GUIDE 2 – B-BBEE IN SOUTH AFRICA: SOME PRACTICAL STEPS
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Foreword

Broad-based black economic empowerment (B-BBEE) is a central part of the South African Government’s transformation strategy.

Broad-based black economic empowerment (B-BBEE) is a central part of the South African Government’s transformation strategy.

B-BBEE comprises various components aimed at increasing the numbers of Black people (being South African citizens who have been racially classified as African, Indian or Coloured) who manage, own and control the country’s economy, and decreasing racially based income inequalities.

There is no positive obligation to have a particular B-BBEE status level. However, any company wishing to do business in the South African environment must consider and develop its B-BBEE position as – in addition to the pressures from Government – an entity that does not have a good B-BBEE rating may be hampered in the conduct of its day-to-day business with Government, organs of state and the private sector.

Further, a company’s B-BBEE rating and/ or its local ownership may be a determining factor when applying for a state licence, permit or authorisation, depending on requirements imposed by sector-specific legislation.

Bowmans provides trusted, specialist advice in all areas of B-BBEE. Our lawyers have extensive experience advising and acting for major local and international commercial and industrial corporations, mining houses, banks and private equity funds across a range of industry sectors. We have also been involved in several ground-breaking B-BBEE transactions.

We advised Isanti Glass on its proposed ZAR 15 billion acquisition of Nampak Glass, which was named BEE Deal of the Year for 2019 at the Dealmakers South Africa Awards event which was held in February 2020. Isanti Glass is 60% owned by black-owned investment company Kwande Capital and 40% owned by SABSA Holdings, the South African holding company of SA Breweries. SABSA is owned by AB InBev, the world’s biggest brewer and one of the largest glass manufacturers.

We are up to date with the most recent developments in B-BBEE, including the amendments to and interpretations and nuances arising in the context of the Codes of Good Practice (Codes) and the various sector-specific codes. We regularly engage – both independently and on behalf of our clients – with the B-BBEE Commission, the Department of Trade and Industry and various B-BBEE verification agencies.

Because B-BBEE is such an important consideration for any company conducting business in South Africa, we have produced a series of four guides to help our clients understand the complex regulations that govern it. This, the second in the series, provides a step-by-step overview of the practical steps that can be followed by any company considering and/ or implementing a B-BBEE strategy or plan.

We are in a unique position to help our clients in the development and implementation of lasting and sustainable transformation. Please contact us if you would like to discuss either the content of this guide in more detail or your unique B-BBEE challenges. Key contacts are set out at the end of this guide.

Ashleigh Hale
Co-head of Corporate

The contents of this guide are for reference purposes only and should not be considered a substitute for detailed legal advice. It is correct as at October 2020. If you require further information, please contact one of the key contacts listed at the end of this guide.
Step 1: Understand the Broad Regulatory Framework Applicable to B-BBEE in South Africa

How is B-BBEE regulated in South Africa?

- The BEE Act is the principal legislation for the promotion and measurement of B-BBEE in South Africa.
- The BEE Act also establishes the B-BBEE Commission (B-BBEE Commission) which is responsible for investigating alleged ‘fronting’ practices and referring them for prosecution.
- The BEE Regulations are published under the BEE Act. Among other things, the BEE Regulations regulate the functions of the B-BBEE Commission, including, for example, the complaints process and the registration of major B-BBEE practitioners.
- The Codes are published under the BEE Act and detail the manner in which B-BBEE must be measured in South Africa. In assessing B-BBEE, a ‘scorecard’ (measurement) approach is used whereby the different aspects of B-BBEE, including ownership, management control, skills development, enterprise and supplier development (including preferential procurement), and socio-economic development, are accorded points to arrive at the B-BBEE score of a company. These Codes set out these indicators to measure B-BBEE and the weightings attached to these indicators.

The B-BBEE Regulations, 2016 (BEE Regulations)

The B-BBEE Act 53 of 2003 (BEE Act)

The Codes of Good Practice (Codes or general Codes)

The sector-specific codes

The Liquid Fuels Charter, 2003

The Mining Charter, 2018

The sector-specific codes

Step 2: Assess and Understand the Environment Applicable to the Business

Question: What is the annual turnover and Black ownership of the enterprise?

An assessment of the annual turnover and Black ownership of a business will be important as it will determine how a business will be measured under the Codes. In other words:

- Will it be measured as a large enterprise or as a QSE, EME or start-up?
- Is it a foreign company or multinational corporation, and can the South African operations be ring-fenced?
- Does the enterprise currently have any Black ownership?

Question: Which sector does the enterprise fall into from the perspective of its core business?

An assessment must be made as to the applicable sector into which the enterprise falls into with regard to its core business. The Black ownership targets and thresholds will be different in terms of each sector code, and the manner in which the elements are dealt with may differ.

In a licensing, permit or authorisation context, B-BBEE requirements are implemented in the empowering legislation for the licence, permit or authorisation in question (e.g. banking, broadcasting, mining, telecommunications, transportation, etc.) and in certain instances, B-BBEE minimum thresholds may be set.
Step 3: Assess and Understand the B-BBEE Requirements of Existing and Prospective Customers

Any existing contractual requirements relating to an enterprise's B-BBEE level must be considered.

Consideration must also be given to the nature of the enterprise's current and prospective customers, and to any specific tenders or procurement programmes the enterprise is targeting (where a specific B-BBEE level may be required):

- **Government bodies and state-owned enterprises (SOE):** In terms of the BEE Act, government bodies and SOEs are required to take private-sector parties' relative B-BBEE levels into account when they procure any goods or services or enter into any partnerships. This means businesses that sell to Government would need to consider their levels of B-BBEE in order to conduct their businesses in those sectors. B-BBEE requirements are generally set out in tender documents.

- **Private sector companies:** B-BBEE is relevant even to private-sector businesses which do not require government licences or sell goods or services to Government. Most private businesses will have customers who have to meet their own B-BBEE procurement targets. As a result, customers are likely to consider the B-BBEE rating of their suppliers (this will be a factor in determining with whom to do business). Where customers impose B-BBEE requirements, a prospective supplier's B-BBEE measurement is a competitive assessment of its B-BBEE status relative to that of its competitors.

Step 4: Obtain an Indicative B-BBEE Rating

To the extent that the measured enterprise – the entity that wants to obtain a rating certificate – decides to pursue a particular B-BBEE certification, it would be important to obtain an indication of its likely score under each of the various elements of the relevant scorecard.

This indicative B-BBEE rating could be obtained from an accredited verification or rating agency through a B-BBEE audit of the business. A business’ B-BBEE score will be determined based on its activities during the previous financial year and its ownership and management structures and staff profile as at the date of measurement.

Step 5: Conduct a B-BBEE Gap Analysis

At the same time as determining an enterprise's likely score, a gap analysis should be performed (i.e. a determination of where steps could be taken to improve the enterprise’s scoring under certain elements of the Codes). This will ultimately determine the points that should be achieved on the ownership element and the appropriate ownership structure, if any, to be implemented.
Step 6: Develop a B-BBEE Plan, Which May Include an Ownership Transaction

Any business operating or looking to operate in South Africa can decide on the B-BBEE rating that would be most effective for its operations in the country and develop a strategy for implementing the aspects of B-BBEE within its business to achieve the desired B-BBEE rating.

After obtaining an indication of an enterprise’s likely score, a B-BBEE plan should be developed, setting target B-BBEE levels, milestones and practical steps to improve a B-BBEE rating. Remember that no one size fits all.

To the extent that an ownership transaction is required, the Codes contemplate that measured entities are able to score ownership points on the ownership scorecard in several different ways including through:

- **actual sales of equity** including to strategic third-party investors (e.g. black individuals or companies that have significant levels of ownership by Black people), private equity funds, and broad-based structures such as a broad-based ownership scheme, an employee share ownership programme or a trust;

- **equity equivalents** (which involve a measured entity implementing an approved corporate social investment programme as opposed to giving up actual equity); and

- **sales of assets** (which involve a measured entity selling an asset – which may include shares in another company – to a purchaser and claiming ownership points on its ownership scorecard related to the purchaser’s B-BBEE ownership).

An enterprise may also consider participating in the Youth Employment Services (YES) Initiative which has been introduced to provide for enhanced B-BBEE recognition for YES-measured entities in South Africa, enabling these entities to improve their B-BBEE rating by one to two B-BBEE levels. In essence, the YES Initiative aims to place one million young (below the age of 35) Black South Africans in employment for at least a year to upskill them and make it easier for them to find further work opportunities.

For more information on ownership transactions and structures, please see the third part in this series of B-BBEE guides focusing on the ownership element.

Step 7: Obtain a B-BBEE Rating but Constantly Re-assess the Environment Applicable to the Business

Once a B-BBEE plan has been developed and implemented, a B-BBEE rating should be obtained, supported by a certificate issued by an accredited verification or rating agency. The certificates issued by the verification agencies are valid for 12 months and certify a measured entity’s B-BBEE level based on a B-BBEE audit of the business which is conducted on an annual basis. Remember that a B-BBEE audit will be conducted once a year and the measured entity’s B-BBEE rating will be determined based on its activities during the previous financial year as well as its ownership and management structures and staff profile as at the date of measurement.

Once a B-BBEE rating has been obtained, it will be necessary for a measured entity to consistently re-assess and re-evaluate its position in the market, particularly concerning its competitors and the requirements of its current and aspirational customer base.

It is imperative to keep up to date with any legislative developments within the B-BBEE space, as well as the approach adopted by the BEE Commission.
Our Firm

We help our clients overcome legal complexity and unlock opportunity in Africa.

Our track record of providing specialist legal services in the fields of corporate law, banking and finance law and dispute resolution, spans over a century.

With nine offices in seven African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist them to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include corporates, multinationals and state-owned enterprises across a range of industry sectors as well as financial institutions and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, at the inaugural IFLR1000 Awards for Sub-Saharan Africa (2020), we received 10 awards across four jurisdictions confirming our leadership when it comes to advising on multi-jurisdictional mergers and acquisitions in Africa. At the African Legal Awards (2020), we won awards in three categories and were highly commended in a further four categories including African Law Firm of the Year - Large Practice. We received awards in three out of four categories at the Dealmakers East Africa Awards (2019): top legal adviser in the M&A Category for both deal flow and deal value and advised on the Deal of the Year. In the Dealmakers South Africa Awards (2019), we were placed third for deal value in the M&A Category and advised on both the Deal of the Year and the BEE Deal of the Year.

Our Footprint in Africa

We are present in seven countries in Africa: Kenya (Nairobi), Malawi (Lilongwe), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our alliance firms in Ethiopia (Aman Assefa & Associates Law Office) and Nigeria (Udo Uduma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have developed a best friend relationship with one of Mozambique’s strongest law firms (Taciana Peão Lopes & Advogados Associados) and regularly work with leading law firms in other countries such as Angola, Botswana, Ghana, Ivory Coast, Namibia, Rwanda, South Sudan and Zimbabwe.

We have a comprehensive database of all the law firms we work with in the rest of Africa covering such countries as Algeria, Egypt, Morocco and French-speaking West Africa.

We are representatives of Lex Mundi, a global association with more than 160 independent law firms in all the major centres across the globe. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.
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