

Is it the end for Broad-Based Black Economic Empowerment or B-BBEE?



Broad-Based Black Economic Empowerment (B-BBEE or BEE) remains a controversial subject in South Africa more than a decade after its official inclusion in the country's legislative framework.

There has been much misunderstanding of and resistance to BEE, as well as frequent accusations that the policy in its current form is ineffective, benefitting only a small part of society. Some believe, for many different reasons, that the Act should be scrapped, as was the case in Namibia and Zimbabwe. *The reality is that it's here to stay.*

BEE and the Constitution

BEE has been around in South Africa as early as 1993, at least informally. With the development of the Constitution and other laws enshrining equality, BEE policies were formulated to redress the injustices of the past and were designed to be broad to ensure more equitable participation by black South Africans in all aspects of business and the economy. The B-BBEE Act was promulgated in 2003, and then supplemented by Codes of Good Practice in 2007 – the *B-BBEE Codes have been revised, more recently on 31 May 2019.*

Section 217 of the Constitution provides that:

- *When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, **contracts for goods or services**, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.*
- *Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for*
 1. *categories of preference in the allocation of contracts; and*
 2. *the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.*
- *National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented.*

Chapter 2 of the Constitution introduces a Bill of Rights, which is the complete antithesis of what existed under apartheid. The Bill of Rights includes the right to equality, as the very first right, prohibiting unfair discrimination on the basis of, amongst other things, race.

The right to equality is a basic human right. First-generation rights protect citizens from the state and, although basic, were absent during most of South Africa's history. After the Second World War, second-generation human rights developed. These are economic, social and cultural rights, such as the right to education, housing, health and food. These rights are more progressive and are sorely needed in South Africa. There is also a third generation of human rights, such as the right to a healthy environment, group rights and intergenerational rights. These are far more aspirational and largely unofficial. South Africa sought to compensate for its previous lack of human rights by including these in its Constitution.

This is what makes our Constitution so different. One third-generation right is the right to economic and social development.

How BEE fits into South Africa's constitutional framework is an important consideration: Clearly, if it does not, it would not be allowed, and the Constitutional Court would have declared it null and void. This has not happened and those who say the BEE Act should be scrapped should rethink things.

Is BEE discriminatory?

We need to consider how legislation such as the BEE Act, which is clearly discriminatory and does not treat everyone equally, can be upheld when at first glance it appears to be a contravention of the first human right.

Although the Constitution promotes equality and non-discriminatory behaviour, restricted discrimination is tolerated by the Constitution in order to advance previously disadvantaged individuals. After all, there is still a great deal of discrimination that we readily accept. Pensions, maternity leave, etc. are examples of discrimination where not everyone is treated equally but which nobody has challenged constitutionally. So, the first consideration is whether BEE is fair discrimination in the context of South Africa.

Section 9(1) of the Right to Equality clause in the Bill of Rights states “to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”. *Therefore, if the BEE Act is intended to promote equality, it is specifically allowed.*

The BEE Act has specific objectives in section 2 which include economic transformation for more meaningful participation of black people in the economy. There is no question that this is designed to advance a category of persons disadvantaged by unfair discrimination.

It would be difficult to argue that the economy is fairly distributed while in terms of the Gini coefficient we are the most unequal society in the world.

There is still a great need for empowerment and development initiatives in South Africa – 25 years after the end of apartheid, the country remains divided and unequal in many ways. The BEE Act cannot have a sunset clause if there has not yet been a sunrise, implying that much-needed change is just beginning.

BEE and the National Development Plan (NDP)

Love it or hate it, BEE is – and will continue to be – part of the business fabric of the country. Businesses of all shapes and sizes have both a moral and economic imperative to make an effort to comply. While this is voluntary, failure to do so means potentially missing out on tenders and preferential procurement deals, as well as being marked as a company that seems uninterested in moving South Africa forward. Government has confirmed that BEE will remain a key part of the National Development Plan going forward – and this is likely even if the ruling party changes. President Cyril Ramaphosa recently told Members of Parliament that government would not scrap the Broad-Based Black Economic Empowerment Act.

Ramaphosa told members that while the pace of investment and economic transformation has been slow, it has not been insignificant, and that government will not be abandoning B-BBEE.

"We are not going to scrap B-BBEE, because it has brought real benefits to blacks, women and persons living with disabilities. It has contributed to the significant growth of a black middle class, boosted employment equity and it has enabled black people and women to become owners and managers of businesses. Far from abolishing it (B-BBEE), now is actually the time to strengthen it, to make it more effective and make it more aligned with our goals of increasing investment and employment," said Ramaphosa.

In conclusion

The Act is central to our objective of transforming South Africa. Nobody has ever thought this could be achieved without some compromise and cost. BEE is sometimes seen as the cost of transformation and even if this is true, South Africa should focus on what it's getting. This goal is spelled out in our world-class Constitution and its third-generation rights. This alone separates us from Namibia and Zimbabwe and for as long as it's the Supreme Law of our land, it will be difficult to scrap BEE entirely, although it may require some amendments to fulfil its objectives.

SERR Synergy assists businesses to implement viable B-BBEE initiatives and ensure alignment of initiatives with the legal requirements of the B-BBEE Codes and to avoid any possible risks associated with fronting or any other unethical business practices that may cause possible reputational damage to an enterprise.

About the Author: Sherisa Hiralal completed her LLB at the University of South Africa (UNISA) and has worked in the B-BBEE industry since 2011. She started at SERR Synergy in 2015 and currently holds the title of Project Manager where she specialises in the incorporation of specialised programmes and initiatives relating to B-BBEE.

