



KRIEK WASSENAAR & VENTER ING
PROKUREURS - ATTORNEYS

Our ref: PJ Wassenaar/ QB1173

Your ref:

24 November 2023

**THE MINISTER OF AGRICULTURE,
LAND REFORM, AND RURAL DEVELOPMENT
184 JEFF MASEMOLA STREET
PRETORIA**

By e-mail: PA.Minister@daff.gov.za
cosmin@daff.gov.za

**THE DIRECTOR-GENERAL
DEPARTMENT: AGRICULTURE,
LAND REFORM, AND RURAL DEVELOPMENT
AGRICULTURE PLACE
20 STEVE BIKO STREET
PRETORIA**

By e-mail: DGOoffice@dalrrd.gov.za
Debbie.Khan@dalrrd.gov.za

Minister / Sir / Madam

AGRI BEE ENFORCEMENT GUIDELINES

SAKELIGA NPC / MINISTER OF AGRICULTURE, LAND REFORM, AND RURAL DEVELOPMENT & OTHERS

1. We act on the instructions of our client, Sakeliga NPC.
2. Per our client's instructions, we wish to address the recent implementation of broad-based black economic empowerment (BEE) requirements by the Department of Agriculture, Land Reform and Rural Development (the "Department"). These requirements pertain to the allocation of import and export permits within systems established under certain international trade agreements to which the state is a party—specifically those with the World Trade Organization, the European Union, and the United Kingdom. Our client is currently evaluating the legality of these regulations, which were promulgated in Government Gazettes on 31 October, 1 November, and 2 November 2023. While we are not yet prepared to provide a detailed response to each regulation, the substance of these regulations has raised significant concerns with our client, as well as by various other stakeholders within the agricultural sector

www.kwv-inc.com

(t) (+27) 12 756 7566 • (f) (+27) 86 596 8799 (a) 3rd Floor, HB Forum Building, 13 Stamvrug Road, Val de Grace, Pretoria 0184
(p) Postnet Suite # 11, Privaatsak / Private Bag X025, Lynwood Ridge, 0040 • BTW Reg: 4020260685

Direkteure/ Directors: Johan Kriek (B Proc, LLM), Péter Johannes Wassenaar (LLB)

Bygestaan deur/assisted by Tertia Johanna Wassenaar (LLB), Kayla Dames (Bcom LLB), Rohann Eloff (Bcom LLB), Melissa Jansen van Vuuren (LLB);
Konsultante / Consultants: Catherina Elizabeth Pienaar (BA, BCur, LLB, LLM, PhD) , Sylvia Adriana Venter (LLB)

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and the broader business community, regarding the approach adopted by the Department, specifically regarding transformation and BEE in the agriculture sector.

3. It has come to light that the Department has since 2014/2015 undertaken the development of various policy instruments with the objective of 'aligning' what is referred to as the Department's 'internal mechanisms' and 'instruments' to compel Broad-Based Black Economic Empowerment (BEE) participation and grading as conditions precedent for members of the public seeking access to governmental services within the agricultural sector. This policy approach effectively bars a considerable segment of industry participants owing to their race or racial composition. Furthermore, individuals who do not typically necessitate BEE grading find themselves encumbered with ancillary costs for the sole purpose of accessing basic agricultural authorisations.
4. The main policy instruments prescribing the restrictions and penalisations set out above appear to be the *AgriBEE Enforcement Plan* (titled: 'A plan for the alignment of DAFF's internal tools for the implementation of the AgriBEE Sector Code: Enforcement measures') and the *AgriBEE Enforcement Guidelines*.
5. According to the *AgriBEE Enforcement Guidelines*, issued for implementation by 31 March 2019, the following acts and regulations are affected by the guidelines:
 - 5.1 Agricultural Pests Act 1983 (Act No. 36 of 1983);
 - 5.2 Agricultural Produce Agents Act, 1992 (Act No. 12 of 1992);
 - 5.3 Agricultural Product Standards Act, 1990 (Act No. 119 of 1990);
 - 5.4 Animal Diseases Act, 1991 (Act No. 35 of 1984);
 - 5.5 Animal Identification Act, 2002 (Act No. 6 of 2002);
 - 5.6 Animal Improvement Act 1998 (Act No. 62 of 1998);
 - 5.7 Conservation of Agricultural Resources Act, 1983 (Act No. 43 of 1983);
 - 5.8 Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 1947 (Act No. 36 of 1947);
 - 5.9 Genetically Modified Organisms Act, 1997 (Act No.15 of 1997);

- 5.10 Liquor Products Act, 1989 (Act No. 60 of 1989); Marketing of Agricultural Products Act, 1996 (Act No. 47 of 1996);
 - 5.11 Meat Safety Act, 2000 (Act No. 40 of 2000);
 - 5.12 Marketing of Agricultural Products Act, 1996 (Act No. 47 of 1996);
 - 5.13 National Environment Management Act: Biodiversity Act, 2004 (Act No. 10 of 2004);
 - 5.14 Perishable Products Export Control Act, 1983 (Act No. 9 of 1983);
 - 5.15 Plant Breeders' Rights Act, 1976 (Act No. 15 of 1976);
 - 5.16 Plant Improvement Act, 1976 (Act No. 53 of 1976);
 - 5.17 Subdivision of Agricultural Land Act, 1970 (Act No. 70 of 1970).
6. Pursuant to the prescribed guidelines, a spectrum of statutory authorisations—including import and export permits, approvals for animal vaccines, certificates for plant breeders' rights, and hunting permits, shall only be dispensed according to a person's race (BEE levels). In most instances, the guidelines mandate that governmental mechanisms be refined to preclude the issuance of certificates or permits to 'non-compliant' persons. The implications of these guidelines are profound: henceforth, statutory authorisations to engage in the agricultural sector shall be circumscribed for 'non-compliant' entities, contingent upon their participation within a sanctioned BEE framework. As an illustration (to name but a few examples from the guidelines):
- 6.1 Plant breeders rights: A *'non-compliant'* individual who develops a new plant variety in South Africa will, according to the Department's guideline, in the future only be able to obtain plant breeders rights under the Plant Breeders' Rights Act (Act 15 of 2019), if he is a BEE participant, and then also only subject to strict BEE requirements as to who he may trade with once a certificate has been issued. According to the guidelines, *"No certificate/ permit to be issued to Non-Compliant entities/ contributors"*.
 - 6.2 Hunting permits: Game farm permits authorising the 'buying' and 'hunting' of an animal shall be allocated according to the preference of a person's BEE rating. According to the guidelines, *"No certificate/ permit to be issued to Non-Compliant entities/ contributors"*.

- 6.3 Encephalartos (bread trees, bread palms and cycads): Permits to own or trade in encephalartos shall be allocated according to the preference of a person's BEE rating. According to the guidelines, *"No certificate/ permit to be issued to Non-Compliant entities/ contributors"*.
- 6.4 Export of wine and liquor products: Export licenses shall be allocated according to preference of a person's BEE rating. According to the guidelines, *"No certificate/ permit to be issued to Non-Compliant entities/ contributors"*.
7. Sakeliga deems the Department's AgriBEE enforcement plan and guidelines to be unlawful and unconstitutional.
8. The enforcement plan and guidelines developed under the auspices of the BEE framework are ostensibly predicated upon an intent to transfigure most permit and licensing requisites within the agricultural sector. This transfiguration deviates substantially from the initial regulatory objective of the primary legislation mentioned in paragraph 3 above, instead veering towards a race-based regulatory schema. Within the ambit of this plan, entities not actively engaged in BEE, typically those extraneous to the government tender value chain—are subjected to onerous, even punitive measures in the apportionment of quotas or permits. Such entities may find themselves either disadvantaged in the allocation process or categorically barred from participating in agriculture. Sakeliga is of the view that the Department has ostensibly employed these instruments for the ulterior purpose of exacting alterations in the ownership structures of agricultural participants.
9. The Department's AgriBEE enforcement plan and guidelines unlawfully and unconstitutionally seek to restrict the rendering of governmental services to only BEE participants.
10. Sakeliga hereby requests the Minister and her Department to formally:
- 10.1 Recognise the existence and implications of its AgriBEE Enforcement Plan and accompanying AgriBEE Enforcement Guidelines, which ostensibly propose limitations on the provision of 'services'—specifically, the issuance of permits, licences, and certificates—contingent upon the racial classification of applicants;
- 10.2 Acknowledge that her department has exerted influence upon various state entities to enforce BEE stipulations across all permits and licences and to deny 'services' to enterprises deemed 'non-compliant';

- 10.3 Rescind the aforementioned AgriBEE Plan and AgriBEE Enforcement Guidelines; or, in lieu thereof, furnish detailed justifications for their purported legality (to enable a thorough evaluation and potential contestation thereof); and
- 10.4 Commit that her department shall refrain from coercing its internal divisions or other state bodies to predicate their functions (such as the granting of permits, licences, etc.) on an individual's race or their adherence to BEE criteria.

We request that the Minister and/or Department provide a response by 8 December 2023.

Yours faithfully,



KRIEK WASSENAAR & VENTER INC
Péter Wassenaar – Director
(e) peter@kriekprok.co.za