

B-BBEE: AN ACT IN PROGRESS . . .

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Article by Terrance M. Booysen

Since the original launch of what was first known to be the Black Economic Empowerment Act No. 53 of 2003 ('the Act') which was signed into South African law in January 2004, the Act has seen many changes. The emphasis of the Act has always been on 'black' people and the critical need to transform their dire economic and social conditions which were brought about as a result of the past 'apartheid' system where Africans, Coloureds and Indians were excluded from almost all sectors of the country's benefits and development.

With an understanding of the African National Congress' ('ANC') Freedom Charter of 1955, the Act was developed and refined upon the requirements of the Reconstruction and Development Programme ('RDP'). The RDP was developed as a South African socio-economic policy framework by the ANC government in 1994 as a forward looking plan to transform and mobilise all South Africans in an effort to -- amongst other -- alleviate poverty caused through the Apartheid regime, as well as eradicate the white business owner's elitist privileges of pre-1994.

"The pressure on business of all sizes to do more to empower black people is growing relentlessly. The sooner they start doing this, the better they'll be able to survive, and in fact prosper."

Executive Business Brief

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The efforts to build a new democratic, non-racial and non-sexist society and economy have for all intent and purpose not been achieved since the Act's debut, and South Africa is still regarded as one of the most unequal societies in the world. Over a decade since the original BEE Act was launched, the country still experiences massive gaps in education, healthcare, job creation, unemployment and social insecurity. Indeed a lot has been achieved since the country was liberated from its apartheid shackles; however the extent to which the majority of black people participate meaningfully in South Africa's economy remains limited. Whilst South Africa continues to remain a largely divided and unequal society, the stability and its economic prosperity continue to be undermined. If these imbalances continue, there's no doubt that the consequences will be to the detriment of all South Africans, irrespective of their race.

Due to the fact that the Act has not yet achieved its original objectives to 'normalise' the country's unbalanced racial differences, there is now an even greater chance that any party who interacts with South Africa will -- directly or indirectly -- be impacted by the additional efforts legislators are introducing through the revised Broad-Based Black Economic Empowerment Amendment Bill 2013 ('the B-BBEE Bill') and its revised Codes of Good Practice on B-BBEE ('the Revised Codes'). These re-focused efforts are all designed to equalise and level the economic playing fields; and continuing to pay lip service to them is guaranteed to be costly.

The revised B-BBEE Bill and the Revised Codes provide the legal framework for the application of B-BBEE in South Africa. Both the Bill and the Revised Codes have undergone significant amendments that will impact the manner in which B-BBEE will be measured and implemented within organisations operating in South Africa. The amendments reflect a shift from a voluntary approach, to a more punitive approach in government's new B-BBEE policy. For example, the B-BBEE Bill introduces offences and penalties, including imprisonment of up to ten years for natural persons; or a fine of up to ten percent of the organisation's annual turnover for juristic persons. Furthermore, the Revised Codes create 'priority elements', where certain organisations must obtain at least forty percent of the allotted targets or points, failing which, their B-BBEE level will be 'discounted by one level'. The Revised Codes may result in a drop in the B-BBEE level within some organisations and this may be caused by various factors which may include: (i) an increase in the points



needed to qualify for the various B-BBEE levels, and (ii) adjustments to the B-BBEE elements and revised scorecards used to calculate B-BBEE points.

Organisations conducting a business, trade or profession in South Africa, with an annual turnover of less than fifty million rand may benefit from the amendments of the Revised Codes. For example, the compliance thresholds for Exempted Micro Enterprises ('EMEs') and Qualifying Small Enterprises ('QSEs') have been increased, resulting in certain organisations falling into less onerous categories. Furthermore, EMEs and QSEs are no longer required to obtain a B-BBEE certificate from a verification agency - instead an affidavit confirming the B-BBEE level of the organisation will suffice. In order for organisations to maintain (or increase) their current B-BBEE level, they must identify and address the amendments to the B-BBEE Act and the Revised Codes.

As is the case with the many good intentions which underpin the amendments of the B-BBEE Act and its Revised Codes which were introduced in October 2013; one must also consider some of the criticism being levelled against the Revised Codes which come into effect in May 2015. A number of critics argue that the Revised Codes have not really addressed the problems of the previous Codes. Moreover, whilst the B-BBEE points-to-levels-table has changed, many organisations will not be able to maintain their existing B-BBEE level if they do not dramatically increase their B-BBEE efforts.

As a result, many organisations may in all likelihood automatically drop in their levels of compliance and in other cases they may simply become non-compliant. For example, the old level eight B-BBEE level organisation -- which was the lowest possible B-BBEE compliant level -- required between 30 and 40 points. In the Revised Codes, the same organisation will now require between 40 to 55 points to remain a level eight B-BBEE compliant organisation. If for some reason this organisation cannot gain the additional points, it will automatically fail in its B-BBEE scorecard. In this respect, EMEs and QSEs may now become more discouraged to expand their businesses and purposely remain small by ensuring their turnover remains below certain thresholds to avoid the additional B-BBEE requirements (organisations who remain below ten million rand per annum are automatically B-BBEE compliant). Clearly this approach will contradict the original transformation intentions of B-BBEE and employment of more black people will become even more elusive if organisations battle to meet the new B-BBEE requirements and become fearful of their non-compliance.

Rather ironically, whilst it may be easier for smaller organisations who fall below the annual turnover threshold to become automatically B-BBEE compliant, because there is still no revised B-BBEE scorecard for these organisations, they will at this stage also be regarded as non-compliant come the beginning of May 2015. Compounding matters yet further, the Department of Trade and Industry ('Dti') have recently announced a change in the manner that organisations will be vetted in terms of their B-BBEE verification and scores. Verification agencies will be downgraded to "empowerment advisers" and the Dti will take the verification process in-house. The Deputy Minister of Trade and Industry, Mr Mzwandile Masina, stated that "verification agencies undermined the government's development goals" and "it must be difficult for you to get a (BEE)

"International studies show that in countries where legislation is more enabling - for example, in Brazil - there are far-sighted company directors who are taking a pivotal role in regard to corporate involvement on entrenched societal issues.

These leaders are rethinking the social aspects of their business strategies and are aligning these with societal needs. They are working together with the government and civil society and the results are now apparent - Brazil's notorious rating as the "most unequal" society on earth has declined, while it is South Africa that has taken over this unenviable position...

... It remains to be seen whether leaders with the audacity to do things differently, and to invite communities into their world, will emerge. Certainly the proposed amendments to the B-BBEE codes will do nothing to facilitate such a paradigm."

New B-BBEE codes will harm the poor and marginalised

(28 November 2012)



certificate". The process the Dti will follow to verify the BEE status of organisations is unclear at this stage; creating more uncertainty regarding the practical application of BEE in South Africa.

ENDS

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For further information contact:

CGF Research Institute (Pty) Ltd
Terry Booysen (Chief Executive Officer)
Tel: 011 476 8264
Cell: 082 373 2249
E-mail: tbooyesen@cgf.co.za

Transcend Corporate Advisors
Dr. Robin Woolley (Chief Executive Officer)
Tel: 011 442 2433
E-mail: robin@transcend.co.za

