation, as ambiguity in that area had been cited as a problem by rating agencies and companies trying to comply.

“[The department] previously advised companies, but ... it was felt that there was a need for a body within the department that could deal with queries and advise companies.”

October said discussions were held around “a more regulatory body with investigative powers”. “But after careful consideration it was felt that BEE [should not be punitive]. The view ... was to look at how do you effect transformation while growing the economy.”

He said it is envisaged that companies could be issued with advisories if the commission receives a complaint about noncompliance. “In general because the corporate sector is well regulated, if they get an advisory they will take note.”

He said the Special Investigating Unit could deal with fronting, as the new Act makes it a criminal offence.

Black economic empowerment has become a hot talking point of late, not only because of the public hearings



The Bapo Ba Mogale community has turned to the courts to claim millions it believes mining giant Lonmin owes it as proceeds from an empowerment deal. Photo: Delwyn Verasamy

being held in Parliament around the new Broad-Based Black Economic Empowerment Amendment Bill, but also because of recent calls by prominent political and business people for BEE to be scrapped.

The argument is that BEE has not achieved its aims, which is to share the country's wealth with previously disadvantaged sectors of society and to encourage the development of productive and sustainable black businesses, particularly in the small and medium sectors.

Mamphela Ramphele, former Gold Fields chair and founder of the political movement Agang South Africa, has been particularly vocal about her opposition to BEE, saying it only benefited a small, elite group.

In an interview with *Business Day* this week, she revealed that the government had forced Gold Fields to select the Invictus Gold black economic empowerment shareholders for their empowerment deal or be denied a mining licence.

The deal saw Invictus Gold take 9% of the lucrative South Deep mine. Only 18 names of the 73 shareholders have been revealed. The deal cost the shareholders R1.1-billion in 2010.

Trevor Manuel, the former finance minister and now minister in the presidency, has long been a critic of BEE as it has unfolded over the years, expressing his frustration and anger particularly at corruption.

Manuel was quoted in a *Wall Street Journal* interview in March 2011 as saying that the ArcelorMittal deal involving Duduzane Zuma, son of President Jacob Zuma, was “the ugliest face of [BEE] but not the only instance”.

The South African Institute of Race Relations, in its December 2012 submission to Parliament on the BEE codes introduced alongside the new

Bill, made its position clear in the heading “BEE should be scrapped, not reformed”, quoting objections by the trade union federation Cosatu and the South African Communist Party to BEE as it stands, and the fact that it has benefited a black elite instead of addressing “economic inequalities”.

Empowerment stakeholders interviewed by the *M&G* were not in favour of seeing BEE scrapped. With only 8% of black companies represented on the JSE and “racial disparities”, the interviewees believed there had not been sufficient transformation to do away with BEE.

But there was agreement that BEE is not working, and that something has to be done, as one person put it, “if not for economic reasons, then just to satisfy an increasingly angry public who are not seeing changes to their circumstances, despite BEE being introduced in 2003”.

The Bapo Ba Mogale community, for one, has turned to the courts to claim the millions of rands it believes it is owed by mining giant Lonmin from an empowerment deal.

The Black Business Council told Parliament on March 8 that BEE “had not been successful” but did not agree that it should be scrapped.

Xolani Qubeka, chief executive of the council, called for the proposed broad-based BEE commission to be established as an independent entity that operated outside the ambit of the trade and industry department, and Loyiso Mbabane, who chairs of the Commission for Employment Equity, called for the strengthening of powers granted to the commission.

Christine Qunta, executive chair for Pholosang BEE Resolution Services, said: “Provision should be made to allow the commission to apply an inquisitorial method of

adjudication.”

Like Zungu, Vanessa Phala, the executive director of social policy for Business Unity South Africa, said a commission with powers to take action over noncompliance would make a difference: “It has to have some teeth,” she said. “We want a commission that is an independent juristic body ... to ensure that it is impartial and independent.”

Wilmot James, the Democratic Alliance's spokesperson on trade and industry, said that the commission “should have the same power as the Competition Commission” to ensure that monopoly of the economy by the “big boys' club” does not happen again.

Amendments to the broad-based BEE legislation include making fronting and misrepresentation a statutory offence. Categories of the scorecard to measure BEE would be reduced from seven to five, with the categories of employment equity and management control merged into one category, and preferential procurement and enterprise development into another.

One of the more controversial amendments is the decision to give priority to ownership, skills development and the enterprise and supply development categories when scoring companies.

For reasons of uniformity, the trade and industry department selected the Independent Regulatory Board of Auditors to register and regulate the people who would verify companies' BEE ratings.

Manufacturing, agriculture and retail were identified as sectors that have been slow to implement BEE, in comparison to the financial, mining, media and telecommunication sectors. October said there was a need to reach out to these sectors to ensure empowerment was speeded up.