## Contents

<table>
<thead>
<tr>
<th>Page</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>04</td>
<td>Foreword</td>
</tr>
<tr>
<td>06</td>
<td>Part 1: An Overview of B-BBEE in South Africa</td>
</tr>
<tr>
<td>10</td>
<td>Part 2: The Measurement of B-BBEE: Large Enterprises</td>
</tr>
<tr>
<td>18</td>
<td>Part 4: The Measurement of B-BBEE: Foreign Entities and Multinational Corporations</td>
</tr>
<tr>
<td>20</td>
<td>Part 5: An Overview of B-BBEE in Certain Sectors</td>
</tr>
<tr>
<td>24</td>
<td>Our Firm</td>
</tr>
<tr>
<td>25</td>
<td>Our Presence in Africa</td>
</tr>
<tr>
<td>26</td>
<td>Key Contacts</td>
</tr>
</tbody>
</table>
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 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.

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 regulatory framework applicable to B-BBEE in South Africa.

This, the first in the series, provides a general overview of B-BBEE (Part 1) with a focus on understanding the measurement of B-BBEE for:

- large enterprises (Part 2);
- small to medium-sized enterprises, which are referred to as exempted micro-enterprises (EMEs) and qualifying small enterprises (QSEs), and start-up enterprises (Part 3); and
- foreign companies and multinational corporations (MNCs) (Part 4).

The guide also provides a high-level overview of B-BBEE in certain sectors (Part 5).

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: An Overview of 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 ‘frontraking’ 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.

The B-BBEE Regulations, 2016

- The Liquid Fuels Charter, 2003
  - The process of aligning the Liquid Fuels Charter with the B-BBEE legislation is underway.
  - For more information on the Bowmans’ Oil and Gas Practice, click here.

The B-BBEE Act, 2003 (BEE Act)

- The Mining Charter, 2018
  - The Mining Charter, read together with the Implementation Guidelines, is published under the Mineral and Petroleum Resources Development Act 28 of 2002 and is intended to facilitate a sustainable transformation, growth and development of the mining industry.
  - For more information on Bowmans’ services concerning the Mining Sector, click here.

- The various sector-specific codes published under the BEE Act detail the manner in which B-BBEE must be measured for businesses operating in particular sectors (although sector-specific codes generally apply the same broad principles as the general Codes).
  - Sector codes have been published for the following sectors:
    - Agriculture
    - Chartered accountancy (draft version)
    - Construction
    - Defence
    - Financial services (including banks, short-term insurance, reinsurance and financial services intermediation and brokerages)
    - Forestry
    - Information communication and technology (ICT)
    - Marketing advertising and communications (MAC)
    - Property
    - Tourism
    - Transport

The Codes of Good Practice (Codes or general Codes)

- 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.
- The Codes set out these indicators to measure B-BBEE and the weightings attached to these indicators.

The Codes of Good Practice

A high-level overview of the Codes of Good Practice

<table>
<thead>
<tr>
<th>CODE SERIES</th>
<th>STATEMENT</th>
<th>TITLE</th>
<th>OVERVIEW</th>
</tr>
</thead>
<tbody>
<tr>
<td>CODE SERIES 000</td>
<td>STATEMENT 000</td>
<td>Framework for measuring B-BBEE</td>
<td>Among other things, specifies the interpretative principles of B-BBEE, the application of the Codes and basis for measurement under the Codes, and the application of the Codes to EMERQS, QSEs and start-up enterprises.</td>
</tr>
<tr>
<td>STATEMENT 003</td>
<td>Amended guidelines for developing and gazetted sector codes</td>
<td>Among other things, specifies the process for developing and gazetted sector codes.</td>
<td></td>
</tr>
<tr>
<td>STATEMENT 004</td>
<td>Scorecards for specialised enterprises</td>
<td>Provides guidance about the treatment of ownership for specialised enterprises (e.g. higher education institutions and non-profit companies) for B-BBEE, and specifies applicable scorecards.</td>
<td></td>
</tr>
<tr>
<td>CODE SERIES 100</td>
<td>STATEMENT 100</td>
<td>The general principles for measuring ownership</td>
<td>Sets out the measurement of the effective ownership of entities by Black people.</td>
</tr>
<tr>
<td>STATEMENT 102</td>
<td>Recognition of the sale of assets, equity instruments and other businesses</td>
<td>Sets out the conditions where the sale of assets, equity instruments and other businesses will be recognised and sets out how the ownership points will be determined.</td>
<td></td>
</tr>
<tr>
<td>STATEMENT 103</td>
<td>Recognition of equity equivalents for multinationals</td>
<td>Defines how MNICS may apply for recognition of equity equivalent programmes and sets out how ownership points will be determined.</td>
<td></td>
</tr>
<tr>
<td>CODE SERIES 200</td>
<td>STATEMENT 200</td>
<td>The general principles for measuring management control</td>
<td>Sets out the measurement of the effective control of entities by Black people.</td>
</tr>
<tr>
<td>CODE SERIES 300</td>
<td>STATEMENT 300</td>
<td>The general principles for measuring skills development</td>
<td>Sets out the measurement of the extent to which employers carry out initiatives designed to develop the competencies of Black employees and Black people internally and externally.</td>
</tr>
<tr>
<td>CODE SERIES 400</td>
<td>STATEMENT 400</td>
<td>The general principles for measuring enterprise and supplier development</td>
<td>Sets out the measurement of the extent to which: entities buy goods and services from Empowering Suppliers with strong B-BBEE recognition levels; and enterprises carry out supplier development and enterprise development initiatives intended to assist and accelerate growth and sustainability of enterprises owned by Black people.</td>
</tr>
<tr>
<td>CODE SERIES 500</td>
<td>STATEMENT 500</td>
<td>The general principles for measuring socio-economic development</td>
<td>Sets out the measurement of the extent to which entities carry out initiatives that contribute towards socio-economic development or sector-specific initiatives that promote access to the economy for Black people.</td>
</tr>
<tr>
<td>CODE SERIES 600</td>
<td>STATEMENT 601</td>
<td>Ownership for QSEs</td>
<td>Specifies the elements of B-BBEE measurable under the QSE scorecard, as well as the applicable measurement principles.</td>
</tr>
<tr>
<td>STATEMENT 602</td>
<td>Management control for QSEs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STATEMENT 603</td>
<td>Skills development for QSEs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STATEMENT 604</td>
<td>Enterprise and supplier development for QSEs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>STATEMENT 605</td>
<td>Socio-economic development for QSEs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>SCHEDULE 1</td>
<td></td>
<td>Interpretation and definitions</td>
<td>Sets out the interpretation and definitions applicable to the Codes.</td>
</tr>
</tbody>
</table>
Are companies required to achieve specific B-BBEE targets in South Africa?

In general, no. Other than in certain state licensing, permitting and authorisation processes, there is no ‘hard law’ requiring that a private entity in South Africa must achieve a certain level of B-BBEE or that Black people must hold a certain percentage of equity in a business. There are also no sanctions for non-compliance. However, in certain sectors, such as mining and telecommunications, minimum equity requirements are or may be imposed in terms of the sector-specific legislation governing those sectors.

How important is B-BBEE for government bodies and state-owned enterprises?

In terms of the BEE Act, government bodies and state-owned enterprises (SOEs) are required to take private-sector parties’ relative B-BBEE levels into account when they:
• procure any goods or services,
• issue any licence or other authorisation, or
• enter into partnerships with the private sector.

This means that businesses that interact with Government by selling to Government or that require licences to perform their particular activities would need to consider their levels of B-BBEE to conduct their businesses in those sectors.

In a licensing context, B-BBEE requirements are implemented in the empowering legislation for the licence in question (e.g. banking, broadcasting, mining, telecommunications, transportation, etc.) and, in certain instances, B-BBEE minimum thresholds may be set.

The Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) also provides that B-BBEE must be considered by any public sector body in the context of its procurement practices and details the manner in which B-BBEE must be taken into account by government departments and agencies and SOEs.

The PPPFA Regulations allow B-BBEE minimum thresholds to be set for certain tenders and in every tender evaluation process:
• tenders for contracts with a value of up to ZAR 50 million are scored on the basis that 80% of the available points are based on price, and 20% of the available points are based on the bidder’s B-BBEE rating; and
• tenders for contracts with a value above ZAR 50 million are scored on the basis that 90% of the available points are based on price, and 10% of the available points are based on the bidder’s B-BBEE rating.

For more information on Bowmans’ services concerning Government Contracting and Public Procurement, click here.

How important is B-BBEE for the private sector?

B-BBEE is relevant even to private sector businesses which do not require government licences or sell goods or services to Government. Most private sector 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 the entities 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.

This means that – although there are no absolute requirements in relation to B-BBEE – any company wishing to do business in the South African environment must consider and develop its B-BBEE position because 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 the private sector (as well as with Government and organs of state, as discussed above).

Are there offences and/or penalties for non-compliance with B-BBEE requirements?

There are no offences or penalties under the B-BBEE legislative framework relating to B-BBEE performance. However, there may be penalties in certain sectors where B-BBEE requirements are imposed for licensing or other authorisation purposes.

Further, under the B-BBEE legislation, it is a criminal offence to engage in a fronting practice or to make deliberate misrepresentations about an enterprise’s true B-BBEE status. Fines for fronting may be up to 10% of a company’s annual turnover.

What is fronting?

The Codes provide that, when measuring B-BBEE levels, substance applies over legal form. This is an attempt to limit instances of fronting by enterprises which make representations that they have adopted particular B-BBEE initiatives to score points when, in substance, the initiatives have not been adopted.

The BEE Act defines a ‘fronting practice’ as ‘a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of [the BEE Act] or the implementation of any of the provisions of [the BEE Act].’
Part 2: The Measurement of B-BBEE: Large Enterprises

What is considered a large enterprise?

A ‘Large Enterprise’ is any enterprise with annual total revenue of ZAR 50 million or more.

The term ‘total revenue’ is defined under the Codes as the total income of an enterprise from its operations as determined under South African Generally Accepted Accounting Practice (which are effectively the same as the International Financial Reporting Standards (IFRS)).

How is B-BBEE measured: the scorecard approach

In assessing B-BBEE, a scorecard approach is used whereby the different aspects of B-BBEE are weighted according to a points system to determine the B-BBEE score of a measured entity. A general scorecard is included in the general Codes, while sector-specific scorecards are included in the sector codes that apply to particular sectors.

The scorecards detail the various elements and sub-elements of B-BBEE on which enterprises are measured and stipulate targets to be achieved for each element and sub-element. The closer an enterprise is to reaching a particular target, the more points it will achieve for that element of B-BBEE.

What are the elements of B-BBEE and how are they weighted?

Under the general Codes, the elements of B-BBEE on which a measured entity’s B-BBEE score is measured are as per the graphic opposite:

- Ownership (Code Series 100)
- Management Control (Code Series 200)
- Skills Development (Code Series 300)
- Enterprise and Supplier Development (Code Series 400)
- Socio-Economic Development (Code Series 500)
- Elements under the General Codes of Good Practice
- Measurement of the extent to which entities carry out initiatives that contribute towards socio-economic development or sector specific initiatives that promote access to the economy for Black people
- Measurement of the effective ownership of entities by Black people
- Measurement of the effective control of entities by Black people
- Measurement of the extent to which entities buy goods and services from Empowering Suppliers with strong B-BBEE recognition levels (preferential procurement); and
- Enterprises carry out supplier development and enterprise development initiatives intended to assist and accelerate growth and sustainability of enterprises owned by Black people
- Measurement of the extent to which employers carry out initiatives designed to develop the competencies of Black employees and Black people internally and externally

Elements under the
General Codes of
Good Practice

Ownership
(Code Series 100)

Management
Control
(Code Series 200)

Skills
Development
(Code Series 300)

Enterprise and
Supplier Development
(Code Series 400)

Socio-Economic
Development
(Code Series 500)

Measurement of the extent to which:
- entities buy goods and services from Empowering Suppliers with strong B-BBEE recognition levels (preferential procurement); and
- enterprises carry out supplier development and enterprise development initiatives intended to assist and accelerate growth and sustainability of enterprises owned by Black people

Measurement of the effective
ownership of entities by Black people

Measurement of the effective
control of entities by Black people

Measurement of the extent to which:
- employers carry out initiatives designed to develop the competencies of Black employees and Black people internally and externally

Measurement of the extent to which:
- employers carry out initiatives designed to develop the competencies of Black employees and Black people internally and externally
A more detailed overview of the various elements of B-BBEE and their respective weightings under the general Codes is as follows:

**B-BBEE ELEMENT** | OVERVIEW | PROOF REQUIRED | POINTS AVAILABLE
--- | --- | --- | ---
Ownership | 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; and
- such ownership interests are unencumbered by debt (referred to as ‘net value’). | Proof of ownership rights in the hands of Black people (e.g. share certificates, shareholders agreement, etc.). 25 points | 25
Management control | The management control element refers to the number of Black members, and Black women in particular, who sit on the measured entity’s board of directors, as well as the number of Black people who participate in all levels of management (executive, senior, middle and junior management). Companies above a certain size also have separate obligations in terms of the Employment Equity Act, 1998 to prepare employment equity plans and to submit returns regarding their progress on employment equity to the Department of Labour. | Proof of Black people in top, senior, middle and junior management. Interviews will be held to confirm seniority, job description, salary, etc. Submission of an employment equity report required. 19 points | 19
Skills development | The skills development element is measured based on the amount of money that an entity spends on skills development programmes for Black employees.
- Employers are required to, by law, pay an amount equal to a prescribed percentage of all of their employees’ salaries to the National Skills Fund in terms of the Skills Development Act, 1998 and the Skills Development Levies Act, 1999.
- Entities can also score points for the number of learnerships they facilitate for Black people, Black women and Black disabled persons, the amount of money they spend on bursary programmes, and the implementation of mentorship programmes. | Proof of training spend on Black employees or non-employees and accredited programmes (e.g. apprenticeships, learnerships, internship and mentorship programmes). 20 points (plus 5 bonus points) | 25
Enterprise and supplier development | The enterprise and supplier development element under the Codes has three components: preferential procurement, enterprise development and supplier development.
- Points for preferential procurement are scored depending on the extent to which measured entities procure goods and services from Black-empowered suppliers who comply with certain criteria to qualify as Empowering Suppliers. In essence, a certain percentage of a measured entity’s expenditure with an Empowering Supplier is recognised as B-BBEE expenditure depending on that supplier’s B-BBEE level. Entities can increase their scores on this element if they procure a greater percentage of goods and services from suppliers with higher B-BBEE ratings, from small businesses (such as QSEs and EMEs), from suppliers that are at least 51% Black-owned, and from suppliers that are at least 30% owned by Black women. | Proof of purchases from current suppliers that have a B-BBEE rating and are empowering suppliers as a percentage of total procurement spend. Proof of contributions to developing business owned by Black people. Proof of contributions to Black-owned suppliers. 40 points in total (plus 4 bonus points) | 25

**B-BBEE OVERVIEW**

- **Enterprise and supplier development**
  - Points are scored for enterprise development in relation to the contribution (both monetary and non-monetary) that an entity makes to developing businesses that are owned by Black people (e.g. investing in businesses owned by Black people, making loans to businesses owned by Black people, providing credit guarantees to businesses owned by Black people, providing preferential credit terms to businesses owned by Black people, giving discounts, and providing training or mentoring). The targets that apply to enterprise development are set as a percentage of the measured entity’s net profit after tax (NPAT).
  - Supplier development refers to the enterprise development contributions that an entity makes to its Black-owned suppliers and, in particular, small Black-owned businesses who are its suppliers. The targets that apply to supplier development are also set as a percentage of the measured entity’s NPAT.

**TOTAL POINTS ON THE SCORECARD (INCLUDING BONUS POINTS)** 118

If a measured entity achieves the target for a particular indicator or if it exceeds the target for a particular indicator, it will achieve the full points for that indicator in the example above, the total points that could be scored will be 4 points.

**What are B-BBEE levels and why do they matter?**

The more points a measured entity achieves in total across each of the individual elements, the higher its B-BBEE status level will be. Each B-BBEE level translates into a procurement recognition level (the percentage which a company procuring can claim).

**How are the available points obtained?**

If a measured entity does not achieve the target for a particular indicator under an element, it will score points on a pro rata basis.

**B-BBEE STATUS**

<table>
<thead>
<tr>
<th>B-BBEE STATUS</th>
<th>NUMBER OF WEIGHTING POINTS REQUIRED</th>
<th>PROCUREMENT RECOGNITION LEVEL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level 1 Contributor</td>
<td>≥ 100 points</td>
<td>15%</td>
</tr>
<tr>
<td>Level 2 Contributor</td>
<td>≥ 95 points &lt; 100 points</td>
<td>12.5%</td>
</tr>
<tr>
<td>Level 3 Contributor</td>
<td>≥ 90 points &lt; 95 points</td>
<td>10%</td>
</tr>
<tr>
<td>Level 4 Contributor</td>
<td>≥ 80 points &lt; 90 points</td>
<td>7.5%</td>
</tr>
<tr>
<td>Level 5 Contributor</td>
<td>≥ 75 points &lt; 80 points</td>
<td>5%</td>
</tr>
<tr>
<td>Level 6 Contributor</td>
<td>≥ 70 points &lt; 75 points</td>
<td>2.5%</td>
</tr>
<tr>
<td>Level 7 Contributor</td>
<td>≥ 55 points &lt; 70 points</td>
<td>1%</td>
</tr>
<tr>
<td>Level 8 Contributor</td>
<td>≥ 40 points &lt; 55 points</td>
<td>0.5%</td>
</tr>
<tr>
<td>Non-Compliant Contributor</td>
<td>&lt; 40 points</td>
<td>0%</td>
</tr>
</tbody>
</table>
How is a business’ B-BBEE level assessed?

Where a business presents any information regarding its B-BBEE score – for example, in the context of a tender response – this must be 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.

A business’ B-BBEE score will be determined on the basis of its activities during the previous financial year and its ownership and management structures and staff profile as at the date of measurement.

What are the priority elements and how does this affect a business’ B-BBEE level?

There are three priority elements: ownership (net value), skills development, and enterprise and supplier development. A large enterprise is required to comply with all the priority elements. Sub-minimum requirements – 40% of the relevant targets – apply in the context of the three priority elements.

If any of the sub-minimum requirements are 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 one of the sub-minimum requirements, it will be deemed to be a Level 4 B-BBEE contributor.

What does this mean about the points that must be scored on each of the priority elements?

Ownership: 40% of the points for net value (8 points) = 3.2 points

Skills development: 40% of the total points, excluding bonus points, for skills development (20 points) = 8 points

Enterprise and supplier development: 40% of the total points for each category under enterprise and supplier development, excluding bonus points:
- 40% of the total points for preferential procurement (25 points) = 10 points
- 40% of the total points for supplier development (10 points) = 4 points
- 40% of the total points for enterprise development (5 points) = 2 points

What is an EME and how is it measured?

Under the Codes, any enterprise with an annual total revenue of ZAR 10 million or less qualifies as an EME.

A deemed B-BBEE status level means an EME does not need to be measured using the scorecard approach under the Codes, and its B-BBEE status level will be determined solely with reference to its percentage of Black ownership. However, EMEs are allowed to be measured in terms of the QSE scorecard should they wish to maximise their points and move to the next procurement recognition level.

The measurement of an EME is as follows:

- **100% Black-owned**: will be deemed to have a Level 1 B-BBEE status
- **51% Black-owned**: will be deemed to have a Level 2 B-BBEE status
- **Under 51% ownership by Black people**: will be deemed to have a Level 4 B-BBEE status (100% Black procurement recognition of 100%)
What is a QSE and how is it measured?

Under the Codes, any enterprise with an annual total revenue of between ZAR 10 million and ZAR 50 million qualifies as a QSE.

The measurement of a QSE is as follows:

- **100% Black-owned** will be deemed to have a Level 1 B-BBEE status.
- **51% Black-owned** will be deemed to have a Level 2 B-BBEE status.
- Under 51% ownership by Black people must be measured.

The QSE Code contains simplified scorecards for each of the five elements and includes adjusted points weightings for skills development and enterprise and supplier development. Under the QSE Code, the elements of B-BBEE on which an enterprise’s B-BBEE score is measured and their respective weightings are:

<table>
<thead>
<tr>
<th>B-BBEE ELEMENT</th>
<th>CODE SERIES</th>
<th>POINTS AVAILABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership</td>
<td>Statement 601</td>
<td>25</td>
</tr>
<tr>
<td>Management control</td>
<td>Statement 602</td>
<td>15</td>
</tr>
<tr>
<td>Skills development</td>
<td>Statement 603</td>
<td>25 (plus 5 bonus points)</td>
</tr>
<tr>
<td>Enterprise and supplier development</td>
<td>Statement 604</td>
<td>30 (plus 3 bonus points)</td>
</tr>
<tr>
<td>Socio-economic development</td>
<td>Statement 605</td>
<td>5</td>
</tr>
<tr>
<td>TOTAL (including bonus points)</td>
<td></td>
<td>108</td>
</tr>
</tbody>
</table>

With regard to the priority elements, a QSE is required to comply with the sub-minimum requirements for ownership (as a compulsory element) as well as the sub-minimum requirements for either skills development or enterprise and supplier development (unless it is eligible for a deemed rating).

What is a start-up enterprise and how is it measured?

A start-up enterprise is defined under the Codes as ‘a recently formed or incorporated entity that has been in operation for less than one year’. Importantly, a start-up enterprise does not include any newly constituted enterprise which is merely a continuation of a pre-existing enterprise.

Under the Codes, start-up enterprises must be measured as EMEs for the first year following their formation or incorporation (unless the start-up enterprise chooses to be measured on the QSE scorecard or generic scorecard). This provision applies regardless of the expected total revenue of the start-up enterprise.

If, however, a start-up enterprise tenders on large projects, it must submit a scorecard. The value of the tender will determine whether a start-up enterprise is required to submit a QSE scorecard or a generic Code scorecard.

How is the B-BBEE recognition level of an EME, QSE and a start-up enterprise assessed?

All EMEs (including start-up enterprises) and certain QSEs (QSEs with 51% or 100% Black ownership) will not need to be verified by a verification agency and will only need an affidavit (signed before a Commissioner of Oaths) or a certificate issued by the Companies and Intellectual Property Commission, confirming the following:

- details of the deponent;
- reliance on either management accounts or financial statements;
- the financial year of the financial information;
- total annual revenue (either ZAR 10 million or less for an EME, or between ZAR 10 million and ZAR 50 million for a QSE); and
- level of Black ownership.

There is a standard form available for EMEs or QSEs wishing to complete an affidavit. The affidavit must be completed on an annual basis. Any misrepresentation is a criminal offence.

A QSE with less than 51% Black ownership will need to be measured under the QSE Code on each of the five ordinary elements of B-BBEE and must obtain a certificate issued by an accredited verification or rating agency.

It is important to note that, under the Codes, initiatives which split, separate or divide a measured entity as a means of ensuring eligibility as an EME, a QSE or a start-up enterprise may constitute an offence. Any such initiatives must be carefully considered before relying on such initiatives to obtain a B-BBEE recognition level.
Part 4: The Measurement of B-BBEE: Foreign Entities and Multinational Corporations (MNCs)

Must a foreign entity or MNC comply with B-BBEE requirements in South Africa?

No. Other than in terms of certain sector-specific legislation (which may impose limitations on foreign ownership within that sector, such as broadcasting and aviation), there is no requirement for a foreign entity or MNC to comply with B-BBEE. This means there is no requirement for a foreign entity or MNC to sell any equity to conduct business in South Africa.

However, an entity that is 100% foreign-owned will not generally score any points for ownership, as Black people do not hold any economic interest or voting rights in that entity. A score of zero for ownership will impact negatively on a business’ overall B-BBEE score which may affect its ability to do business in South Africa, particularly with Government and organs of state, as well as certain private sector entities.

Does that mean a foreign entity or MNC must sell equity to operate effectively in South Africa?

Not necessarily and much will depend on the sector and the market within which a foreign entity or MNC operates, including the role of competitors. Some options include the following:

Option 1: Sale of equity (See also our Guide 3 - B-BBEE in South Africa: Ownership and Ownership Structures)

Some possible sale of equity options include:

• 10% sale of equity (to avoid a penalty being imposed for failure to meet the ownership sub-minimum requirements)
• 25% + 1 sale of equity (to score all available points on the ownership scorecard, under the general Codes)
• 30% Black woman-owned (which has certain advantages from the perspective of preferential procurement)
• 50% Black-owned (which has certain advantages from the perspective of preferential procurement)

Option 2: Participation in an Equity Equivalent Investment Programme

The Codes recognise that some MNCs – defined as a measured entity with a business in South Africa and elsewhere which maintains its international headquarters outside South Africa - 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 2003, the Codes make provision for the recognition of contributions in lieu of a direct sale of equity. Such contributions are referred to as equity equivalent (EE) contributions. EE contributions count towards the ownership element of B-BBEE made by MNCs. This is discussed further in our Guide 3 - B-BBEE in South Africa: Ownership and Ownership Structures.

Option 3: Exclusions from Total Measured Procurement Spend

Most private sector businesses to which services are rendered or goods are sold will themselves have to meet B-BBEE procurement targets. Under the preferential procurement element, the total spend of a measured entity with suppliers is measured against the total procurement expenditure or total measured procurement spend (TMPS). Measured entities can increase their scores on the preferential procurement element if they procure a greater percentage of goods and services from suppliers with higher B-BBEE ratings.

TMPS includes, among other things, cost of sales, operational expenditure, capital expenditure, imports and third-party procurements.

However, the Codes also provide for certain permissible exclusions from TMPS, including:

• imported capital goods or components for value-added production in South Africa provided there is no existing local production of such capital goods or components and those capital goods or components promote further value-added production in South Africa; and
• other imported goods and services if there is no local production of those goods or services including, but not limited to, imported goods or services that carry a different brand to the locally produced goods or services; or have different technical specifications to the locally produced goods or services.

Understanding whether goods and services can be excluded from customers’ procurement spend may form an integral part of a foreign entity or MNC’s B-BBEE strategy.

TMPS includes, among other things, cost of sales, operational expenditure, capital expenditure, imports and third-party procurements.
Part 5: An Overview of B-BBEE in Certain Sectors

The Minister of Trade and Industry has published various sector-specific codes which detail the manner in which B-BBEE must be measured for businesses operating in particular sectors. Where a sector-specific code has been issued, businesses in that sector are required to apply the relevant sector code rather than the general Codes. The general Codes apply only where there is no sector-specific code published.

The table below provides a high-level overview of the sector codes that have been published in various sectors to date.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Effective Date</th>
<th>Application</th>
<th>Ownership Targets</th>
<th>Notable Aspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Codes</td>
<td>1 May 2015</td>
<td>General application</td>
<td>Black people: 25%</td>
<td>Thresholds: EME: enterprise with annual total revenue less than ZAR 5 million.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Black women: 10%</td>
<td>QSE: enterprise with annual total revenue between ZAR 5 million and ZAR 45 million.</td>
</tr>
<tr>
<td></td>
<td>20 November 2015</td>
<td>All enterprises within the Tourism Sector and all parts of value chain, including:</td>
<td>Black people: 30%</td>
<td>Note: A draft amended Tourism Sector Code was published for public comment on 27 September 2019 to ensure alignment with the amended general Codes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Accommodation</td>
<td>Black women: 15%</td>
<td>• Residential property industry.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Hospitality and related services</td>
<td></td>
<td>• Commercial property industry.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Travel and related services</td>
<td></td>
<td>• Other property value chain areas.</td>
</tr>
<tr>
<td>MAC</td>
<td>1 April 2016</td>
<td>• Advertising company</td>
<td>Black people: 45%</td>
<td>Thresholds: Different thresholds for EMEs, QSEs and large enterprises for each sub-sector.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Public relations company</td>
<td>Black women: 30%</td>
<td>Additional points: Increase in points available under management control (27 points, as opposed to 19 points under the general Codes).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Communication company</td>
<td></td>
<td>Increase in the absorption points to 10 under the skills development element (higher than 5 points in the general Codes).</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Additional element: Responsible Social Marketing and Communications (5 points) - measuring contributions made towards the promotions of responsible social marketing.</td>
</tr>
<tr>
<td>ICT</td>
<td>7 November 2016</td>
<td>All persons, organisations and entities operating in the ICT sector in South Africa.</td>
<td>Black people: 30%</td>
<td>Additional points: Additional points available under enterprise and supplier development (50 points, as opposed to 40 points under the general Codes).</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Black women: 10%</td>
<td>(2 points, as opposed to 5 points under the general Codes).</td>
</tr>
<tr>
<td>Forestry</td>
<td>21 April 2017</td>
<td>All enterprises involved with commercial forestry and first-level processing of wood products, including the following sub-sectors: commercial primary growth, fibre production, contracting, sawmilling, pole and charcoal.</td>
<td>Black people: 25%</td>
<td>B-BBEE recognition levels: Points applicable to the B-BBEE contributor levels differs under the ICT Sector Code compared to general Codes.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Non-timber forest product enterprises fall outside the ambit of the Forest Sector Code.</td>
<td>Black women: 10%</td>
<td>Ownership element: Up to 12 bonus points given as an incentive for enterprises to achieve various higher ownership targets.</td>
</tr>
<tr>
<td>Property</td>
<td>9 June 2017</td>
<td>All privately owned and public enterprises in the property sector, including the following industries:</td>
<td>Black people: 30%</td>
<td>Ownership element: Different thresholds for EMEs and Large Enterprises for certain property segments.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Residential property industry.</td>
<td>Black women: 15%</td>
<td>• 4 additional points available for achieving financial support targets under the ownership scorecards.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Commercial property industry.</td>
<td></td>
<td>• 3 bonus points available for 35% disposal of assets to Black-owned and controlled company with at least 51% Black ownership as a percentage of total asset disposals.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Other property value chain areas</td>
<td></td>
<td>Additional element: Economic Development (5 points) - economic development investment in under-resourced areas and contribution towards an economic development programme.</td>
</tr>
<tr>
<td>Construction</td>
<td>December 2017</td>
<td>All entities falling within the construction sector, including:</td>
<td>Black people: 30%</td>
<td>Ownership element: Different thresholds for BEPs which are deemed B-BBEE levels based on percentages of Black ownership.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Contractors (enterprises conducting construction project activities, including civil engineering, electrical engineering, power transmission, general building and specialist construction works); and</td>
<td>Black women: 10%</td>
<td>Year 4: Different scorecards (and points) for contractors and BEPs.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Built environment professionals (BEP) (enterprises that conduct activities such as planning, design and costing of construction projects in the built environment).</td>
<td>Black women: 14%</td>
<td>Ownership: Up to 4 bonus points given as an incentive for enterprises to achieve various higher ownership targets.</td>
</tr>
</tbody>
</table>
## Overview of B-BBEE sector nodes continued

<table>
<thead>
<tr>
<th>Sector</th>
<th>Effective Date</th>
<th>Application</th>
<th>Ownership Targets</th>
<th>Notable Aspects</th>
</tr>
</thead>
</table>
| **Financial**        | 1 December 2017 | Any natural or juristic person conducting business in the South African financial sector, including; banking, long-term and short-term insurance, re-insurance, retirement fund administration, management of collective investment scheme assets, financial services intermediation and brokerage and private equity. | Black people: 25%  
Black women: 10%  
(unless exempted from ownership)  
**Scorecards:**  
Different scorecards (and points) for (1) banks and life offices, (2) short-term insurers, (3) stock exchanges and stock exchange members, and (4) other institutions.  
Additional element:  
Access to financial services aimed at facilitating access to finance for Black people and Black-owned enterprises. | **Notable Aspects** |
| **Agriculture**      | 21 April 2017  | Enterprises which derive more than 50% of turnover from:  
• primary production of  
agricultural products;  
• provision of inputs and  
services to enterprises  
• engaged in production of  
agricultural products;  
• beneficiation of agricultural  
products of primary or  
semibeneficiated  
form; and  
• storage, distribution and / or  
trading and allied activities  
• related to non-beneficiated  
agricultural products. | Black people: 25%  
Black women: 10%  
**Ownership:**  
Target for land ownership where applicable is 30%.  
**Socio-economic development:**  
Up to 15 points available under socioeconomic development (compared to only 5 points under the general Codes). | **Ownership:** |
| **Defence**          | 12 April 2019  | All entities in the South African defence industry, including private enterprises providing defence material or other supplies, products and services to the Department of Defence. | Year 1  
Black people: 25%  
Black women: 10%  
Year 2  
Black people: 30%  
Black women: 15%  
Year 3  
Black people: 35%  
Black women: 15%  
**Thresholds:**  
EME: enterprise with annual total revenue less than ZAR 5 million.  
QSE: enterprise with annual total revenue between ZAR 5 million and ZAR 50 million.  
**Additional element:**  
Localisation (10 points) – measures extent to which entities procure defence material from local enterprises that contribute to the development of manufacturing and new locally developed technology. | **Notable Aspects** |
| **Transport**        | 21 August 2009 | Comprises eight sub-sectors:  
• Bus commuter and coach  
• services  
• Taxi industry  
• Road freight  
• Public sector – transport  
• Maritime transport and  
• services industry  
• Forwarding and clearing  
• Rail sector  
• Domestic aviation  
Different ownership targets set for each of the sub-sectors. | **Notable Aspects** |
| **Chartered accountancy** | Draft sector code only | The chartered accountancy profession and sector. | Black CAs: 20%  
Black people: 32.5%  
Black women CAs: 6.5%  
Black women: 13%  
**Ownership:**  
Up to 3 bonus points given as an incentive for enterprises to achieve various higher ownership targets. | **Notable Aspects** |
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 2022, Bowmans won six IFLR Africa Awards including overall M&A Team of The Year; Jurisdictional Firm of the Year: South Africa; Loans Firm of the Year: South Africa; M&A Firm of the Year: South Africa; and Project Finance Firm of the Year: South Africa. We also advised on the deal named M&A Deal of the Year. At the 2022 Africa Legal Awards, we won four practice awards including Banking and Finance Team of the Year; Capital Markets Team of the Year; Tax Team of the Year and Transportation and Infrastructure Team of the Year.

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 & Partners LLP) and Nigeria (Udo Uduma & Belo-Osagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

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.

In the 2021 DealMakers Africa Awards we ranked first in East Africa for both deal value and deal flow and 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; third and fourth by value and flow respectively, in the Listed Company M&A Transactions category; and fourth by deal value and deal flow in the General Corporate Finance category.

We have a special relationship with a competent practitioner in 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.

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