

## ECONOMIC DEVELOPMENT DEPARTMENT

NO. 857

25 AUGUST 2017

**MEMORANDUM OF UNDERSTANDING**

Entered into by and between

**The Competition Commission**

(hereinafter referred to as "the Commission")

A juristic person established in terms of Section 19 of the Competition Act 89 of 1998,  
herein represented by **Mr Tembinkosi Bonakele** in his capacity as the  
**Commissioner of the Competition Commission**

And

**The Broad Based Black Economic Empowerment Commission**

(hereinafter referred to as "the B-BBEE Commission")

A juristic person established in terms of Section 13B of the Broad Based Black  
Economic Empowerment Act 53 of 2003, as amended and herein represented by **Ms  
Zodwa Ntuli** in her capacity as the **Acting Commissioner** of the Broad Based Black  
Economic Empowerment Commission

(Hereinafter referred to as "the Parties")

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**PREAMBLE****WHEREAS -**

The B-BBEE Commission was established in terms of Section 13B of the Black Economic Empowerment Act 53 of 2003 as amended by Act 46 of 2013 ("the B-BBEE Act") in order to *inter alia*, oversee; supervise and promote adherence with the BBEE Act in the interest of the public.

**WHEREAS -**

The Competition Commission is established in terms of Section 19 of the Competition Act 89 of 1998 ("the Competition Act") in order to *inter alia*, investigate, control, and evaluate restrictive practices, abuse of dominant position, exemptions and mergers, and to promote the efficiency, adaptability and development of the South African economy.

**WHEREAS -**

The Commission, in terms of the provisions of Section 21(1)(h) read with Sections 3 (1A) (b) and 82 (1), 81(2) and 81(3) of the Competition Act, has a responsibility to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act.

**WHEREAS -**

B-BBEE Commission, in terms of Section 13F (4) of BBEE Act, is required to liaise with any regulatory authority on matters of common interest and may exchange or receive information from such regulatory authority pertaining to matters of common interest or to a specific complaint or investigation.

**NOW THEREFORE -**

The Parties now agree to conclude this Agreement as follows:

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## 1. BASIS OF THIS AGREEMENT

- 1.1 This Agreement is entered into in order to establish the manner in which the Parties will interact with each other in respect of the investigation, evaluation and analysis of merger transactions and/ or complaints involving persons' subject to regulation of the B-BBEE Act.
- 1.2 This Agreement is entered into on the basis of mutual respect, in a spirit of goodwill and in no way affects the independence of the two regulatory bodies hereto.

## 2. COMPLAINTS

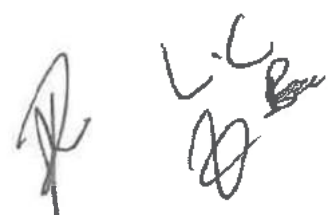
- 2.1 Where a complaint/ appeal is lodged regarding a practice in respect of which the Commission and B-BBEE Commission have concurrent jurisdiction, the following process shall be followed:
- 2.1.1 The regulator that receives the complaint ("the Recipient Regulator") shall ensure that the said complaint is made available to the other regulator;
- 2.1.2 The Recipient Regulator shall inform the complainant(s) that the matter will be discussed jointly by the Commission and the B-BBEE Commission in terms of this Agreement;
- 2.1.3 The Commission and the B-BBEE Commission shall consult with each other and evaluate the complaint in order to establish how the matter should be managed in terms of this Agreement;
- 2.1.4 When the Commission considers a transaction with implications for the B-BBEE, the Commission must consult with the B-BBEE Commission. The Commission must have regard for the B-BBEE Commission views.
- 2.1.5 In evaluating how the complaint may be managed, the parties must have regard to the principle that-

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- 2.1.5.1 the Commission is to exercise primary authority to detect and investigate alleged prohibited practices to give effect to the Competition Act; and
- 2.1.5.2 B-BBEE Commission has primary authority to exercises powers assigned to it by the B-BBEE Act.
- 2.1.6 The Recipient Regulator shall advise the complainant(s) within a period of sixty (60) days or such further period as may be agreed upon between the parties of the decision of the joint discussion between the Commission and the B-BBEE Commission;
- 2.1.7 The Recipient Regulator shall give the complainant(s) further directions regarding the prosecution of the complaint in question;
- 2.1.8 In the event that the matter is dealt with by the Commission, representatives from the B-BBEE Commission may participate in the matter through inter *alia* attending meetings when required; providing inputs during the case investigation and making representations at the Competition Tribunal hearing if necessary.
- 2.1.9 In the event that the matter is dealt with by the B-BBEE Commission, representatives from the Commission may participate in the matter through inter *alia* attending meetings, providing inputs during the case investigation and making representations at the B-BBEE Commission proceedings if necessary
- 2.2 If it is decided in the consultation process, contemplated in 2.1.3 above, that the B-BBEE Commission will deal with the matter, the Commission may issue a notice of non-referral, in terms of Section 50(2)(b) of the Competition Act, and in instances where the Commission received the initial complaint, the complainant(s) shall not be precluded from pursuing the matter with the Competition Tribunal (established in terms of Section 26 of the Competition Act).

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- 2.3 Nothing in the procedures, contemplated in paragraph 2, shall detract from the jurisdiction of the Commission or the jurisdiction of the B-BBEE Commission to receive and deal with complaints in terms of their enabling statutes, or preclude the public from lodging complaints with both the Commission and the B-BBEE Commission concurrently.
- 2.4 Where a complaint relates to a matter where either the Commission or the B-BBEE Commission has jurisdiction, but there is no concurrent jurisdiction, the following shall apply:
- 2.4.1 The complaint must be lodged with the regulator that has jurisdiction;
- 2.4.2 If upon receiving a complaint, the Regulator is of a view that it does not have jurisdiction over the matter, the Regulator with whom the complaint is lodged shall advise the complainant(s) accordingly and recommend that the complainant(s) refer the complaint to the relevant regulator;
- 2.4.3 If the B-BBEE Commission is the Regulator that has jurisdiction, it shall, if it is legally competent under its legislation to take into account considerations of competition, be entitled to liaise and consult with the Commission so as to ensure the consistent application of competition principles to the complaint in question;
- 2.4.4 The Commission shall be entitled to do likewise when it is the Regulator with jurisdiction, and be entitled to consult with the B-BBEE Commission on the regulatory aspects, subject to the B-BBEE Commission's jurisdiction, in order to obtain the B-BBEE Commission's input on regulatory issues pertaining to the complaint; and
- 2.4.5 The Commission and the B-BBEE Commission may, upon request from each other, participate in each other's proceedings in their advisory capacity.

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- 2.5 In the circumstances contemplated in 2.4 above, the decision by the regulator exercising jurisdiction over the complaint to consult the other regulator shall be discretionary and voluntary, and the regulator exercising jurisdiction shall, with or without consultation, make its independent decision.
- 2.6 When the Commission and the B-BBEE Commission consult each other, as contemplated in 2.4.3 and 2.4.4 above, they shall do so at no cost to each other.
- 2.7 In either of the circumstances contemplated in 2.4.3 and 2.4.4 above, the Commission and the B-BBEE Commission shall act as expeditiously as circumstances permit and shall ensure that the parties involved receive a timely response.

### 3. APPROVAL OF MERGER TRANSACTIONS

#### (A) Application for Merger Approval: *Concurrent Jurisdiction*

- 3.1 Where a transaction appears to the Commission to require approval, the Commission may consult with the B-BBEE Commission in terms of clause 3.2 below.
- 3.2. The parties may consult each other for purposes of evaluating the manner in which the transaction may be managed. In doing this, the parties must have regard to the principle that:
- 3.2.1. the Commission is to exercise primary authority in the review of mergers in order to give effect to the Competition Act; and
- 3.2.2. the B-BBEE Commission has primary authority to exercise powers and perform duties assigned to it in terms of the B-BBEE Act, in order to give effect to its relevant legislation.



**(B) Application for merger approval: No concurrent jurisdiction**

3.3. Where an application to the Commission or the B-BBEE Commission requires the approval of either party, but not both, the following shall apply -

3.3.1 if the B-BBEE Commission is the party whose assessment is required, it may, when considering competition issues consult with and obtain input from the Commission so as to ensure the consistent application of competition principles to the transaction in question.

3.3.2 if the Commission is the party whose approval is required, it may, if it deems it necessary to take into account regulatory aspects that relate to broad based black economic empowerment regulated by the B-BBEE Commission, consult with and obtain input from the B-BBEE Commission so as to ensure the consistent application of the black economic empowerment principles to the transaction in question.

**4. ESTABLISHMENT OF A JOINT WORKING COMMITTEE**

4.1 A Joint Working Committee ("the Committee") constituted by representatives of the Commission and the B-BBEE Commission, as nominated by the respective regulators, shall be established pursuant to this Agreement and shall function on an on-going basis.

4.2 The functions of the Committee shall be:

4.2.1 To manage and facilitate co-operation and consultation between the parties regarding fulfillment of responsibilities and obligations in respect of matters dealt with by each regulator in terms of this Agreement;

4.2.2 To propose, when necessary, any amendment of or supplementation to this Agreement;

4.2.3 To promote workshops and training aimed at building capacity, advocacy information sharing and enhancing regulatory capabilities;





4.2.4 To advise management of both the Commission and the B-BBEE Commission on issues affecting competition in the B-BBEE transactions, as the case may be, and make recommendations on how to deal with same. Such advice shall be on, but not limited to the following:

4.2.4.1 Types of conduct or transactions affected by both the Competition Act and the B-BBEE Act in respect of which concurrent jurisdiction is to be exercised by the two regulators;

4.2.4.2 International approach to issues of jurisdictional overlap between a Competition Authority and a B-BBEE Commission, as the case may be;

4.2.4.3 Amendments to the relevant or applicable statutes that may be necessary from time to time; and

4.2.4.4 Any other related matter.

## 5. SHARING OF RESOURCES

The Commission and the B-BBEE Commission may, under certain circumstances, share each other's available resources in order to bring the provisions of this Agreement into full effect; provided such a process is reasonable, shall not compromise the respective independence of the two institutions and does not contravene any statute with which the two regulators must conform.

## 6. EXCHANGE OF INFORMATION

Subject to paragraph 7 below, the Commission and the B-BBEE Commission may exchange such information as may be necessary to give effect to this Agreement.



## 7. CONFIDENTIALITY

- 7.1 Any information shared by the Commission and the B-BBEE Commission pursuant to this Agreement shall be used only for lawful supervisory or statutory purposes.
- 7.2 Where confidential information has been submitted by the parties to a complaint to the B-BBEE Commission, the B-BBEE Commission shall obtain permission from the party which submitted such confidential information with it, prior to such confidential information being disclosed to the Commission. The Commission shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.
- 7.3 Where information has been submitted by the parties to a complaint to the Commission, the Commission shall obtain permission from the party which submitted such confidential information to it, prior to such confidential information being disclosed to the B-BBEE Commission. The B-BBEE Commission shall ensure that the information accordingly disclosed to it remains confidential and is not placed in the public domain through any negligent or willful conduct on its behalf.
- 7.4 To the extent permitted by law, the Commission and the B-BBEE Commission shall hold confidential all information, including the information contemplated in 7.2 and 7.3 above, received from each other pursuant to this Agreement and shall not otherwise disclose such information than is necessary to carry out their regulatory or statutory responsibilities or otherwise in accordance with national law.
- 7.5 The Commission and the B-BBEE Commission shall, prior to disclosing such confidential information or a part thereof, consult each other for direction and advice on such disclosure.

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- 7.6 The sharing of confidential information, in accordance with this Agreement, relies on the assurances given in 7.1, 7.2 and 7.3 above and shall not constitute a waiver of any legally recognizable privilege by any person other than the Parties to this Agreement.
- 7.7 The Commission and the B-BBEE Commission, in providing confidential written material pursuant to this Agreement, shall mark every page of the material provided with the following words: "CONFIDENTIAL – PROVIDED PURSUANT TO THE COMPETITION COMMISSION / BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION AGREEMENT".
- 7.8 Where confidential information is made available by either the Commission or the B-BBEE Commission in contravention of this Agreement, such disclosing party shall be solely liable in law for such disclosure.

## 8. GENERAL PROVISIONS

- 8.1 The provision of, or request for, information under this Agreement may be denied:
- 8.1.1 Where compliance would require the Commission or the B-BBEE Commission to act in a manner that would violate the applicable law;
  - 8.1.2 Under circumstances where there is an imminent risk to national security; or
  - 8.1.3 Where compliance with a request or provision of information would interfere with an ongoing investigation, in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.
- 8.2 No provision of this Agreement shall give rise to any person, entity or government authority other than the Commission or the B-BBEE Commission,

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directly or indirectly, to obtain any information or to challenge the execution of a request for information.

- 8.3 The two regulators shall consult each other before either of them issues a media statement concerning a transaction or complaint covered by this Agreement.

## 9. VARIATION OF THE AGREEMENT

Any variation of this Agreement shall have no legal effect and shall not be binding on the Parties unless reduced to writing and signed by persons authorized to act on behalf of each party.

## 10. COMMENCEMENT AND DURATION

This Agreement shall come into effect on the date of last the last party signing and it shall continue in force indefinitely unless terminated by either party giving the other party fourteen (14) days' written notice.

## 11. DOMICILIUM CITANDI ET EXECUTANDI

- 11.1 The Parties choose the following addresses as their respective *domicilium citandi et executandi* for purposes of this Agreement:

### THE COMPETITION COMMISSION

the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria

Postal: Private Bag X23 Lynwood Ridge

Pretoria 0040

Telephone Number:

Facsimile:

E-mail: [mziwodumor@compcom.co.za](mailto:mziwodumor@compcom.co.za)

CONTACT PERSON: Head Stakeholder Relations

And

**THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION**

420 Witch-Hazel Avenue, Eco-Glades 2, Block 2, Eco-Park; Centurion 0144

Telephone Number: 012 649 0910

E-mail: MRamare@beecommission.gov.za

CONTACT PERSON: Office of the B-BBEE Commission

11.2 The parties undertake to notify each other of any change of address within fourteen (14) days of such change.

**12. PUBLICATION**

This Agreement shall be published in the Gazette for public information as soon as it has been signed.

**13. GOVERNING LAW**

13.1 The parties agree that this Agreement shall be governed by and construed in accordance with the laws of the Republic of South Africa and acknowledge that they are both organs of state and that the Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005) is applicable to the resolution of any dispute between them.

13.2 The parties shall use reasonable efforts to resolve any dispute that may arise under this Agreement through good faith negotiations.

13.3 In the event that the parties are unable to reach a settlement, such dispute shall be referred to the Accounting Authority of the Commission and the Acting Commissioner of the B-BBEE Commission, and they shall endeavor to settle the matter of such referral.



13.4 Should such endeavor still fail to resolve the dispute, then the dispute shall be referred to the Director-General of the Department of Economic Development and the Department of Trade and Industry to attempt to settle the matter.

13.5 In the event that the dispute still remains unresolved, then the matter shall be dealt with in terms of Section 41 (3) of the Constitution read with chapter 4 of the Intergovernmental Relations Framework Act.

#### 14. GENERAL

No party shall be entitled to cede, delegate or transfer any of its rights in terms of this Agreement to any of its authorized representatives, unless written consent has been obtained from the other party.

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**IN WITNESS WHEREOF** the undersigned parties approve the terms and conditions of this Agreement.

For the **COMPETITION COMMISSION**

Signed at PRETORIA on this 25<sup>th</sup> day of JULY 2017 by

  
\_\_\_\_\_  
**Mr Tembinkosi Bonakele**  
**Commissioner**  
**COMPETITION COMMISSION**


\_\_\_\_\_  
WITNESS 1


\_\_\_\_\_  
WITNESS 2

For the **BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION**

Signed at CENTURION on this 06 day of JUNE 2017 by

  
\_\_\_\_\_  
**Ms Zodwa Ntuli**  
**Acting Commissioner**  
**B-BBEE COMMISSION**

  
\_\_\_\_\_  
WITNESS 1

  
\_\_\_\_\_  
WITNESS 2