

DEPARTMENT OF TRADE, INDUSTRY AND COMPETITION
NOTICE 499 OF 2020

MEMORANDUM OF UNDERSTANDING

Between

Broad-Based Black Economic Empowerment Commission

a statutory entity established in terms of section 13B of the Broad-Based Black Economic Empowerment Act, Act No. 53 of 2003, as amended, herein represented by Zodwa Ntuli in her capacity as the Commissioner, and duly authorised to enter into this agreement

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

and

The Companies Tribunal

A public entity established in terms of section 170 of the Companies Act, 2008 (Act No. 71 of 2008) as amended, within the Department of Trade, Industry & Competition group of Institutions,

herein represented by Dr Mohamed Alli Chictay in his capacity as Chairperson and duly authorised thereto
(hereinafter referred to as the "CT")

concerning

mutual co-operation and assistance between the B-BBEE Commission and CT (hereinafter referred to as "the Parties") relating to the fulfilment of responsibilities and obligations under the Companies Act, 71 of 2008 ("the Act") and the Broad-Based Black Economic Empowerment Act, 53 of 2003, as amended ("B-BBEE Act") and any other legislation applicable to the Parties.

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1. PREAMBLE

WHEREAS the Parties acknowledge the importance of consultation, mutual support and co-operation regarding aspects such as the disclosure of investigations, information, training and in general, mutual co-operation and assistance;

AND WHEREAS the CT was established as an entity of the Department of Trade and Industry and Competition (**the dtic**) to contribute towards making South Africa an attractive investment destination;

AND WHEREAS the CT is independent and has jurisdiction throughout the Republic of South Africa and its functions are, as set out in section 195 of Companies Act, 71 of 2008 ("the Act"):

- a) To adjudicate in relation to any application that may be made to it in terms of the Act and to make any order provided for in the Act in respect of such application;
- b) To assist in the resolution of disputes through conciliation mediation and arbitration; and
- c) To perform any other function assigned to it by or in terms of the Act or any law mentioned in schedule 4 of the Act.

AND WHEREAS the function and objectives of the CT (as expressed in the Act) are to exercise or perform the powers, duties and functions assigned to or conferred upon CT by the Act in respect of matters referred to it in terms of section 195 of the Act;

AND WHEREAS the B-BBEE Commission is an entity within the administration of the Department of Trade and Industry established in terms of section 13B of the B-BBEE Act, entrusted with powers to oversee the implementation of the B-BBEE Act, promote compliance with the B-BBEE Act in the interest of the public, strengthen and foster collaboration between the public and private sector to achieve the objectives of the B-BBEE Act;

AND WHEREAS the B-BBEE Commission has jurisdiction throughout the Republic of South Africa and its functions are, as set out section 13F of the B-BBEE Act as follows:

- (a) To oversee, supervise and promote adherence to the B-BBEE Act in the interest of the public;
- (b) To strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of broad-based black economic empowerment;
- (c) To receive complaints relating to broad-based black economic empowerment in accordance with the B-BBEE Act;
- (d) To investigate, either on its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment;
- (e) To promote advocacy, access to opportunities and educational programmes and initiatives of broad-based black economic empowerment;
- (f) To maintain a register of major broad-based black economic empowerment transactions, above a threshold determined by the Minister in the Gazette;
- (g) To receive and analyse such reports as may be prescribed concerning broad-based economic empowerment compliance from organs of state, public entities and private sector enterprises;
- (h) To promote good governance and accountability by creating an effective environment for the promotion and implementation of broad-based black economic empowerment;
- (i) To exercise such other powers which are not in conflict with the B-BBEE Act as may be conferred on the B-BBEE Commission in writing by the Minister; and
- (j) Increase knowledge of the nature and dynamics and promote public awareness of matters relating to broad-based black economic empowerment by implementing education and awareness measures, providing guidance to the public and conducting research on matters relating to its mandate and activities.

AND WHEREAS the B-BBEE Commission has identified synergies and need for cooperation to effectively execute its mandate given non-compliance with the B-BBEE Act and the scourge of fronting that the B-BBEE Commission is required to address;

AND WHEREAS the Parties acknowledge the importance of investigating, resolving of disputes relating to, and or adjudication of the fronting practices and the relationship between corruption, derailment of economic transformation, lack of protection to minority rights, lack of access to company information, fraudulent attainment of high level B-BBEE status and flouting of corporate governance, and further acknowledging that each Party

may have specialised skills and specialist knowledge that assist in conducting investigations, resolving of disputes and or adjudication of such;

AND WHEREAS the Parties acknowledge that everything dealt with and agreed to herein is in the context of and subject to all legislation, as amended from time to time, applicable to a Party.

NOW THEREFORE the Parties agree to enter into this Memorandum of Understanding and record the terms of their agreement as follows:

2. DEFINITIONS

In this MOU, unless the context indicates a contrary intention, the following words and expressions bear the meanings assigned to them and cognate expressions bear corresponding meanings—

“B-BBEE Act” means the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended by Act 46 of 2013;

“B-BBEE Commission” means Commission established in terms of section 13B of the B-BBEE Act;

“CT” means the CT established in terms of 170 of the Companies Act 71 of 2008;

“MOU” means this Memorandum of Understanding;

“Requested Party” means a Party from whom a request under this MOU is addressed;

“Requesting Party” means a Party making a request under this MOU;

“the Act” means the Companies Act, 71 of 2008;

3. PURPOSE

- 3.1 This MOU sets forth the points of agreement between the B-BBEE Commission and CT regarding cooperation and exchange of certain information relevant for referral of matters for adjudication and or dispute resolution that fall within the area of jurisdiction of the B-BBEE Commission and CT in accordance with the laws of the Republic of South Africa.
- 3.2 Most specifically, this MOU sets out arrangements that both Parties have agreed to implement in order to ensure that the information concerned pursuant and during the implementation of this MOU –
- a) is kept confidential and may not be disclosed to any person except as authorised;
 - b) is collected, processed and stored by each Party in a manner as required by South African law (e.g. the Companies Act, 2008, IP related legislation and POPI Act);
 - c) is used solely for the purpose of improving the Parties' processes concerned as reflected in this MOU.
- 3.3 As this MOU is a partnership agreement between two public entities within the sphere of government, no remuneration, financial contribution or charge is applicable between the Parties for purpose of this MOU with regard to information or training etc, unless so agreed between the Parties in the form of a formal written amendment to this MOU as signed off by the duly authorised signatory of each Party.
- 3.4 The Parties recognise that requests in terms of this MOU will not be denied solely on the grounds of differences in the definitions used by or applicable to the Requesting and Requested Parties.

- 3.5 This MOU embodies the understanding of the Parties with regard to a relationship of consultation, mutual support and co-operation between them, and serves to strengthen and formalise a relationship between the Parties with reference to referral of matters under investigation within the parameters of the B-BBEE Act and legislation and policies regulating the B-BBEE Commission.
- 3.6 The Parties agree to provide mutual assistance, subject to their relevant governing laws and any other applicable legislation.
- 3.7 The Parties acknowledge that this MOU does not modify or supersede any laws and that it does not create legally binding obligations or enforceable rights between them.
- 3.8 Anything performed under this MOU will be subject to applicable legislation. It will furthermore be subject to applicable policies and standard operating procedures of the Parties and/or any other terms and conditions as may be agreed upon between the CT and the B-BBEE Commission.
- 3.9 Neither Party may cede, assign or transfer its rights and obligations in respect of this MOU, or any part thereof, either directly or indirectly, to any third party.
- 3.10 Each Party will provide the fullest possible measure of assistance to the other subject to applicable legislation and policies and any other terms and conditions agreed upon between the CT and the B-BBEE Commission.
- 3.11 Each request for assistance will be assessed on a case-by-case basis by the requested Party to determine whether assistance can or may be provided and subject to applicable processes of CT and BBBEE Commission.
- 3.12 The provisions of this MOU will not give rise to a right on the part of any other person, directly or indirectly, to obtain, suppress or exclude any evidence or to challenge the execution of any conduct under this MOU.

4. GUIDELINES FOR MUTUAL ASSISTANCE

- 4.1 The Parties may agree to participate in the conduct and review of projects which may be deemed necessary from time to time.
- 4.2 In the event of the Parties identifying and agreeing on a specific form of **Co-operation** that requires funding, the Parties will –
- (a) comply with the process(es) concerned / applicable (if any) to obtain approval for such funding / payment; and
 - (b) thereafter formalise the specifics, rights and obligations of the **Parties** in a separate legally binding contract.
- 4.3 Each Party remains responsible for its own expenses, except as may be agreed in a contract contemplated in clause 4.2 above.
- 4.4 No legally binding obligations shall arise from a contract contemplated in clause 4.2 above, where a Party's applicable policies and procedures relating to the commitment of funding or other resources has not been complied with.

5. PRINCIPLES OF CO-OPERATION

- 5.1 The Parties will endeavour to co-operate with one another on the prevention, detection and investigation of unlawful activities which come to their attention during the execution of their respective legal mandates.
- 5.2 The Parties will facilitate and foster co-operation between them in relation to investigation of matters that fall within their respective legal mandates and disclosure of information as envisaged in clause 5.3 hereunder.
- 5.3 Co-operation contemplated in this MOU shall be subject to *inter alia* CT processes and based upon principles such as:

- (a) Mutual trust, respect and benefit to the Parties;
- (b) Technical information, knowledge and expertise exchanged between the Parties shall not be passed to a third party without the prior written consent of the other (originating) Party;
- (c) Commitment to joint training and exchange of information where applicable to enhance knowledge, skills and an understanding of the functions of the respective Parties as per *inter alia* CT processes; and
- (d) Adherence to the legislative frameworks governing the Parties, while also giving due consideration to political, economic and social considerations where applicable.

6. AREAS OF COLLABORATION

6.1 The areas of collaboration shall include the following:

6.1.1 Referral by the B-BBEE Commission of B-BBEE matters for purposes of alternative dispute resolution and other related disputes falling within the jurisdiction of CT for consideration and appropriate relief or order;

6.1.2 Information sharing on the best practices aimed at facilitating economic transformation; and

6.1.3 any other matters of common interest as may be identified from time to time.

6.2 The parties anticipate that their collaborative activities will include:

6.2.1 A joint approach to regulation, compliance and enforcement regarding violation of the B-BBEE Act;

6.2.2 Information Sharing and coordinate seminars, media engagements, workshops, training aimed at building capacity, advocacy, information sharing and enhancing regulatory capabilities in relation to the B-BBEE Act and the Companies Act; and

6.2.3 Where necessary, to establish a Working Group(s) responsible for ensuring that agreed areas of collaboration are implemented in such a manner as to achieve the objectives of this MOU and legislation within the jurisdiction of the respective institutions.

7. GUIDELINES FOR THE DISCLOSURE OF INFORMATION

7.1 In response to requests for information and assistance subject to any conditions established, a Party will provide the fullest possible measure of mutual assistance, subject to its governing statutes and regulations and overall policy.

7.2 Such assistance may include, *inter alia*, the disclosure of information in pursuance of the respective mandates subject to the limitations of the Act, the B-BBEE Act, Protection of Personal Information Act (POPI) and any other legislation applicable to the Parties and as per CT processes.

8. COMMENCEMENT AND TERMINATION

8.1 This MOU supersedes and replaces all previous oral or written (if any) agreements or MOUs between the Parties, excluding any access to CT database agreements between CT and B-BBEE Commission.

8.2 This MOU will come into effect on the date of the last signing of this MOU and shall endure, subject to its terms and conditions for a period of three (3) years and may be terminated earlier by either Party by giving a thirty (30) days written notice to the other Party.

8.3 The termination of this MOU will not prejudice the completion, in accordance with their terms, of any ongoing projects or activities under this MOU unless otherwise agreed to by the Parties at or after termination of this MOU.

9. UNSOLICITED INFORMATION

- 9.1 The information acquired in terms of this MOU is subject to any confidentiality requirements in law and in particular any legislation applicable to the B-BBEE Commission.
- 9.2 If one Party comes into possession of information which would be likely to assist the other Party in administrating or enforcing the laws for which it is responsible, the first-mentioned Party may notify the other Party of the existence of that information, subject to 9.1, and 6.1(a) above and 11.1 below.

10. PERMISSIBLE USES AND CONFIDENTIALITY

- 10.1 The Parties and their officials are obliged to treat information under this MOU as confidential, except where compliance with a legal duty or compulsion by law necessitates disclosure. In the event of such disclosure the other Party shall be informed in writing without delay.
- 10.2 Where information may be and is disclosed in terms of this MOU such information will be disclosed by the Requested Party to the Requesting Party as soon as is reasonably possible. In regard to exchanges of confidential information, each Party agrees not to disclose any such information to a third Party except as provided for in applicable legislation and in the event of such disclosure the other Party shall be informed in writing without delay.
- 10.3 Information supplied will be used for the purpose only for which it was requested.

11. ANNEXURES TO THIS MOU

- 11.1 This is a founding memorandum of understanding between the Parties. Further details with regard to matters agreed to in terms of this MOU will be dealt with between the applicable business unit of the B-BBEE Commission and the CT.

11.2 Such other specific additional agreements or procedures and processes as the case may be, will be in writing and agreed to by signature thereof by both Parties and will come into effect on the date of signature of the Party signing last in time.

11.3 Such additional agreements, procedures and processes will form part of this MOU and any such agreement, procedure or process' existence will be conditional upon the existence or continuing existence of this MOU or any amendment or replacement thereof.

12. SETTLEMENT OF DISPUTES

When a dispute arises out of the interpretation, operation and implementation of this MOU, the Parties must in good faith, make every reasonable effort to settle the dispute amicably through direct negotiation with the other Party or negotiations through an intermediary.

13. REVIEW AND AMENDMENT

13.1 The operation and implementation of this MOU shall be subject to periodic review by the Parties but not less than once during the Term.

13.2 Notwithstanding the aforesaid, in the event of material changes in legislation affecting the content of this MOU, the Parties shall review and amend this MOU within a period of thirty (30) days from the date of the relevant changes coming into effect, in order to comply with the legislative amendments and with retrospective effect where necessary.

13.2 Any amendment agreed to by the Parties shall be in writing and signed off by the authorised signatory of each Party. Such an amendment shall form part of this MOU and such amendment will come into effect on such a date as agreed upon by the Parties.

14. GOOD FAITH

14.1 The Parties undertake to implement this MOU based on a foundation of mutual trust and good faith.

15. COMPLIANCE WITH POPI

15.1. The Parties acknowledge their respective obligations to comply with the substantive provisions of the Protection of Personal Information Act, 4 of 2013, which in essence comprises of both Parties allowing the other Party access to records on the condition that the identifiable person (or his or her guardian or curator) to whom the records relates has furnished prior written consent for the disclosure of the records.

15.2. A Party understands and acknowledges that the restrictions and obligations accepted by the other Party pursuant to this MOU are reasonable and necessary in order to protect the interests of the other Party, its employees and stakeholders and that a Party's failure to comply with this MOU in any respect could cause irreparable harm to the B-BBEE Commission the other Party, its employees and stakeholders for which there may be no adequate legal remedy.

15.3. A Party therefore understands and agrees, notwithstanding any contrary provision in any other agreement between the Parties, that each Party retains its full rights to pursue legal or equitable remedies in the event of any breach or threatened breach of this MOU, and may prevent the other Party, any of its agents (if any) or subcontractors (if any), or any third party who has received records from that Party from violating this MOU by any legal means available. Each Party further understands that violation of this MOU may subject that Party to applicable legal penalties, including those provided under POPI and termination of any agreements entered into between the B-BBEE Commission and CT.

16. DOMICILIA AND NOTICES

16.1 For all notices, correspondence and court processes the parties hereby choose as their *domicilia citandi et executandi* for all purposes under this MoU to be served under the addresses as set out below.

16.2 All notices to CT shall be served or addressed to:

Maletlatsa Monica Ledingwane

Designation: The Chief Operations Officer

Street Address: The Companies Tribunal
the dti Campus
Block E 3rd Floor
77 Mentjies Street
Sunnyside
Pretoria
0002

Telephone number: (+27) 12 394 5553

Email: MMLedingwane@companiestribunal.org.za

16.3 All notices to B-BBEE Commission shall be served or addressed to:

Ms Zodwa Ntuli

Designation: Commissioner

Street Address: B-BBEE Commission
420 Witch-Hazel Avenue
Eco-Glades 2
Block C

Eco-Park, Centurion, 0144

Telephone: (+27) 12 649 0910

Email: MRamare@beecommission.gov.za

16.4 Notice of any change of address stated may be given by either party with 14 (fourteen) days of such change.

16.5 Any notice in terms of this MoU:

16.5.1 in case of hand delivery at a physical address, an acknowledgment of receipt shall be endorsed by the respective party.

16.5.2 may be sent by registered post upon which proof of postage issued by the relevant authority shall be vanished or provided to serve as proof of service.

17. GOVERNING LAW

17.1 This MoU shall be governed by and interpreted or construed in accordance with the laws of oh the Republic of South Africa without regard to its principles regarding conflict of laws. Any and all disputes arising out of it or in connection with this MoU shall be governed by Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005) for a dispute resolution considering the fact that they are both organs of the state.

17.2. The parties shall at all material times use all reasonable effort to resolve any dispute arising from this MoU through good faith negotiations.

17.3 In the event of failure to reach an agreement or settlement, such dispute shall be referred to the Chairperson of CT and the Commissioner of the B-BBEE Commission, and they shall endeavor to settle the matter of such referral.

17.4 Should the endeavors also fail in attempting to solve the dispute, then it shall be referred to the Director-General of the Department of Trade and Industry or an official delegated by him for such purpose, to attempt to solve such matter.

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

18. GENERAL

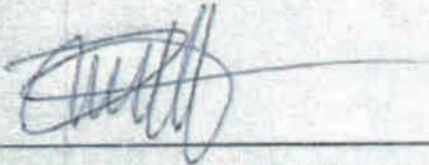
18.1 This MoU constitutes the cooperative and collaborative framework through which parties will manage the working relationship and acknowledge that they have entered into this Agreement, not relying on any representations, statements, warranties or guarantees not recorded in this MoU;

18.2 No amendments of, or additions to variation or cancellation of this Agreement shall be of any force or effect unless reduced to writing and signed by both parties hereto;

18.3 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.

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

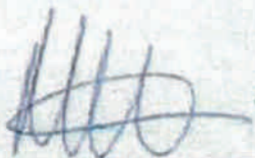
Signed and agreed to at Pretoria on this 21st day of MAY 2020



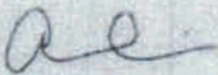
For and on behalf of the Broad-Based Black Economic Empowerment Commission

Lindene Madonsela

Witness

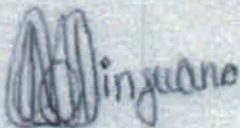

Date: 21/05/2020

Signed and agreed to at Pretoria on this 18 day of MAY 2020



Dr M.A. Chicktay

For and on behalf of the Companies Tribunal



Mrs M.M. Ledingwane

Witness

Date: 18/05/2020