

A grayscale photograph of a diverse group of business professionals sitting around a conference table, smiling and engaged in a meeting. A laptop in the foreground shows a desktop with a clock and date.

2020/2021 **#BEEready**

**The Basics of BEE in South Africa for startups,
SMEs, medium and large enterprises**

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BASICS OF BEE

What is the BEE Act?

- The BEE Act is a legislative framework that promotes the economic empowerment of previously excluded groups in South Africa.
- Any definition you search now will mention previous inequalities, Apartheid-redress measures, and affirmative action.
- **BEE isn't just a moral framework, it's a very pragmatic strategy to enhance South Africa's economic potential by facilitating the inclusion of different groups in economic activity.**
- The BEE Act is the framework that governs these activities and sets out the guidelines for its implementation.
- It is the governing tool that provides methods for the legal application of the measures for BEE.
- It is important to remember that the BEE Act is subject to the South African Constitution.
- "...In order to promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy, and promote a higher growth, increased employment, and more equitable income distribution." - BEE Act
- "Establish a national policy on Broad-based Black Economic Empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services." - BEE Act

The BEE Act addresses and governs the following topics around BEE:

- The BEE Act instituted the BEE Council
- It aligns with the Codes of Good Practice for BEE implementation
- It places a mandate on the Minister of the DTI to set a strategy for South Africa's BEE implementation and for Transformation Charters for certain economic sectors
- And lastly, it provides that the Minister is to publish regulations that govern specific implementations of the BEE landscape.
- **So, the BEE Act is a large, governing legislative framework that sets the playing field for BEE, and the specifics of BEE implementation across the broad spectrum is governed by more specific regulations, Codes of Good Practice, sector codes, and various other pieces of legislation that focuses on specifics when implementing BEE.**

The Basics of the BEE Codes

- The BEE Codes are codes that govern the BEE process for different sectors, within the framework of the BEE Act.
- So, each industry has a specific set of BEE Codes that determines how their BEE implementation is measured, and their codes determine their BEE level.
- Essentially, the industry-specific codes were put in place to ensure fairness across different economic sectors, that considers the nature of that sector as well as the transformation targets for that sector.
- So you would have BEE Codes that govern the BEE process for example, the transport sector, the construction sector, finance sector, the ICT sector, and then there is a larger set of codes called the General Amended Codes.
- The General Amended Codes is the umbrella-framework for smaller sectors and generalised sectors that do not have the need for specific considerations. For example, the manufacturing industry, wholesale and retail, business services, and cleaning services are all governed by the General Amended Codes. These industries have no need for specific regulations because they are relatively generic at their core.
- **All of these codes, whether they are industry-specific or general, consider the 5 main elements of BEE and these 5 elements are Ownership, Management Control, Skills Development, ESD, and SED.**
- So, every set of BEE Codes considers these 5 elements, but the different codes have different measurements for scoring under each element. If you are in transport, your scoring and implementation of Skills Development would look different than if you were in ICT or retail.
- The interpretation and accurate implementation of BEE according to the different sector Codes are absolutely crucial for your BEE success, and you do need someone that understands the demands and details of your sector code.



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Who needs a BEE Affidavit?

What is a BEE Affidavit?

- First, a BEE Affidavit is as valid as a BEE Certificate and it is essentially an affidavit, stamped by a commissioner of oath, to confirm the direct Black Ownership within a company
 - Essentially, companies that make use of a BEE Affidavit in place of a BEE Certificate are startup companies, companies with a turnover of 0-10million rand, or companies within specific sectors within the 10-50 million turnover bracket - called QSEs.
 - **It is important to note here that Generic Companies cannot use a BEE Affidavit at all, they have to comply with the full BEE Scorecard.**
 - That brings us to how the BEE Affidavit differs from a BEE Certificate, which requires full scorecard compliance.
 - Now, as you'll know from the previous section on the basics of BEE, there are 5 different elements that together determine the overall BEE level that is reflected on your BEE Certificate.
 - **A BEE Affidavit does not consider any other elements than the first element, Ownership. The affidavit that will be signed by the commissioner of oaths will ONLY confirm direct black ownership, and that's it.**
- So, if you are a startup with a turnover of 0 - 10 million, there is an EME Affidavit as set by the BEE Commission which can be downloaded online.
 - This Affidavit must then be completed with your company details and stamped by a commissioner of oaths. So, you can take that to the police or to a private commissioner of oaths to be stamped.
 - Now, we always recommend that you get a private commissioner of oaths to stamp your affidavit, and preferably someone who has experience or an understanding of the BEE principles. Approaching a lawyer or Chartered Accountant for this is always a good idea.
 - The other thing we need to address is the fact that EMEs and QSEs have different affidavits which should not be confused, and then there are sector-specific affidavits as well that serve different purposes. But, if you are an EME or a QSE that can use an affidavit, it's a relatively straightforward process.

Utilizing an affidavit is quite easy, but it becomes more complex when you have to comply with the full elements of the BEE scorecard as your company grows or you decide to participate in the tendering process.

So, what is your BEE level if you have an Affidavit?

- Many people assume you'll automatically get a Level 1 BEE Compliance with your affidavit, but that's not true.
- For an EME, you'll get an affidavit for a Level 1, Level 2, or Level 4 based on the actual percentage of direct black ownership in your company.
- So that clears up the perception that only 100% black ownership companies can be BEE compliant. If you have 100% black direct ownership, that's a level 1. For 51% black ownership, you can get a Level 2 and for less than 50% black direct ownership you'll get a Level 4 BEE Compliance with your affidavit.
- Utilizing an affidavit is quite easy, but it becomes more complex when you have to comply with the full elements of the BEE scorecard as your company grows or you decide to participate in the tendering process.

How to get a BEE Certificate

- So, this is a difficult topic because it can get really complex, but we'll keep it to the basics for a standard BEE process.
- First of all, if you want a BEE Certificate then you have to comply with all 5 BEE elements and those are Ownership, Management Control, Skills Development, ESD and SED.
- Second, it's important to understand that some of these elements are Priority Elements with a sub-minimum target to reach for each, and if you don't reach the subminimum target for an element you will be discounted a level.
- **“Discounted a level” means that whatever your final level is, you will drop down one additional level - and you can only be penalised with 1 level, so a maximum of 1 level can be subtracted.**
- Now, the priority elements that you should be focusing on to reach that sub-minimum are Ownership, Skills Development, and Enterprise and Supplier Development.
- The sub-minimum for the priority elements that you have to reach in order NOT to be discounted a level, is 40% compliance for every priority element. Depending on the targets of your industry's codes, you need to achieve 40% of the total score for that element.

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Now, how to get a certificate?

1. The first thing is that you need to decide what level of BEE compliance you need on that certificate. If you are participating in tendering processes, a level 1 to 4 is often required - but this is a strategic exercise that you need to undertake to ensure what you need to do will get you where you want to be.
2. Once you know what level you want on that certificate, you'll need to follow the stipulations and satisfy the requirements of the BEE Codes that are applicable to your industry. This can often take a year.
3. It means getting your Ownerships structure in line with the level of BEE compliance that you want to achieve.
4. For Management Control, you'll have to look at the occupational levels of your company at the skilled, professional, and junior/senior management levels. It predominantly looks at the representation of designated groups within those occupational levels so you will have to implement Skills Development programmes to promote staff internally into those positions.
5. This brings us to the Skills Development element, where employers and employees can benefit the most. Learnerships, apprenticeships, and bursaries have to be planned and implemented, and the implementation and spend on these make up a large part of your compliance. Again, these are processes that take quite some time to get in place before you can get your certificate.
6. The next element is ESD, which is Preferential Procurement and Enterprise and Supplier Development. >>

(cont) How to get a BEE Certificate

7. Looking first at Preferential procurement, the name says it all: it's where you procure your goods and services from. Your suppliers' BEE levels are the considering factors here, and you have to get your goods and services from suppliers that are BEE compliant, preferably for levels 1-4.
8. Then for Enterprise and Supplier Development, again as the name implies, the consideration is: what has your business done to uplift and enterprise outside your supply chain, as well as a supplier in your supply chain?
9. The last element is Socio-Economic Development, or SED. This is an easy one - you have to prove that you donated 1% of your annual turnover to socio-economic development initiatives from charities or NGOs that benefited at least 75% black beneficiaries.
10. Now, once you have complied with these elements and preferably with the sub-minimum for the priority elements, you will send your entire BEE implementation with all the relevant supporting documents to a Verification Agency, who reviews your activities and proof and issues a certificate that reflects your level of compliance.
11. By law, your Verification Agency can under no circumstances be the same people that consulted you on BEE and the Verification Agency will charge an additional invoice for your verification.
12. All BEE expenditure must take place within your financial period that will be verified. You can get verified any time of the year, and that will be determined by your financial year-end.
13. So, getting your BEE certificate will take most companies up to a year - it can be done faster if your business is really poised for implementation, but it is a long term commitment that has to be implemented diligently over time.

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What are BEE Levels?

- BEE Levels are recognition levels, that indicate to what degree you comply with BEE legislation.
- Now, there are 8 BEE Levels for compliance - with Level 1 being the best compliance. If you score lower than what qualifies for a Level 8, you are non-compliant.
- Across an entire BEE Scorecard, you can score 100+ points across the 5 elements. This score determines your percentage of compliance.
- The different scorecard scores, and the corresponding level you'll get, look as follows:
 - Level 1 - 100 points and above
 - Level 2 - 95 to 99.99 points
 - Level 3 - 90 to 94.99 points
 - Level 4 - 80 to 89.99 points
- **Up to level 4 you are considered fully BEE Compliant and most tendering processes will require a BEE level 1-4.**
 - Level 5 - 75 to 79.99
 - Level 6 - 70 to 74.99
 - Level 7 - 55 to 69.99
 - Level 8 - 40 to 54.99
- **If you score below 40 points, you are non-compliant.**
- This is what BEE Levels are, and why they matter is because the economic system with the BEE legislation will, at times, require specific levels from you in order to participate in certain processes, like tendering processes. Your BEE level, as you'll know from previous sections, also affects your clients' BEE levels and they will want to do more business with you or increase their spend with you if you can benefit their BEE compliance.



What BEE level should you aim for?

- This is a controversial topic and it cannot be untied from what is realistic for your business in terms of finances and resources.
- So, considering the technicalities, a level 1-4 is ideal because that will allow you to be counted as compliant and it will allow you to access certain opportunities like applying for tenders. However, it may not be feasible or realistic for your business and your team, especially if you are new to BEE.
- First, you need to consider the strategic implications for your business and why you have to comply with BEE legislation. Your strategic exercise will determine the business case, the opportunities for business growth that BEE participation offers, and how far you are willing to expend resources to reach your goal.
- When it comes to business, your finances have to be considered. If you are participating in BEE and aiming for a Level 2 in order to get a 1 million rand tender, but to get that level 2 you have to spend 2 million rand, it may not be the most feasible approach because your business cannot necessarily carry a 1 million rand expenditure. But, if its for a 10 million rand tender, its worth spending that money.
- **So, consider your realistic business case and consider your financial situation.**
- The next consideration is how BEE can benefit your team. BEE processes will allow you to upskill your team members, which can have a significant impact on your overall business performance for years to come. Enhancing your employee retention will save recruitment costs and internal promotions boosts employee career paths and commitment. So there are many intangible benefits that you can gain in the process of BEE implementation and you should consider what that is worth to you.
- **Now, if you are new to BEE and it's your first time participating, you may not have the means to go for a level 1 or 2 or even 3. In that case, it's worth looking at a level 4-6, where 4 would still be considered fully compliant.**
- If you get a level 5-8, it gets easier the next year to improve your level as the processes are set in place, your business is structured accordingly, and it becomes much easier to implement the required processes.
- Ultimately, the BEE Level you aim for is determined by your business's individual needs and means, but it should be kept realistic and attainable.

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BEE and Ownership Explained

- Probably one of the most controversial and misunderstood topics on BEE is the element of Ownership.
- Way too often, we encounter businesses that essentially “gave away” 51% or more of their business ownership in order to improve their BEE level.
- Moreover, there are a few questionable Ownership structures out there, that are essentially fronting - making it look like your ownership is different than it really is.
- **Let’s start with the meaning of Ownership. Ownership is the decision-making power of a shareholder in the business, at strategic level.**
- This constitutes control of economic assets and resources. It is enacted as an active interest into the business’s sustainability and profitability, and the shareholder has either direct or indirect shares in a company.
- So in essence, the shareholder HAS TO contribute to the wellbeing and operations of the business.
- Now, this definition of ownership is a great way to honor the spirit of BEE because it actively encourages black shareholders to make a meaningful contribution to the business, get the knowledge they need in order to contribute, and gain a true understanding of the business as well as being financially and psychologically involved with the wellbeing and growth of the business and employees.
- Ownership can take different forms, and the 4 main types of ownership you will find are Direct Ownership, Indirect Ownership, Private Equity Funds, and Trusts.
- If we look at each of these, the first is the most straight-forward: with direct ownership, the shareholder bought a percentage of shares in the company and that gives them certain obligations and decision-making power in the business.
- Indirect Ownership is better known as the Modified Flow Through Principle (MFTP).
- This is a common or popular type of ownership: it entails multiple level structures of ownership. For example, if a black shareholder owns shares through a trust, then you apply the MFTP.
- The next one is Private Equity Funds, which closely resemble venture capital firms investing directly in a company by purchasing a percentage of shares. They frequently use leveraged buy-outs to acquire financially distressed companies. Now, the shares they bought in the company gives them a controlling interest, and their black ownership will translate to the business’s ownership. >>

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(cont) BEE and Ownership Explained

- There is a second type of Private Equity Fund for ownership, where investors pool all their funds together and select an asset manager to manage their assets.
- Their pooled resources will then be managed by a black person as the asset manager, and his/her hands-on control in the management of the pooled assets or funds counts towards ownership as per the definition we explained at the beginning of the section.
- But, this is not a very common ownership structure and it's difficult to make these types of investments - you won't find an SME or QSE that can easily do this.
- What's left is the Trust.
- As per the BEE Commission, a Trust is used to facilitate ownership by employees, communities, or other similar collective groups, where it refers to an arrangement in terms of which a person, often the Founder or Trustee, holds property or assets for the benefit of another, commonly known as a beneficiary. It can be used for charity, or estate planning, amongst other reasons.
- Basically, you'd have a trust with a black person/s as trustees, amongst others. The trust, with its black trustees, can then invest into a company.
- Because the black trustees have voting rights and shareholding in the trust, the ownership of the trust applies to the business's BEE compliance.
- The trust must comply with the Codes of Good Practice for trusts in order to prevent Trusts from being used to circumvent Ownership and the spirit of BEE.
- Now, your business needs to decide, with the help of an expert, which one of these sounds feasible to structure your ownership if you are participating in BEE.
- If none of these sound relevant to your business, you can get expert help to explore some other forms of ownership.



CONTACT US FOR YOUR NEXT BEE VERIFICATION

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