

22 JULY 2020

# CORPORATE & COMMERCIAL ALERT

## IN THIS ISSUE >

### BLACK ECONOMIC EMPOWERMENT

Decision to award B-BBEE  
facilitator status for Telkom's  
benefit found to be fatally flawed

In *Altron TMT Holdings (Pty) Ltd and Another v Minister of Trade & Industry and 4 Others*, [2020] ZAGPJHC 162, Altron applied to the High Court for an order to review and set aside a decision made by the then Minister of Trade and Industry (Minister) published in the Government Gazette GN262 on 7 May 2019 (May Notice) to grant B-BBEE Facilitator Status to the Government of South Africa (Government) as a 40.50% shareholder in Telkom SA SOC Limited (Telkom).

FOR MORE INSIGHT INTO OUR  
EXPERTISE AND SERVICES

[CLICK HERE](#) 

## BLACK ECONOMIC EMPOWERMENT

### Decision to award B-BBEE facilitator status for Telkom's benefit found to be fatally flawed

In April 2019 a submission was made by the B-BBEE Unit of the Department of Trade and Industry to the Minister requesting that the B-BBEE Facilitator Status be granted to "the Government of South Africa represented by the Office of the Presidency" as a result of being a 40.50% shareholder in Telkom.

*In Altron TMT Holdings (Pty) Ltd and Another v Minister of Trade & Industry and 4 Others, [2020] ZAGPJHC 162, Altron applied to the High Court for an order to review and set aside a decision made by the then Minister of Trade and Industry (Minister) published in the Government Gazette GN262 on 7 May 2019 (May Notice) to grant B-BBEE Facilitator Status to the Government of South Africa (Government) as a 40.50% shareholder in Telkom SA SOC Limited (Telkom).*

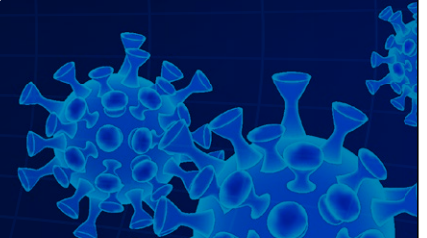
On 1 February 2019 the Minister issued a notice for public comment of the intention to grant Telkom B-BBEE Facilitator Status in terms of paragraph 3.6 of the Revised Codes of Good Practice (February Notice). If granted, Telkom would have been regarded, *inter alia*, as a 100% black-owned entity. Various parties, including Altron made submissions in response to the February Notice.

In April 2019 a submission was made by the B-BBEE Unit of the Department of Trade and Industry to the Minister requesting that the B-BBEE Facilitator Status be granted to "the Government of South Africa represented by the Office of the Presidency" as a result of being a 40.50% shareholder in Telkom. This consequently meant that the Government of South Africa would replace Telkom as the recipient of the B-BBEE Facilitator Status. On 7 May 2019 the Minister published notice of his decision to grant B-BBEE Facilitator Status to the Government.

The High Court concluded that through the granting of B-BBEE Facilitator Status to the Government, the Minister had implemented legislation as provided in section 85(2)(a) of the Constitution, which meant that the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was applicable to the matter along with

## CDH'S COVID-19 RESOURCE HUB

Click here for more information 



## BLACK ECONOMIC EMPOWERMENT

### Decision to award B-BBEE facilitator status for Telkom's benefit found to be fatally flawed

*...continued*

---

The final decision made by the Minister in the May Notice to grant B-BBEE Facilitator Status to the Government was materially different as the public had not based their submissions on the change in the intended recipient.

---

the principle of legality. This meant that the decision taken by the Minister to grant B-BBEE Facilitator Status was subject to the requirement of a proper consultation process in terms of PAJA.

The High Court found that the published February Notice had cited Telkom as the only party contemplated to be granted B-BBEE Facilitator Status and that the public had provided submissions on that basis. The final decision made by the Minister in the May Notice to grant B-BBEE Facilitator Status to the Government was materially different as the public had not based their submissions on the change in the intended recipient. In short, the Minister had granted the B-BBEE Facilitator Status to the Government without actual public participation. The High Court expressed that the *"nature and purpose of the proposed decision must be described with sufficient particularity in the notice so that the right to make representation will be real rather than illusory"*, and concluded that for the Minister to have granted the B-BBEE Facilitator Status without the public knowing the true identity of the intended recipient rendered the decision procedurally unfair. *"The nature and purpose of the proposed decision are not the same as the nature and purpose of the decision as published. This is a fatal flaw rendering the decision reviewable"*, the court said.

Furthermore, the Minister failed to file an affidavit giving his reasons for his decision in the matter. In response to this the High Court stated that, *"It is a fundamental principle that the decision maker must provide reasons why he made the decision..... I find that the evidence is both insufficient to establish that the reasons were relied upon by the decision maker and also that they were the reasons at all. In addition, there is a failure to establish what the facts were upon which the decision taker relied. The reasons for taking a decision are founded both in fact and in the opinion of the decision taker. As neither the facts nor the opinions founding the reasons for the decision are established the decision is reviewable."*

As such, the High Court found that the Minister's decision was procedurally flawed and set it aside. The court made an exception in that it held that the May Notice would be regarded as valid for the purpose of the B-BBEE status of Telkom and its subsidiaries arising from such Notice in respect of only those contracts entered into and tenders awarded after 7 May 2019 and prior to the date of the court's order. It would, however, not be treated as valid for the purpose of any renewals or extensions of such contracts and tenders. It is also clear that Telkom cannot continue to recognise its B-BBEE status resulting from the B-BBEE Facilitator Status under any other circumstances.

---

*Verushca Pillay and  
Arnold Saungweme*



## 2019 THE LEGAL DEALMAKER OF THE DECADE BY DEAL FLOW

### DealMakers

<p><b>2019</b> M&amp;A Legal DealMakers of the Decade by Deal Flow: 2010-2019. 1<sup>st</sup> by BEE M&amp;A Deal Flow. 1<sup>st</sup> by General Corporate Finance Deal Flow. 2<sup>nd</sup> by M&amp;A Deal Value. 2<sup>nd</sup> by M&amp;A Deal Flow.</p>	<p><b>2018</b> 1<sup>st</sup> by M&amp;A Deal Flow. 1<sup>st</sup> by M&amp;A Deal Value. 2<sup>nd</sup> by General Corporate Finance Deal Flow. 1<sup>st</sup> by BEE M&amp;A Deal Value. 2<sup>nd</sup> by BEE M&amp;A Deal Flow. Lead legal advisers on the Private Equity Deal of the Year.</p>	<p><b>2017</b> 2<sup>nd</sup> by M&amp;A Deal Value. 1<sup>st</sup> by General Corporate Finance Deal Flow for the 6th time in 7 years. 1<sup>st</sup> by General Corporate Finance Deal Value. 2<sup>nd</sup> by M&amp;A Deal Flow and Deal Value (Africa, excluding South Africa). 2<sup>nd</sup> by BEE Deal Flow and Deal Value.</p>	<p><b>2016</b> 1<sup>st</sup> by M&amp;A Deal Flow. 1<sup>st</sup> by General Corporate Finance Deal Flow. 2<sup>nd</sup> by M&amp;A Deal Value. 3<sup>rd</sup> by General Corporate Finance Deal Value.</p> <p><b>2015</b> 1<sup>st</sup> by M&amp;A Deal Flow. 1<sup>st</sup> by General Corporate Finance Deal Flow.</p>
---	---	--	---

CDH's Corporate, Commercial and M&A practice is ranked as a Top-Tier firm in THE LEGAL 500 EMEA 2020.

David Pinnock is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

Willem Jacobs is ranked as a Leading Individual in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

David Thompson is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

Johan Green is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

Johan Latsky is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

Lilia Franca is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

Peter Hesseling is recommended in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

Justine Krige is ranked as a Next Generation Partner in Corporate, Commercial and M&A in THE LEGAL 500 EMEA 2020.

CDH's Investment Funds practice is ranked in Tier 3 in THE LEGAL 500 EMEA 2020.

John Gillmer is recommended in Investment Funds in THE LEGAL 500 EMEA 2020.

Wayne Murray is ranked as a Rising Star in Investment Funds in THE LEGAL 500 EMEA 2020.



## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Vivien Chaplin**  
Director  
T +27 (0)11 562 1556  
M +27 (0)82 411 1305  
E vivien.chaplin@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Projects & Energy  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Jay Govender**  
Projects & Energy Sector Head  
Director  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesselning**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesselning@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
M +27 (0)83 645 5044  
E kendall.keanly@cdhlegal.com

**Rachel Kelly**  
Director  
T +27 (0)11 562 1165  
M +27 (0)82 788 0367  
E rachel.kelly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

**Johan Latsky**  
Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nkcubeko Mbambisa**  
Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E nkcubeko.mbambisa@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**Ayanda Mhlongo**  
Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E ayanda.mhlongo@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Tessmerica Moodley**  
Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E tessmerica.moodley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jerain Naidoo**  
Director  
T +27 (0)11 562 1214  
M +27 (0)82 788 5533  
E jerain.naidoo@cdhlegal.com

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:

### Francis Newham

Executive Consultant  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

### Gasant Orrie

Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

### Verushca Pillay

Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

### David Pinnock

Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

### Allan Reid

Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

### Megan Rodgers

Oil & Gas Sector Head  
Director  
T +27 (0)21 481 6429  
M +27 (0) 79 877 8870  
E megan.rodgers@cdhlegal.com

### Ludwig Smith

Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

### Ben Strauss

Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

### Tamarin Tosen

Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E tamarin.tosen@cdhlegal.com

### Roxanna Valayathum

Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E roxanna.valayathum@cdhlegal.com

### Roux van der Merwe

Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

### Chart Williams

Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E chart.williams@cdhlegal.com

### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

### PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

### STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.  
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2020 9172/JULY

