GUIDE 4 – B-BBEE IN SOUTH AFRICA: MONITORING BY THE B-BBEE COMMISSION
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Foreword

Broad-based black economic empowerment (B-BBEE) is an important consideration for any company conducting business in South Africa.

Broad-based black economic empowerment (B-BBEE) is an important consideration for any company conducting business in South Africa. 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 1.5 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 Kivande 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 and the various sector-specific codes. We regularly engage – both independently and on behalf of our clients – the Broad-Based Black Economic Empowerment Commission (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 fourth in the series, provides a general overview of the monitoring of B-BBEE in South Africa by the B-BBEE Commission including consideration of the:

- role of the B-BBEE Commission (Part 1);
- reporting obligations for listed companies (Part 2);
- registration of major B-BBEE transactions (Part 3); and
- complaints and investigations processes administered by the B-BBEE Commission (Part 4).

Engagement with the B-BBEE Commission during these processes is crucial and we are well placed to assist with the navigation of these processes.

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.
Part 1: The B-BBEE Commission and its Role

The B-BBEE Commission was established under the BEE Act and falls under the administration of the Department of Trade and Industry. It is responsible for, among other things:

• overseeing, supervising and promoting adherence to the Broad-Based Black Economic Empowerment Act 53 of 2003 (BEE Act);
• receiving complaints relating to B-BBEE;
• investigating - on its own initiative or in response to complaints received - any matter concerning B-BBEE including alleged fronting practices and referring them for prosecution; and
• maintaining a registry of major B-BBEE transactions.

It is also required to provide guidance to the public by issuing explanatory notices outlining its procedures; issuing non-binding opinions on the interpretation of the BEE Act; and applying to a court for a declaratory order on the interpretation or application of the BEE Act.

The B-BBEE Commission is headed by a Commissioner, currently Ms Zodwa Ntuli.

Part 2: Reporting Obligations for Listed Companies and the Role of the B-BBEE Commission

All listed companies are required to submit a compliance report to the B-BB-BBEE Commission on an annual basis. The fact that a listing on the JSE is secondary does not exempt a multinational company from reporting.

The process is as follows:

1. Submit the compliance report, including Form B-BBEE 1 and annual financial statements, to the B-BBEE Commission.

2. B-BBEE Commission must acknowledge receipt.

3. Timeframe: Within 5 days of receipt of the compliance report.

4. Content of Form B-BBEE 1:
   • Score obtained by company for each of the B-BEE elements.
   • Whether the company is an Empowering Supplier.
   • Whether the company has achieved the priority element thresholds.

5. Timeframe: Within 90 days of receiving the compliance report.

6. Non-compliance

   If the B-BBEE Commission finds non-compliance with the BEE Act, it will notify the company or entity in writing of the apparent non-compliance. In terms of this notification, the company or entity will be required to correct its report and ensure compliance with its reporting duties under the BEE Act within 30 days.

7. Compliance

   If the B-BBEE Commission is of the view that the report complies with the requirements of the BEE Act, it will notify the company or entity in the prescribed form.
## Part 3: Registration of Major B-BBEE Transactions and the Role of the B-BBEE Commission

### What is the registration requirement?

All parties to a major B-BBEE transaction over the prescribed transaction value threshold are obliged to submit the transaction to the B-BBEE Commission for registration.

### What is a major B-BBEE transaction?

Any transaction between entities or parties that results in ownership over the entity, with the BEE Regulations requiring that the B-BBEE Commission be notified of all parties to a major B-BBEE transaction to the B-BBEE Commission.

**What is the prescribed transaction value threshold for a major B-BBEE transaction?**

ZAR 25 million. This threshold is based on the transaction value excluding administration, professional and legal fees.

### When must a major B-BBEE transaction be registered?

Within 15 days of the conclusion of the major B-BBEE transaction.

### Is prior approval from the BEE Commission required?

No prior approval of the transaction is required, but it may be necessary to take steps to seek appropriate advice from the B-BBEE Commission before concluding the transaction.

### Who must register a major B-BBEE transaction?

While the BEE Regulations provide that a party that enters into a major B-BBEE transaction must register it, the notice published by the B-BBEE Commission that set the registration threshold states that multiple parties/entities involved in the transaction need to register the transaction as a collective.

Our view is that it is the commercial parties to the transaction (the buyer and seller), rather than the measured entity or target, who should register it collectively, although the measured entity would generally be party to parts of the transaction and should therefore also participate in the reporting or be listed in the registration form.

If a bank has funded the B-BBEE transaction, in our view it will not have any separate reporting obligation, as it is envisaged in the notice that there is only one registration per transaction. However, if the bank is central to the deal, it should be listed as one of the parties in the registration form.

### What if a company fails to report a major B-BBEE transaction to the B-BBEE Commission?

There is no offence associated with failing to report, although we recommend parties to major B-BBEE transactions take the necessary steps to register the transaction with the B-BBEE Commission.

### What documents must be submitted?

- Form B-BBEE B which requires only basic information on the parties and transaction value.
- The following documents:
  - brief description of the major B-BBEE transaction;
  - copy of a signed sale agreement or similar agreement transferring shares/interest/ assets/ business, as the case may be, from one party or entity to another;
  - copy of signed shareholders’ agreements or similar agreements governing the relationship between holders of interest, in respect of the major B-BBEE transaction;
  - copy of signed trust deeds, if the ownership structure of the major B-BBEE transaction includes a trust;
  - copy of a signed financing agreement relating to the transaction, irrespective of whether or not it was vendor financed;
  - copy of a schematic diagram of the ownership structure before and after the conclusion of the major B-BBEE transaction;
  - copy of a valid B-BBEE certificate or a B-BBEE affidavit of the measured entity involved in the major B-BBEE transaction; and
  - any document that the parties or entities deem relevant to the transaction.

The parties must indicate where any of these is not applicable. These documents must be submitted for the certificate of registration to be issued by the B-BBEE Commission.

### What happens after the required information and documents are submitted?

The B-BBEE Commission must immediately acknowledge receipt of the submission.

If the requirements for registration have been met (if the prescribed form and all the required information has been submitted to the Commission within the prescribed time), the Commission will issue a certificate of registration to the parties within 10 days, noting the date of registration.

Receipt of a certificate of registration is not the end of the B-BBEE Commission’s role.

### What happens after a registration certificate is received?

The Commission may assess a transaction to determine “adherence” to the BEE Act.

If the B-BBEE Commission decides there has been adherence with the BEE Act, the B-BBEE transaction will be included on the B-BBEE Commission’s register of major B-BBEE transactions.

If the B-BBEE Commission decides there has been no adherence with the BEE Act, the B-BBEE Commission will advise parties of its concerns in writing within 90 days after registration.

The submitting party must take steps to remedy the transaction within a reasonable period. If the submitting party fails to remedy the transaction to the satisfaction of the B-BBEE Commission, the B-BBEE Commission may initiate an investigation.

### Are there any ongoing obligations?

The BEE Regulations require that the B-BBEE Commission be notified of any material change to the B-BBEE elements of the entity occurring after the transaction has been registered if such material change meets the threshold.

Within 15 days of the conclusion of the major B-BBEE transaction.
Complaints, Investigations, and the Role of the B-BBEE Commission

When will the B-BBEE Commission conduct an investigation?

The B-BBEE Commission may – on its own initiative or on receipt of a complaint – investigate any matter arising from the application of the BEE Act, any B-BBEE initiative or any category of B-BBEE initiatives. For example, an investigation may be initiated by the B-BBEE Commission following the submission of a registration of a major B-BBEE transaction or a compliance report (where required).

Who may lodge a complaint?

Any person may lodge a complaint with the B-BBEE Commission by completing Form B-BBEE 7. The following information must be provided by a complainant:

- a description of the conduct or practice alleged to be in contravention of the BEE Act;
- particulars of a person, sphere of government, entity or organ of state alleged to be in contravention of the BEE Act;
- name and contact details of any person that may provide information relevant to the complaint to the B-BBEE Commission;
- information on measures taken by the complainant to attempt to resolve the complaint, including alternative dispute resolution measures, prior to lodging the complaint; and
- the way in which the alleged contravention may in the opinion of the complainant be addressed.

What happens after the B-BBEE Commission receives a complaint?

The B-BBEE Commission must acknowledge the complaint in writing within five days of receipt, allocate a distinctive case number and notify the complainant of the case number.

Within one year of receipt of the complaint, the B-BBEE Commission must notify the respondent of the complaint and conduct an assessment of the merit of the complaint.

The B-BBEE Commission must also request any further information from the complainant, which must be provided by the complainant with 14 days of any such request. If the complainant fails to provide the additional information within the prescribed period, the B-BBEE Commission may close the complaint or continue to investigate it as if the B-BBEE Commission initiated it.

The B-BBEE Commission must also issue a summons and hold a formal hearing, if necessary. Finally, the B-BBEE Commission must make a finding, with or without recommendations.

The B-BBEE Commission will issue a notice of non-investigation to the complainant if the B-BBEE Commission is of the view it has no jurisdiction to hear the matter or a complaint does not warrant an investigation.

What happens if the B-BBEE Commission has initiated its own investigation?

Where the B-BBEE Commission initiates an investigation on its own, it must issue a notice to investigate under Form B-BBEE 10. The B-BBEE Commission must notify the respondent of its decision to investigate, issue a summons and hold formal hearings if necessary, and make a finding with or without recommendations.
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 multijurisdictional 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 Udoma & 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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