GUIDE 3 - B-BBEE IN SOUTH AFRICA: OWNERSHIP AND OWNERSHIP STRUCTURES
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Foreword

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 or does not strive to improve its 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 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 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.

An enterprise may also consider participating in the Youth Employment Services Initiative (YES Initiative) which has been introduced to provide for enhanced B-BBEE recognition for YES-measured entities in South Africa, enabling such entities to improve their B-BBEE rating by one to two B-BBEE levels.

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 – 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 third in the series, provides a broad overview of the ownership element under the Codes of Good Practice (Codes), as well as an overview of some of the ways that measured entities can score ownership points on the ownership scorecard, including:

- actual sales of equity including to strategic third-party investors (e.g. Black individuals or companies which have significant levels of ownership by Black people), private equity funds, and broad-based structures such as a broad-based ownership scheme (BBOS), an employee share ownership programme (ESOP) or 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 involves 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 Initiative (YES Initiative) which has been introduced to provide for enhanced B-BBEE recognition for YES-measured entities in South Africa, enabling such entities to improve their B-BBEE rating by one to two B-BBEE levels.

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.
Ownership and Ownership Structures Under the Codes

### Ownership indicator

<table>
<thead>
<tr>
<th>Voting rights</th>
<th>Target</th>
<th>Weighting points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exercisable voting rights in the hands of Black people</td>
<td>25% + 1</td>
<td>4</td>
</tr>
<tr>
<td>Exercisable voting rights in the hands of Black women</td>
<td>10%</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Economic interest</th>
<th>Target</th>
<th>Weighting points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic interest of Black people in the entity</td>
<td>25%</td>
<td>4</td>
</tr>
<tr>
<td>Economic interest of Black women in the entity</td>
<td>10%</td>
<td>2</td>
</tr>
<tr>
<td>Economic interest of the following Black natural people in the entity:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black designated groups:</td>
<td>3%</td>
<td>3</td>
</tr>
<tr>
<td>Black participants in employee ownership schemes:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black beneficiaries of broad-based ownership schemes: or</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Black participants in co-operatives</td>
<td>2%</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Realisation points</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Net value</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>25</td>
<td></td>
</tr>
</tbody>
</table>

The ownership element considers the extent to which ownership interests (voting rights and economic interest) in a measured entity are held by Black people, and by Black women specifically, as well as the extent to which such ownership interests are unencumbered by debt (referred to as ‘net value’).

### What is the flow-through principle?

Ownership is calculated on an effective, flow-through basis. The flow-through principle requires that Black ownership can be traced back to a specific Black individual. This principle applies across every tier of ownership in a multi-tiered chain of ownership until that chain ends with a Black person holding rights of ownership.

### What is the modified flow-through principle?

To calculate the score in respect of voting rights in the hands of Black people and the economic interest of Black people, one entity in the ownership chain that has more than 50% ownership by Black people may be treated as if it is 100% owned by Black people. This is referred to as the ‘modified flow-through principle’.

### Example:

If 60% of the shareholders in Company A are Black people and Company A holds 40% of the shares in Company B, on application of the modified flow-through principle, Company A may be treated as if it was 100% owned by Black people. On this basis, 40% of the shares in Company B would be regarded as being held by Black people even though an effective flow-through basis Black people would hold only 24% of the shares.

### Example:

If 60% of the shareholders in Company A are Black people and Company A holds 40% of the shares in Company B, on application of the modified flow-through principle, Company A may be treated as if it was 100% owned by Black people. On this basis, 40% of the shares in Company B would be regarded as being held by Black people even though an effective flow-through basis Black people would hold only 24% of the shares.

### What is net value?

Realisation points are scored in relation to the extent to which the ownership interests held by Black people in the company are unencumbered (debt-free). The net value indicator relates to the extent to which Black shareholders have been released from funding obligations in respect of their acquisition of shares and their shareholding becomes unencumbered. The target for the percentage of shares that should be debt-free increases over 10 years from when Black shareholders are first introduced.

### Example:

If only a portion of the acquisition price is funded and/or shares are acquired by Black people at a discount, the percentage of the acquisition debt that would need to be paid down in each year following the transaction to meet the target would be adjusted.

A sub-minimum requirement – 40% of the net-value target – applies in the context of ownership. This means that 3.2 points must be obtained under net value to avoid a penalty. If the ownership sub-minimum requirement is not met, a measured entity will be deemed to drop one B-BBEE level. In other words, if a business scores sufficient points to be a Level 3 B-BBEE contributor but fails to meet the sub-minimum requirement for net-value, it will be deemed to be a Level 4 B-BBEE contributor.
Structure B-BBEE Ownership Transactions and Deemed Ownership Programmes

There is an evolved body of practice around structuring ordinary B-BBEE ownership transactions which involve the acquisition of equity by Black people in a measured entity. The Codes set out certain types of enterprises – including individual strategic investors (e.g., Black individuals or companies that have significant levels of ownership by Black people), trusts, BBOSs, ESOPs, and private equity funds – that can contribute points to the B-BBEE ownership scorecard, as well as rules that must be followed for a measured entity to claim ownership points for equity held by Black people through these types of vehicles.

A summary of common types of B-BBEE ownership transactions is set out below. We have included a summary of some of the deemed ownership types which are provided for in the Codes including equity equivalent investment programmes and sales of assets.

When considering any B-BBEE ownership transaction or deemed ownership programme, it is important to remember that the fundamental principle for measuring B-BBEE compliance is that substance takes precedence over legal form.

Individual strategic third-party investor

This option involves approaching a strategic third-party investor to buy an ownership stake in the measured entity. Among other things, this would require an extensive partner selection process to ensure appropriate partners are found with expertise or relationships in the sector, access to own funds, and no reputational concerns.

Trusts, including a BBOS or ESOP

The Codes set out certain minimum qualifying criteria for different types of trusts, such as a BBOS, ESOP, and other trusts such as family or business trusts. If these criteria are met, the trust concerned may contribute a maximum of 40% of the total points on the ownership scorecard of the measured entity concerned. If certain additional criteria are met for each type of trust, the trust may contribute up to 100% of the total points on the entity’s ownership scorecard.

The ownership scorecard has been set up in such a way to encourage broad-based black ownership and the establishment of an ESOP or BBOS is one way to achieve this. For this reason, the overview (opposite) is focused on the requirements applicable to establishing an ESOP or BBOS.

The trust deed must define the trust in the same way as the BBOS deed. The trust deed must define the participants at an annual general meeting of the trust and the proportion of their economic interest received and reserved for future distribution or application. The trust deed must define the participants and the proportion of their claim to receive distributions. The fiduciaries (trustees) have no discretion on the above.

At least 85% of the value of the benefits allocated by the trust must accrue to Black people. At least 50% of the trustees must be independent persons having no employment with or direct or indirect beneficial interest in the trust. At least 50% of the trustees must be Black people and at least 25% must be Black women. The chairperson of the trust must be independent.

Upon winding up or termination of the trust, all accumulated economic interest must be transferred to beneficiaries or an entity with similar objectives. The trust deed must be available, on request, to any participant in an official language in which that person is familiar. The trustees must present the financial reports of the trust to participants yearly at an annual general meeting of the trust.

Additional Criteria

If these additional requirements are met, the BBOS can contribute up to 100% of the total points available on the ownership scorecard of the measured entity concerned (25 points).

Although ESOPs and BBOSs are extremely common structures used in the South African market for B-BBEE purposes, the interpretation recently given to the B-BBEE legislation by the BEE Commission has led to some concerns about these types of structures and whether they will be considered valid going forward. In particular, the BEE Commission appears to have recently adopted a new interpretation of the Codes in respect of the requirements that apply to trusts in order for Black ownership through a trust to be recognised for the purposes of the Codes; see the BEE Commission’s brochure on trusts here.

Core Criteria

If these requirements are met, the BBOS can contribute up to 40% of the total points available on the ownership scorecard of the measured entity concerned (10 points).

For example, the BEE Commission is of the view that a BBOS in the form of a trust must meet the rules for both BBOSs and trusts, as set out in the Codes (and a similar approach has been adopted for ESOPs). The BEE Commission has raised concerns about trusts such as education trusts that award bursaries and other charitable trusts which it says should not be recognised for ownership purposes.

Additional Criteria

If these additional requirements are met, the BBOS can contribute up to 100% of the total points available on the ownership scorecard of the measured entity concerned (25 points).

BBOS

- The management fees of the trust may not exceed 15%.
- The trust deed must record the rules governing any portion of economic interest received and reserved for future distribution or application.
- The trust deed must define the participants and the proportion of their claim to receive distributions.
- The fiduciaries (trustees) have no discretion on the above.
- At least 85% of the value of the benefits allocated by the trust must accrue to Black people.
- At least 50% of the trustees must be independent persons having no employment with or direct or indirect beneficial interest in the trust.
- At least 50% of the trustees must be Black people and at least 25% must be Black women.
- The chairperson of the trust must be independent.
- Upon winding up or termination of the trust, all accumulated economic interest must be transferred to beneficiaries or an entity with similar objectives.
- The trust deed must be available, on request, to any participant in an official language in which that person is familiar.
- The trustees must present the financial reports of the trust to participants yearly at an annual general meeting of the trust.

ESOP

- The trust deed must define the participants and the proportion of their claim to receive distributions (and the trustees ‘must have no discretion’ in relation to these).
- The participants must take part in appointing at least 50% of the fiduciaries trustees.
- The participants must take part in managing the trust at a level similar to the management role of shareholders.
- The trust deed must be available, on request, to any participant in an official language in which that person is familiar.
- The trustees must present the financial reports of the trust to participants yearly at an annual general meeting of the trust.
- Upon winding up or termination of the trust, all accumulated economic interest is payable to the participants at the earlier of the date or event specified in the deed or on termination or winding up of the trust.
Private equity in South Africa is a significant role player in the development of B-BBEE. There are several established Black private equity funds which make strategic investments and single investment Black private equity structures are becoming increasingly common.

In terms of the Codes, shares held by private equity funds – which meet certain criteria and are managed by majority Black-owned fund managers – are deemed to be 100% Black-owned. For a measured entity to treat any of its ownership arising from a private equity fund as if that ownership were held by Black people, the private equity fund would have to meet the following criteria, among others:

- at least 51% of any of the private equity managers’ exercisable voting rights associated with the equity instruments through which the private equity fund holds rights of ownership, must be held by Black people;
- at least 51% of the private equity fund’s executive management and senior management must be Black people;
- at least 51% of the profits made by the private equity fund manager after realising any investment made by it, must by written agreement, accrue to Black people;
- the private equity fund manager must be a Black-owned company; and
- the private equity fund manager must seek to invest at least 51% of the value of the South African funds under management in companies that have at least a 25% direct Black shareholding, post-investment of the investment by the private equity fund, using the flow-through principle.

### Equity Equivalent Investment Programme

The Codes recognise some foreign multinational corporations (MNCs) have global practices preventing them from complying with the ownership element of B-BBEE through the traditional sale of shares to Black South Africans. A global practice is defined in the Codes as ‘a globally and uniformly applied practice of a multinational, restricting alienation of equity in or the sale of businesses in its regional operations’.

Provided the global practice existed before the promulgation of the BEE Act (before 2003), the Codes make provision for the recognition of equity equivalent or EE contributions in lieu of a direct sale of equity. EE contributions count towards the ownership element of B-BBEE made by MNCs.

The value of these EE contributions may be measured against 25% of the value of the MNC’s South African operations or 4% of the total revenue from its South African operations annually over the period of continued measurement.

These contributions may be made on a one-off basis or annually over a period not exceeding 10 years (although in certain circumstances this may be extended using the topping-up principle). The investment period is generally determined by the value of the EE contribution, as follows:

<table>
<thead>
<tr>
<th>EE contribution</th>
<th>Investment period</th>
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<tbody>
<tr>
<td>In excess of ZAR 100 million</td>
<td>Up to 10 years</td>
</tr>
<tr>
<td>From ZAR 75 million to ZAR 100 million</td>
<td>Up to 7 years</td>
</tr>
<tr>
<td>From ZAR 50 million to ZAR 75 million</td>
<td>Up to 5 years</td>
</tr>
<tr>
<td>Less than ZAR 50 million</td>
<td>Up to 3 years</td>
</tr>
</tbody>
</table>

An EE programme must be approved by the Minister of Trade and Industry, in consultation with any minister who is responsible for the sector in which the measured entity operates, to qualify for ownership points.

Such a programme may entail targeting investment or otherwise promoting socio-economic advancement or development within the South African economy. There are several examples of Equity Equivalent Investment Programmes (EEIP) that have been approved, including in respect of Samsung (2019), Microsoft (2011 and 2019), Caterpillar (2017), IBM (2015), Dell (2015) and HP (2007).

### A sale of assets

The Codes make provision for a measured entity (or seller) to conclude a transaction involving a sale of an asset, equity instrument or business with a separately identifiable related business to Black people and to claim the benefits in its own ownership scorecard. If the criteria set out below are satisfied, the entity will be entitled to receive points in respect of the voting rights and economic interest indicators contained in the ownership scorecard.

- The Codes make provision for a measured entity (or seller) to conclude a transaction involving a sale of an asset, equity instrument or business with a separately identifiable related business to Black people and to claim the benefits in its own ownership scorecard.
- The value of these EE contributions may be measured against 25% of the value of the MNC’s South African operations or 4% of the total revenue from its South African operations annually over the period of continued measurement.
- These contributions may be made on a one-off basis or annually over a period not exceeding 10 years (although in certain circumstances this may be extended using the topping-up principle).
- The investment period is generally determined by the value of the EE contribution, as follows:

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</tr>
<tr>
<td>Less than ZAR 50 million</td>
<td>Up to 3 years</td>
</tr>
</tbody>
</table>

A ‘separately identifiable related business’ is defined in the Codes as a business that is related to the seller by virtue of being a subsidiary, joint venture, associate, business division, business unit or any other similar related arrangement within the ownership structure of the seller.

A sale of assets transaction must involve a separately identifiable related business that has:

- no unreasonable limitations concerning its clients or customers (although generally accepted arm’s length limitations may be imposed and may include limitations such as normal arm’s length restraints of trade limitations);
- clients, customers or suppliers other than the measured entity (seller); and
- B-BBEE shareholders holding the asset for a minimum of three years.

A qualifying transaction cannot be claimed as B-BBEE ownership if a repurchase transaction is entered into within a three-year period after the implementation of the transaction, even if the transaction implementation is postponed until after year three. A seller also cannot have any right to enforce such a repurchase.

Ownership points are subject to existing contracts between the parties remaining in effect on market-related terms subject to market norm service levels. A sale of assets transaction should be subject to an independent valuation by an independent expert.
### Enhanced B-BBEE Recognition: What is the YES Initiative and How Does it Work?

The YES Initiative has been introduced to provide for B-BBEE recognition for YES-measured entities in South Africa. The 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.

### What are the qualification criteria for registration for the YES Initiative?

- Large enterprises must achieve at least the 40% sub-minimums under each of the priority elements of the scorecard or must achieve an average of 50% (a total of 34 points) across the three priority elements, for the YES-measured entity to participate.
- YES-measured entities must ensure they maintain or improve their B-BBEE status level and performance against the targets under the overall scorecard obtained in the year before participating in the YES Initiative.
- YES-measured entities must register with the YES non-profit company to participate in the YES Initiative for monitoring and evaluation purposes.

### What are the specific YES targets that must be met?

The specific targets that have been set for generic entities under the YES Initiative will be the higher of the following:

- 1.5% of the YES-measured entity’s headcount in the preceding year;
- 1.5% of the YES-measured entity’s average net profit after tax (NPAT) from South African operations in the immediately preceding three years, converted to a headcount number by dividing that NPAT number by ZAR 55 000; or
- A target as determined under the YES STATEMENT (the number of jobs a company will need to offer based on the total revenue band into which a company falls, e.g. a ZAR 50 to 75 million total revenue band equates to a minimum of six Black youth jobs, while a total revenue above ZAR 450 million equates to a minimum of 15 Black youth jobs).

### Who are the eligible employees?

Only individuals who are (1) between the ages of 18 and 35; and who (2) meet the definition of Black people, are eligible for participation under the YES Initiative.

### What are the B-BBEE recognition levels achievable through the YES Initiative?

- If a company meets the target (as set out above) and absorbs 2.5% of the person employed in the company after 12 months, the company will obtain enhanced recognition and will go up one B-BBEE level.
- A company that achieves 1.5% of the target and 5% absorption will go up one B-BBEE level and earn 3 bonus points.
- A company that achieves 2 x the target and 5% absorption will go up two B-BBEE levels.

### Any other key considerations?

- YES-measured entities are required to sign fixed-term or temporary employment contracts with all eligible employees filling new positions within the company.
- The new jobs must be created in addition to existing headcount (existing positions may not be replaced with new positions).
- B-BBEE recognition is only applicable for the creation of jobs for eligible employees who are unemployed at the time of registering with the YES Initiative.
- If YES-measured entities are not able to create a sufficient number of new jobs within the company to meet their targets, they may sponsor new jobs to be placed in EMEs or QSEs. Any sponsored positions will contribute to meeting the YES-measured entity’s targets.
Our Firm

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

We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With eight offices in six 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 clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include domestic and foreign corporates, multinationals, funds and financial institutions, across almost all sectors of the economy, as well as state-owned enterprises and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, our Kenyan practice won the 2022 Chambers Africa Award for Law Firm of the Year in Kenya. In 2021, Bowmans won three IFLR Africa Awards including National Firm of the Year for South Africa and for Zambia. At the 2021 Africa Legal Awards, we won five practice awards, more than any other law firm.

In the 2021 DealMakers Africa Awards we ranked first in East Africa for both deal value and deal flow, with a 52% and a 40% share of the market respectively. We also advised on the deals named East Africa Deal of the Year and East Africa Private Equity Deal of the Year. In the 2021 DealMakers Awards we placed first by deal flow and second by deal value in the Unlisted M&A Transactions category; first by deal flow and third by deal value in the BEE Deals category; and fourth by deal flow in the General Corporate Finance category.

Our Presence in Africa

Recognising the size and enormous diversity of Africa, our approach to providing legal services across the continent is intended to offer on-the-ground advice in the countries that matter for our clients. Our presence in Africa is always evolving to meet the changes that are shaping the future of this vast continent.

Currently, we have our own offices in six African countries: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our Bowmans 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 special relationships with competent practitioners in Malawi and Mozambique. We also have a non-exclusive co-operation agreement with French international law firm Gide Loyrette Nouel that provides our clients access to assistance in francophone west and north Africa. The arrangement provides complementary access for Gide’s clients and lawyers to markets in central, southern and eastern Africa.

We ensure that, whenever our clients need legal advice in other parts of Africa, we can assist them by tapping into our comprehensive database of contacts of the best firms and practitioners across the continent.

On the global front, Bowmans has long-standing and excellent relationships with a range of international law firms with whom we often work on Africa-focused client mandates. We are also a member firm of Lex Mundi, a global association of 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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