



KNOW THE SCORE

WE PUT THE REVISED B-BBEE CODES OF GOOD PRACTICE UNDER THE MICROSCOPE

By Anton Pretorius

American author Andrew Smith once wrote, "People fear what they don't understand and hate what they can't conquer." It can be overwhelming for local companies to try and process, understand and implement the revised B-BBEE codes. Our comprehensive dissection will not only quash your fears, but will help your business become a valuable contributor to transformation in South Africa.

How businesses and companies engage with BEE legislation has always been a contentious issue in South Africa. And to be fair, the goalposts have moved on more than one occasion.

Since its promulgation in 2003, the original B-BBEE Act, including the Codes of Good Practice (in 2007), experienced fluctuating levels of success. Although the foundation of the B-BBEE codes remain sound, it has often been criticised for the effects of its implementation and lack of shift in the level of real economic empowerment.

However, according to the Department of Labour's Commission for Employment Equity 2017 report, whites, who comprise 8% of the population, still hold more than 68% of top management positions while black people, who make up 80% of the population, hold only 14%.

Levels of participation from both big business and SMEs have risen steadily, with many opting to embrace B-BBEE rather than resist it. Yet, B-BBEE codes have failed to boost the South African economy the way policymakers had hoped they would.

As a result, the previous codes were significantly amended. The revised codes came into force in May 2015, and lesson one is to increase 'real' empowerment in South Africa and close the gaps and loopholes identified during the first era of B-BBEE.

CROSSING THE 'PROVERBIAL RUBICON'

How have the revised B-BBEE codes made compliance easier for companies in South Africa? "Unfortunately, they haven't," says Deon Oberholzer, CEO of BEE consultancy Gestalt Growth Strategies.

"The revised codes have crossed the proverbial Rubicon. We've seen significant resistance from white-owned companies and the general observation is that the cost of compliance is now too high for the perceived business benefit," he says.

But HR Director for EnviroServe Group, Maxwell Jwili, believes that the revised codes weren't intended to make compliance impossible and believes that it provides a framework within which to implement empowerment. "I believe the codes are largely clear on what's required. If implemented properly, they have the potential to level the playing field."

Lianne Friedman, CEO of EconoServ SA, says companies have struggled significantly with their B-BBEE status since the revised codes were promulgated. "Unfortunately, it has become a grudge purchase, and few companies are happy about spending the money required. They also need to make business sense out of their BEE transactions and implement sustainability plans."

Speaking to Vivien Chaplin and Rachel Kelly – partners at international law firm Hogan Lovells in Johannesburg – both agree that companies operating in South Africa have come under pressure from their customers to achieve and maintain (and even improve) a particular B-BBEE contributor status and procurement recognition level.

"We're also seeing pressure being put on companies, particularly in certain sectors, to achieve a 30% black women-owned or 51% black-owned status," says Kelly.

Both partners iterate that without some sort of progressive B-BBEE action plan, companies are tending to achieve lower B-BBEE contributor status when measured under the revised codes. "However, many companies, rather than being discouraged by this, are working hard to develop strategies to improve their B-BBEE ratings. It still remains a business imperative for them," says Chaplin.

ROAD PAVED WITH GOOD INTENTIONS

Jwili says the revised codes were specifically introduced to improve on the weaknesses identified in the earlier version of the codes. "It's a mechanism to address inequalities and mobilise the energy of all South Africans to contribute to sustainable economic growth, development and social transformation," he says. Kelly says it's important to understand the broader

strategy behind B-BBEE. "The reality is that we are under massive social and economic pressure due to the high levels of inequality between the rich and poor in South Africa."

Given the poor global economic climate, and South Africa's own volatility, the economy is not growing at the pace it should. This is concerning given the amount of skills and resources available in this country.

"A lot more funding has to be deployed, especially in education, to close these inequality gaps. The funding can only effectively come from revenue collection, as more foreign debt will not be sustainable," says Kelly.

"The Department of Trade and Industry's strategy behind B-BBEE is not to take wealth from those who have it and redistribute it to those who don't, but rather to tackle inequality and empower those who don't have access to resources," says Chaplin.

THE SIGNIFICANT CHANGES

There have been two significant developments in the revision. 'Fronting' – where businesses attempt to circumnavigate the process by claiming points through the misrepresentation of facts and circumstances – is now a criminal offence.

"The other significant development," according to Chaplin, "is the appointment of the BEE Commissioner and the establishment of the BEE Commission." Its function is not only to investigate complaints and maintain a registry of major B-BBEE deals, but also to strengthen and foster public private partnerships to promote and safeguard the objectives of B-BBEE.

Oberholzer says this is due to the 'very visible' work that the office of the B-BBEE Commissioner is doing. "There are now real consequences for fronting, especially the schemes with elaborate employee structures that can be easily dismantled and offer no real transformation benefit," he says.

Another exciting key outcome of the revised codes is the establishment of 27 new grant-making foundations in South Africa, endowed with a massive amount of R32.6-billion in assets that will support charitable causes in perpetuity.

SECTOR CODES

Friedman says progress has been slow with the establishment of B-BBEE sector codes. "The revised codes were gazetted five years ago, yet not all the sector codes have been realigned. Transport and AgriBEE have not been amended, negatively affecting small black-owned businesses who can't utilise the affidavit," says Friedman.

Oberholzer says that while five sector codes have come into force, namely Media, Advertising and Communication; ICT; Forest; Tourism and Property, "the rest are in limbo". After the tumult with the revised Mining Sector Charter, all sector codes and related documentation were referred back to cabinet for review.

"This setback is deeply unfortunate, as transformation is delayed as a result," says Oberholzer. Companies are also expected to plan for all possible eventualities. The following sector codes have been published and remain in draft format: AgriBEE, Construction, Financial Sector and Integrated Transport. "Until the codes are finalised, companies operating in these industries are measured against the generic scorecard," says Kelly.

INCREASED FOCUS ON GENDER

The revised codes now prescribe demographic quotas on several levels of management and skills development. Friedman highlights the fact that more points are now available for black women so there is a bigger focus on including women in the economy.

As a general statement, the revised codes stipulate that black women should form between 40% and 50% of the beneficiaries of the relevant elements of the scorecard. There's a compliance target of 10% of ownership benefits (voting rights and economic interest) of enterprises to be held by black women.

Oberholzer says that the codes are certainly incentivising the appointment of black managers, especially black women. "This is critical because African women continue to be the least represented in business compare to their relative demographics." According to the latest Commission of Employment Equity (CEE) report, there's been a strong growth of African women in management, but from a very low base.

OLD VERSUS REVISED CODES

The new legislation closes loopholes, especially in the manner of calculating B-BBEE compliance levels or status. Here are five notable changes in the revised B-BBEE legislation.

REVISION #1: CONTRIBUTOR STATUS

"There's been a notable increase in the number of points required to achieve a particular B-BBEE contributor status." Chaplin explains: "Under the old codes, a company achieving 91 points on the generic scorecard would receive Level 2 B-BBEE contributor status, along with a procurement recognition level of 125%." But under the new codes, the same 91 points will see businesses awarded Level 3 B-BBEE contributor status with a procurement recognition level of only 110%.

REVISION #2: MEASURABLE ELEMENTS

The generic scorecard under the old codes measured seven elements, but the revised codes measure only five. Employment Equity now falls under Management Control, and Preferential Procurement and Enterprise Development combines to form 'Enterprise and Supplier Development'. The five elements are: Ownership, Management Control, Skills Development, Enterprise and Supplier Development and Socio-Economic Development.

Oberholzer says that medium-sized companies are the most affected by the revised codes. "Mid-sized companies with an annual turnover of between R5-million and R35-million under the old codes had a choice of elements to comply with. Now, they're required to comply with all of them," he says.

Jwili adds that under the revised codes, "Large enterprises (now with a revised turnover requirement exceeding R50-million) and QSEs (revised turnover requirement of between R10-million and R50-million) must both comply with all the elements for the purpose of measurement."

REVISION #3: PRIORITY ELEMENTS

Chaplin and Kelly both note the prioritisation of elements like 'Ownership,' 'Skills Development' and 'Enterprise and Supplier Development'. "This means that if enterprises are not able to achieve the minimum requirements under these priority elements, their B-BBEE contributor status will automatically be discounted by one level." Kelly adds: "Large enterprises must comply with the sub-minimum requirements of all three priority elements. QSEs are required to comply with the sub-minimum requirements under 'Ownership' elements, and either 'Skills Development' or 'Enterprise and Supplier Development'".

REVISION #4: SKILLS DEVELOPMENT EXPENDITURE

The revised codes' target for Skills Development Expenditure has increased from 3% to 6% of the 'leviable amount' (as defined in the Skills Development Levies Act, 1999). "Also on the skills development scorecard, there's a lot more emphasis on internships, learnerships and apprenticeships," says Chaplin. A higher number of points is awarded for black ownership, as well as more points for engagement with companies that are involved in employment and social change.

REVISION #5: EXEMPT MICRO ENTERPRISES

Under the old codes, companies with a total annual turnover of R5-million or less qualified as an Exempt Micro Enterprise (EME) and deemed Level 4 B-BBEE contributor status. More than 50% black-owned enterprises were promoted to Level 3 B-BBEE contributor status. "A simple auditor's certificate proved sufficient evidence for an EME," says Chaplin. "The revised codes have increased the threshold for qualifying as an EME to R10-million." EMEs are still deemed Level 4 B-BBEE contributor status, "But 100% black-owned businesses are elevated to Level 2 status." In terms of verification, EMEs are required to submit a sworn affidavit on an annual basis confirming total annual revenue and level of black ownership.

B-BBEE Status	Current Qualification	Revised Qualification	Recognition Level
Level 1	Greater than 100 points	Greater than 100 points	135%
Level 2	Greater than 85, less than 100 points	Greater than 95, less than 100 points	125%
Level 3	Greater than 75, less than 85 points	Greater than 90, less than 95 points	110%
Level 4	Greater than 65, less than 75 points	Greater than 80, less than 90 points	100%
Level 5	Greater than 55, less than 65 points	Greater than 75, less than 80 points	80%
Level 6	Greater than 45, less than 55 points	Greater than 70, less than 75 points	60%
Level 7	Greater than 40, less than 45 points	Greater than 55, less than 70 points	50%
Level 8	Greater than 30, less than 40 points	Greater than 40, less than 55 points	10%
Non-Compliant	Less than 30 points	Less than 40 points	0%

Element	Codes of Good Practice 2007	Codes of Good Practice 2007	Revised Codes of Good Practice 2013	Revised Codes of Good Practice 2013
Weighting Points	Weighting Points	Target	Weighting Points	Target
Ownership	20	25% + 1 Vote	25	25% + 1 Vote
Management & Control	10	50%	19	50%
Employment Equity	15	80%	-	-
Skills Development	15	3% of payroll	20	6% of payroll
Preferential Procurement	20	70%	-	-
Enterprise Development	15	3%	-	-
Enterprise & Supplier Development	-	-	40	80%
Socio-Economic Development	5	1%	5	1%
TOTAL	100		109	

WORDS OF ADVICE



"The services of reputable experts will present strategies for compliance that are cost-effective, business beneficial and support the much-needed drive for real transformation." – **Deon Oberholzer, CEO of Gestalt Growth Strategies**



"It's essential that you have good leadership leading from the front. We have monitored our progress and held our executives accountable. All these combined have led us to an industry-leading Level 2 rating." – **Maxwell Jwili, HR director at EnviroServe Group**



"Early planning is critical to implementing activities that are sustainable and result in points. Understand what the scorecard entails. Know what your customers are looking for in terms of level status and black shareholding, so you can work out the targets you need to achieve." – **Lianne Friedman, CEO, EcononServe SA**



"We do not believe in a one-size-fits-all approach. It needs to be tailored to the individual circumstances of each particular business. It's important to create strategies that provide real benefits to a business and the community." – **Rachel Kelly & Vivien Chaplin, partners at Hogan Lovells**

