

June 8, 2021

Is the use of B-BBEE Affidavits under threat?



The Broad-Based Black Economic Empowerment (hereinafter referred to as B-BBEE) Codes of Good Practice allow for the use of so-called sworn affidavits to represent a measured entity's B-BBEE Level in certain instances.

The use of sworn affidavits recently came under fire. SANAS (the South African National Accreditation System), which acts as the main governing body when it comes to **B-BBEE compliance**, has instructed B-BBEE verification professionals to place greater emphasis on whether the correct sworn affidavits are used during verification.

As a result, many B-BBEE sworn affidavits, which may have been accepted previously, will no longer be recognised.

Which entities are entitled to complete a B-BBEE sworn affidavit?

The general rule is that unless a Measured Entity falls within a specific Sector Charter Code, the Amended Codes of Good Practice (COGP) will apply. In terms of the COGP, the following applies:

Exempted Micro Enterprises (EMEs):

An entity with an annual total turnover of below R10 million:

- o **Option 1:** The entity is deemed to have a B-BBEE status of “*Level Four Contributor*” regardless of whether it is less than 51% black owned;
- o **Option 2:** The entity may qualify for elevation to a “Level Two Contributor” provided that it is at least 51% black owned;
- o **Option 3:** The entity may qualify for elevation to a “Level One Contributor” provided that it is 100% black owned;
- o **Option 4:** An EME that qualifies for the use of options 1, 2 or 3 above may elect to be measured in terms of the QSE Scorecard.

Qualifying Small Enterprises (QSEs):

An entity with an annual total turnover of between R10 and R50 million:

- o **Option 1:** The entity may qualify for elevation to a “Level Two Contributor” provided that it is at least 51% black owned;
- o **Option 2:** The entity may qualify for elevation to a “Level One Contributor” provided that it is 100% black owned;
- o **Option 3:** A QSE that is less than 51% black owned must be measured in terms of the QSE Scorecard; **OR** a QSE that qualifies for the use of Option 1 or 2 may elect to be measured in terms of the QSE Scorecard.

Please note: The CIPC has an online B-BBEE Certificate functionality where a CIPC certificate will be issued to eligible entities, as set out above. This option is presently only available to EMEs. The CIPC certificates may be accepted, but also pose certain problems as they do not provide for Sector Charters that have different requirements.

The general rule is easy to understand, so why would the use of affidavits pose a problem?

Let's look at the common mistakes made on B-BBEE affidavits:

- The Owner/Director or Member completing the affidavit does not state in what capacity he/she is completing the affidavit. The correct designation should always be underlined/circled;
- The affidavit is signed by a person who is not the Owner/Director or Member of the measured entity. The auditor/attorney of the measured entity may not complete the affidavit on the measured entity's behalf;
- The identity number of an owner indicates that the owner might not be a black person as defined in the B-BBEE Codes. Further evidence may need to accompany the affidavit to indicate that the owner became a citizen by way of naturalisation or that he/she is the minority shareholder and merely completed the affidavit in his/her capacity as director. Here it would be necessary to indicate that 51% or 100% (depending on the level claimed) is owned by a black person, as defined.
- The financial period/year is not properly indicated; for example, many affidavits only indicate "2020". The correct description should be 28 February 2020.
- The affidavit is signed more than 12 months after the end of the financial year; for example, if the financial period claimed is 28 February 2020, the affidavit must be signed on or before 28 February 2021;
- The affidavit is not signed and/or not commissioned;
- The affidavit is signed and commissioned on different dates;
- QSEs with less than 51% black ownership completed the affidavit. These entities must proceed with a scorecard verification;
- The content of the affidavit was copied to an auditor/B-BBEE consultant letterhead. This is not allowed. The measured entity may copy the content of the affidavit to its own letterhead, but not that of a third party. Third parties are not allowed to charge a fee to provide a measured entity with the B-BBEE affidavit.
- The sworn affidavit was incorrectly used where the nature of business indicated in the affidavit alludes to the fact that the measured entity falls within a specific charter.

Which Sector Charters are often applied incorrectly?



Transport Charter:

- Firstly, the *Transport Charter* qualifies an EME as an entity with a total annual turnover of less than R5 million;
- A QSE has a total annual turnover of between R5 and R35 million;
- A QSE Transport Charter entity does not qualify for an Enhanced Recognition Level (or so-called Automatic Recognition Level). A QSE or a Generic Transport Sector entity must proceed with a scorecard verification;
- An EME Transport Charter entity may not use the sworn affidavit, regardless of whether it qualifies for an automatic or enhanced B-BBEE level;
- An EME Transport Charter entity may only obtain an accounting officer letter confirming turnover, or a SANAS B-BBEE certificate should be obtained;
- It should further be noted that an EME which is at least 50% black owned, qualifies for promotion to a B-BBEE Status of “Level Three Contributor”.



Construction Charter:

- The Construction Charter applies to either construction contractors or material suppliers (measured under the contractor scorecard) or Build Environment Professionals (measured under the BEP scorecard).
- The only entities that may complete the Construction B-BBEE Affidavit (which is a designated construction affidavit and not the COGP affidavit) are–
 - contractors with a total annual turnover of below R3 million; and
 - BEPs with a total annual turnover of below R1,8 million.
- All other construction companies, regardless of turnover or whether they qualify for an enhanced B-BBEE level, must obtain a certificate issued by a SANAS-accredited verification professional;
- Where a SANAS certificate must be obtained by an entity that qualifies for an Enhanced B-BBEE Level, the verification professional will limit their fee for this service to a nominal value, as directed by the Construction Sector Code.

The incorrect use of affidavits or CIPC certificates can have a significant effect on your customers' procurement and BEE scorecard, your entity's eligibility to be an *Enterprise or Supplier Development* beneficiary, as well as the allocation of tenders and contracts.

It should also be borne in mind that “*ignoration legis neminem excusa*” (ignorance of the law excuses no one). A misrepresentation of your B-BBEE status constitutes a criminal offence, as set out in the B-BBEE Act, as amended. Where any doubt exists regarding the completion of a B-BBEE affidavit, it is advisable to obtain professional advice.

SERR Synergy assists businesses to implement viable B-BBEE initiatives and ensure alignment of initiatives with the legal requirements of the B-BBEE Codes.

About the Author: Denise Coetsee is a Senior Project Manager who joined SERR Synergy in February 2018 within the Pretoria B-BBEE Department. She obtained her BCom Law, LLB and LLM (Corporate Law) degrees from the University of Pretoria. Denise is an admitted Attorney of the High Court with 8 years’ legal experience.

©SERR Synergy, www.serr.co.za