

B-BBEE: COULD THE NEW CODES BE A 'STALEMATE'?

Johannesburg
30 September 2015

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Since the introduction of the Black Economic Empowerment Act 53 of 2003 in South Africa, there has been a lot of debate regarding its relevance and impact on business and civil society. At the time of launching the Act, few people argued that the Black Economic Empowerment ('BEE') Act was not necessary. It was important that the past economic and social imbalances -- caused through South Africa's previous apartheid system -- be rectified through appropriate legislation. Accordingly, the BEE Act was intended to provide fertile ground to facilitate rapid economic transformation across a broad spectrum for black people, including their businesses and associated beneficiaries.

In reality however, and since the introduction of the BEE Act and the Codes of Good Practice ('BEE Codes') -- where neither have a sunset clause -- only a small percentage of black people have truly benefitted. Moreover, there is a growing gap between the few elite mega-wealthy black individuals who have benefitted from BEE, as compared to the millions of disgruntled black people who have been given the 'raw end of the stick'. It is important to note that the BEE Codes, which were first published in February 2007 as a standard framework, were issued ostensibly to measure the manner in which organisations were complying with BEE. Due mostly to the poor levels of BEE implementation and transformation within many companies, in 2013 the Codes underwent significant amendments and these changes became effective on 01 May 2015.

"Contrary to popular belief, BEE is primarily a great injustice, well devised, to the general black population because it gives them false hope that they will one day finally own their economy through this process of 'transfer', whereas this BEE actually only guarantees that they will forever be economic side-liners and slaves to capital."

**Article: BEE - South Africa's great injustice by Eugene King
(06 November 2013)**

Since the new Codes came into effect many organisations and people in the South African business sector have taken matters more seriously and they have raised objections to the new Codes. But the most notable complaints about the BEE Codes have been raised by smaller businesses who fall within the ambit of what is known as *Qualifying Small Enterprises* ('QSEs'), whose annual turnover ranges between R10 million and R50 million.

Considering the previous BEE Codes had seven elements; QSEs could choose four of the seven elements for compliance purposes. Now the Codes have been 'reduced' to five elements and QSEs must comply with all of them. In addition, three of the five elements are identified as 'priority' elements and QSEs must reach a minimum level of forty percent in these areas in order to be compliant. The priority elements are ownership, skills development, and enterprise and supplier development. If QSEs do not meet the forty percent requirements in all three of these priority elements, they will be dropped by two levels in their overall BEE status. Expectedly this set of new requirements has increased significantly for QSEs, who by all standards of comparison are actually not very big companies and the consequences for non-compliance may have dire implications to their sustainability.

In respect of providing a short explanation vis-à-vis a QSE's ability to become (and remain) BEE compliant, the socio-economic development element of the BEE Codes only carries 5 points, as compared to the significant weighting placed on enterprise and supplier development (30 points), ownership (25 points), skills development (25 points) and management control (15 points).

Through the manner in which the BEE Code weightings have changed, it is clear that the South African Government is now producing legislation that forces racial transformation in business ownership. This being said,



a company which is one hundred percent black owned and such where the company's annual turnover is between R10m and R50m, it will be considered as a Level 1 ranked company and this is the highest BEE ranking that can be achieved. If the company has fifty-one percent black ownership with the same annual turnover, then the company will be deemed a Level 2 ranked company. Although it would not be in the spirit of fulfilling all the elements of the BEE Codes, these two examples of companies (with the black ownership levels of 1 and 2) would not need to do anything else in terms of the remaining four elements. Considering the need for all five of the BEE elements to be exercised for the overall benefit of South Africa, this is rather bizarre.

Expectedly, these changes have caused many white-owned businesses to reel back and there are reports of them closing shop or emigrating to countries where these onerous conditions of doing business are less threatening. No matter what the outcome of their decisions, this will undoubtedly have negative implications upon an already stressed South African economy, albeit in the form of further unemployment, increased crime and disinvestment. Indeed the imminent consequences which may result from these new draconian BEE Codes are contrary to the original intentions of business transformation the country had first intended, and there are clear signs of tension between the government and business, including black and white people operating in this sphere.

Many white-owned businesses are battling to come to terms with selling, or giving control of their companies to black owners. The reality is that if they do not concede to this BEE ownership element, their companies will be ranked significantly lower than their current levels, and they may even land up at the bottom of the BEE ranking (i.e. Level 8). Companies who are ranked below a Level 2 ranking -- and who have not racially transformed themselves -- will in all likelihood be barred from government contracts and they may also find it challenging to obtain the necessary licenses from the State. Moreover, many companies who are still currently ranked under the old BEE Codes at Level 2 will most likely become Level 8 ranked companies should they not embrace the ownership element contained in the new BEE Code. Making matters worse, these companies will also eventually battle doing business with any South African listed company as they too will be bound by even tougher BEE supplier selection criteria.

“The present black economic empowerment policy... is with respect, not a cure-all to real broad-based black economic empowerment. Millions of black people feel left out and are very sceptical since they cannot enter the formal economy. They only see a few that largely benefited from tenderpreneurship and not from hard work...Past empowerment activities focused on dividing the economic cake rather than implementing actions and activities to grow the economic cake.”

**Article: Phosa slates BEE policy
(18 September 2015)**

Quite understandably, many QSEs may become despondent as they become pressed between a 'rock and a hard place', as they do not have many options at their disposal. Besides closing shop, in real terms many QSEs may resort to 'fronting' (which is illegal) or slice and dice their companies such that their annual turnover is less than R10m and therefore not bother with any form of BEE transformation.

Whilst there is no single reliable source of information in South Africa in respect of the number of registered companies, economists estimate that there could be approximately 550,000 legally operating companies in South Africa. To this extent, BEE rating companies believe that approximately eighty three percent of these companies fall in the QSE category and these companies are currently owned by white people. Within these companies, the black ownership is less than fifty one percent. Considering that ten percent of these companies are less than a year old and fifty three percent are less than five years old, one need not be a rocket scientist to fathom that the kind of change which will be required to get QSE's compliant with the new BEE Codes will have dire consequences in our economy.

Whilst there are many points to debate regarding the merits of BEE, which many critics describe simply as "reversed social engineering" that benefits only a few black people in South Africa, it is interesting to note that a number of the original BEE stalwarts are now also beginning to question whether the Act and its Codes have



achieved its original purpose? The changes in the new BEE Codes have raised a lot of criticism not only for local businesses, but also for foreigners wanting to do business in South Africa. Despite the disapproval expressed by many people, the government appears resolute in following these Codes with even greater punitive measures.

Without detracting from the significant importance to achieve sustainable economic and social transformation in South Africa, let's also not forget that our country is still battling to achieve its much sought after double-digit GDP targets (notwithstanding the best intentions of the National Development Plan). With the huge regulatory burdens already placed upon smaller businesses in a stressed economy, one has to consider how QSEs will remain competitive, not least also encouraging the growth of new businesses for job creation? And if more QSE's fall out the BEE rankings, far greater pressure will be placed on the larger corporates to provide employment. This seems like a stale mate situation, no matter how one looks at it.

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Words: 1,410

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