

Black Economic Empowerment in South Africa: an update

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Abstract:

The Republic of South African Government enacted the broad-based black economic empowerment (BEE) Act No. 53 of 2003, in January 2004, to enforce BEE in all sectors of the South African economy. Several papers, covering different BEE topics, were presented at the COBRA 2009 conference highlighting the importance and relevance of BEE legislation to the construction and property industry. This paper gives clarity on the relevance of BEE to each of the papers presented at the conference and describes how each paper fits with the broader objectives of BEE legislation.

The aim of the paper, as requested by the RICS Research Department, is to bring clarity and make it easier for people who will in future read research papers on BEE to understand its relevance and how each research topic on BEE fits with the objectives of BEE legislation.

The paper brings the broader perspective on BEE objectives and how the legislation came about. Background on BEE legislation and its development is given. An update on the BEE implementation is given. The paper gives reviews of each paper (that had BEE on its content) presented at the COBRA 2009 conference and gives synopsis of the main topic on the paper, highlighting BEE legislation's objectives in the content of the paper.

In conclusion, the prospects of the BEE Act are evaluated based on the contents of the papers presented at the COBRA 2009 conference.

Keywords: Black Economic Empowerment (BEE), COBRA 2009 BEE papers.

1. Introduction

Since the enacting of the black economic empowerment act (BEE Act) of 2003, there has been a lot of activity in all sectors of the South African economy, including the construction industry, in implementing the requirements of the BEE Act. In the same light, it is important to note that the earlier concepts of black economic empowerment (BEE) has evolved since they were first introduced in 1994 to adapt to the changing needs in the implementation process. Nowadays BEE is driven by principles of broad based black economic empowerment (BB-BEE) which emphasises the importance of larger numbers of “black” representation in BEE transactions and in the implementation of the Act. Game theory is relevant in understanding the resistance by some companies and acceptance by others in the implementation process. The purpose of the paper is to review the impact, relevance of game theory and to give an analysis of the papers that were presented at COBRA 2009 conference. The paper gives clarity on key elements and objectives of BEE while drawing possible scenarios on whether the BEE objectives are likely to be achieved or not.

2. Objectives of the BEE Act

According to Woolley (2005:12) the government defines BEE as “an integrated and coherent socio-economic process that directly contributes to the economic transformation of South Africa and brings about significant increases in the number of black people that manage, own and control the country’s economy, as well as significant decreases in the income inequalities”. Woolley emphasis that BEE is strategic and should match the company goals to increase value creation and stresses that the companies that will benefit from BEE are those that have strong BEE strategies as all companies in the sectors will eventually be BEE empowered hence BEE, on its own, will not offer competitive advantage. Balshaw and Goldberg (2005) also note the importance of BEE in the “new” South Africa. Balshaw *et al* states that BEE affects all sectors of the economy and every company irrespective of its size, nature or ownership structure.

2.1 *Reasons for BEE legislation*

The main purpose of the Republic of South African Government passing BEE legislation was to enforce BEE in all sectors of the South African economy in trying to redress the imbalance in the South African economy which is racially biased. The racial imbalance in the control of the economy is a result of the discrimination and segregation laws passed by the pre-1994 governments which disempowered certain races of the population. Most of the segregation laws were passed in the 1950’s and 1960’s and include the Group Areas Act and the Bantu Education Act, as two examples referred to

in this paper. The Group Areas Act of 1950 introduced restrictions for “non-whites” to move around the Republic freely and also introduced restrictions on “non-whites” to land ownership in certain areas of the Republic, notably urban areas. This was a great source of economic disempowerment and resulted in adverse poverty amongst the “non-whites”. The Bantu Education Act of 1953 introduced separate curriculum for different races in the Republic which resulted in certain races in the population having inferior education and again disempowered as they could only qualify for unskilled employment. The BEE legislation seeks to address some of these imbalances through an organised and transparent process.

2.2 *Constitutional framework for BEE legislation*

Many people in South Africa have questioned the legitimacy of BEE legislation and have challenged affirmative action in the South African courts. A former constitutional judge, Abie Sacks, in Marcus, Mangcu, Shubane and Hadland (2007) best describes the legitimacy of the BEE legislation. Sacks refers to section 9(1) of the constitution, the equality protection clause, section 9(2), the affirmative action clause and section 9(3), the anti discrimination clause. In his arguments, Sacks emphasizes that each of the three clauses must be viewed together and notes that it is often difficult to best integrate the three provisions of the clause into a constitutionally and socially meaningful whole. Sacks’ arguments are based on the contradictory principles of affirmative action and anti-discrimination. For example, Sacks states that “a holistic view of equality must be in the South African content”, where there is a history of inequality due to discrimination legislation, in order for one to fully understand the provisions of the three constitution clauses.

BEE legislation has evolved since the constitution was enacted and several other pieces of legislation have been enacted to support BEE. These laws work in conjunction or support the objectives of the BEE Act. Balshaw *et al* noted some of these laws and below is a list of important legislation that work with the BEE Act.

Table 2.1: BEE legislation framework

1994	The ANC-led government assumes power and the interim constitution is promulgated The Reconstruction and Development Programme Promulgation of the National Economic, Development and Labour Council Act 35 of 1994
1995	The Labour Relations Act 66 of 1995 The government develops a strategy for the Development and Procurement of small business The Affirmative action policy development forum is established
1996	Final constitution is adopted

	Green paper on employment and development equity released National small business Act 102 of 1996 introduced
1997	Green paper on public sector procurement reform Employment equity bill
1999	Employment Equity Act 55 of 1998 Skills development Act 97 of 1998 and Skills development levies Act of 1999 Competition Act 89 of 1998 National Empowerment Fund Act 105 of 1998
2000	Public Finance Management Act 1 of 1999 Promotion of Administrative Justice Act 3 of 2000 Preferential Procurement Policy Framework Act 5 of 2000
2003	Broad Based Black Empowerment Act 53 of 2003 Promotion of Equality and Prevention of unfair discrimination Act 4 of 2000
2004	Draft codes of good Practice released by the department of Trade and Industry Municipal Finance Management Act 56 Of 2003
2005	Department of Trade and Industry releases the 1st phase (code 000, 100 and 200) of the BB-BEE Codes of Good Practice
2007	The Code of Good Practice is gazetted in February 2007

2.3 *Evolution of BEE*

The evolution of BEE transactions has been recorded since the early 1990's when all BEE transactions involved shares' transfer to independent BEE companies through special purpose vehicles which were highly geared structures. These BEE transactions experienced problems in the early 2001's as there were dependent on the shareprice going up to service the interest on the debt. 2001 saw the lowest number of BEE transactions with only about fifty five BEE transactions (Woolley, 2005). The government immediately responded with the introduction of the BEE Act of 2003 to address the shortcomings of the earlier BEE transactions and its implications.

Vuyo Jack in Marcus *et al* (2007) accounts for the evolution of BEE transactions in three waves. The early wave of BEE transactions was typically shareholding or ownership transfer and had little or no other dimensions of empowerment. The 1993 transaction, involving the sale of Metropolitan controlling shareholding to New Africa Investment Limited (Nail), is a typical example of the first wave of BEE transactions. This transaction was done through the establishment of a special purpose

vehicle that was highly geared to facilitate the purchase of the shares from Sanlam. Nail proceeded and bought further shares in other listed companies including MTN, African Merchant Bank, Theta, Sowetan, Radio Jacaranda and Randmark. Nail grew to be the largest black owned publicly traded company with a market capitalization of nearly R6 billion at its peak in 1998. Jack states that the second wave of BEE began in 1997 through the establishment of the BEE Commission (BEECom) under the leadership of Cyril Ramaphosa, a former trade unionist and politician who later became a successful businessman. The BEECom set the background for government policy on BEE with the release of a report in 2001, which introduced the change of focus from only ownership and introduced other elements of business strategy like employment, skills development and preferential procurement. This was the beginning of the codes on good conduct for BEE transactions as there are currently applied in the current BEE scorecards. The third wave came with the introduction of the preferential procurement legislation in 2000. The preferential procurement legislation empowers government to award tenders based on allocation of points for transformation (and BEE) issues for contracts worth less than R500 000. This third wave of BEE seeks to encourage black business to start their own businesses from scratch and grow them through procurements and enterprise development opportunities from already established companies. According to Jack, the third wave has broadened the pool of BEE companies and has increased job opportunities in the country. This type of BEE is often referred to as the second economy and there is government policy to further develop the second economy as a strategic means of reducing unemployment.

3. Synopsis of the papers presented at COBRA 2009 conference

Nsibandé and Pienaar (2009) presented a paper on the impact of BEE legislation on shareprice. The paper looked at the “seven areas of focus where a company can score points and achieve BEE status or BEE accreditation, namely; ownership, employment equity, managerial control, skills development, preferential procurement, enterprise development and socio-economic investment. The main purpose of their research was to determine if the different types of strategies employed in the BEE transactions yielded different results on shareholder value by monitoring the impact each strategy had on the shareprice. The main hypothesis was to either support or disprove the hypothesis that the different strategies or methods employed to achieve BEE status will impact differently on shareprices of companies. From the main hypothesis, several sub-hypotheses were drawn: firstly, the transfer of ownership as a means of achieving BEE status has no effect on share-price, that is, when companies undergo an acquisition or a merger, there should be no impact on the share-price of the new company; secondly, employment equity has a positive impact on share-price; thirdly, managerial control as a means of achieving BEE status has a positive effect on share-price, that is, companies employing managerial control as a means to achieving BEE status should impact positively on their share-price;

fourthly, the announcement of skilled employees taking key positions in companies as a means of achieving BEE status has a positive effect on share-price, that is, companies employing skills development as a method of achieving BEE status are likely to have a positive impact on their share-price; fifthly, that preferential procurement as a means of achieving BEE status can either have a negative or positive impact on share-price depending on the nature of the vendor providing the service to the company, that is, when a vendor is in the same industry as the company, positive effects can be expected on the share-price; sixthly, that companies that choose enterprise development as a means of achieving BEE status will be negatively impacted on their share-price; and lastly, companies that choose socio-economic development as a means of achieving BEE status will be impacted negatively on their share-price". Results of the research indicated that overall BEE transactions did not impact on shareprice.

Khatleli and Root (2009) presented a paper on whether the private sector was obstinate agents or maturing stewards in the implementation of BEE. The paper reviewed the private sector's commitment to BEE policy in South African PPPs. The paper stated that "the South Africa's Black Economic Empowerment policy, due to practical exigencies, depended on the previously privileged white-owned companies for its implementation. This arrangement required the government to adopt a management trusted; a pertinent tenet in a country with a history of an institutional racial economic policy". The paper concluded with a PPP case study that demonstrated that "PPP consortia can default transcendental motives which are not purely utility maximizing, but are mutually beneficial". The paper concluded that "agents in PPPs, as a result of pre- and past-contractual interactions, are able to evolve and adapt a posture more akin to a trusted steward on BEE implementation and provides insights for policy makers and practitioners on the utility of PPPs in delivering socio-economic benefits.

Viruly (2009) presented a paper on the transformation of the South African built environment with an institutional approach. The paper developed "the proposition that the characteristic of the South African built environment can largely be explained by the economic and social institutional framework that continues to characterise the market. The proposition is developed within the context of the institutional economics literature and demonstrates the relevance of the theoretical framework in explaining the present and future trajectory of the South African built environment. While recent public policy and private sector policies and interventions have attempted to alter the players, the South African economy, there is growing evidence, and concern, that a significant institutional "lock in" continues to perpetuate historical market outcomes. There is realisation that government intervention may not have been successful in changing the institutional framework and structure of the South African built environment. This suggested that when strong institutional "lock in" exists, public

sector interventions that attempt to alter market institutional arrangements should target different echelons of the institutional hierarchy”.

Cloete (2009) presented a paper on transformation in property education in South Africa. The paper described transformation of real estate education programmes since the election of a democratic government in 1994. The paper referred to issues related to capacity building: student enrolment, the structure of formal real estate courses offered, skills development, the role of the South African Qualifications Authority and adult educational programmes. Results of the research showed conclusively that there was an increase in participation of the previously under-represented groups and mirror trends in transformation of tertiary education in South Africa”.

Rowland and Hoffman (2009) presented a paper on evaluation of credit risk assessment criteria for commercial property finance applications for BEE borrowers. The paper stated that “significant barriers exist which are preventing the redistribution of wealth to “blacks”. Principal amongst them was the lack of capital in black hands a lack of appropriate skills and experience which combine to prevent blacks from gaining access to commercial banks finance. The research indicated that lack of capital and collateral were key challenges facing BEE companies in raising finance from commercial banks. The paper presented a solution that could work, that BEE companies could form partnerships or joint ventures with white and experienced property developers and investors in order to mitigate the risks associated with lack of capital, skills and collateral to satisfy banks lending criteria”.

4. Prospects of the BEE Act

Based on the papers presented at the COBRA 2009 conference, one could develop possible outcomes and prospects of the BEE Act and hypothesize if the objectives of the Act will be met. Game theory is relevant in understanding and analysing the behaviour of industry players and their reaction to the legislation.

There are four possible outcomes of the BEE legislation. The outcomes could be explained using game theory as the BEE implementation is still in progress and the BEE legislation is evolving from time to time. The first possible outcome is a “win-win” situation whereby government achieves the objectives of the legislation while the construction industry strives. The second possibility is a “win-lose” situation whereby the government achieves the BEE legislation objectives while the construction industry fails as a result of implementing BEE. The third possibility is a “lose-win” situation whereby the government fails to achieve the objectives of BEE legislation while the construction industry continues to strive. The last possibility is a “lose-lose” situation whereby both the government and the construction industry fails as a result of implementing the BEE legislation, that is, the objectives of the

BEE legislation would not be met while the construction industry also fails to perform as a result of implementing BEE.

The papers presented at the COBRA 2009 conference give insight to which scenario is developing in the implementation of BEE legislation. Nsibandé and Pienaar (2009) gave a positive outlook, with BEE implementation having no impact on shareprices of companies that implemented BEE legislation. This is certainly a “win-win” situation whereby companies can comply with BEE legislation, that is, assist the government achieve its objectives while the construction companies are not negatively affected by BEE. This situation indicates that companies that embrace the principles of BEE do not necessarily suffer as a result of implementing BEE. Khatleli and Root (2009) also supported a scenario of “win-win”. The research in the paper indicated that PPPs that were implementing BEE principles in delivering large projects were indeed “adapting a posture more akin to a trusted steward on BEE implementation”.

On the other hand Viruly (2009) gave a less positive outlook which was more of a “lose-win” situation. The paper indicated that government was failing to achieve its objectives through BEE legislation measures. The paper postulates that government is unlikely to achieve BEE legislation objectives since the construction industry has a strong institutional “lock-in” hierarchy. The paper gives no indication of adverse impact on the construction industry as a result of the BEE legislation.

Cloete (2009) is not conclusive as to whether the educational institutions were impacted positively or negatively as a result of achieving the transformation as laid out in the BEE legislation. The paper concluded strongly that transformation had indeed been achieved in construction and property education sector. From the paper the two possible outcomes could either be a “win-win” situation whereby the results of transformation have been achieved while the standards of education have been upheld. A “win-lose” situation could be when the transformation has been achieved at the expense of the standards in the quality of the education.

Rowland and Hoffman (2009) indicates a “lose-lose” situation with financial institution failing to embrace BEE objectives while the BEE construction companies also failing to realise their ambitions of improving performance in the property development industry. The situation, as reported in the paper, is stagnation and is what both government and the construction industry would worry of. This is the worst case scenario that would result in government changing BEE legislation and imposing possible fines and punishment to role players. Government has indicated that there is a possibility of making changes to BEE legislation to make it more effective in transforming the economy, including the construction industry.

Overall, the papers presented indicated a positive outlook with eight “win” cases and four “lose” cases. The result indicates that BEE legislation is likely to achieve its objectives. The “win” cases and “lose” cases were derived from the analysis given above.

5. Hypothesis

From the four papers reviewed and discussed above, a hypothesis has been developed:

H_O: The government will achieve BEE transformation objectives without impacting negatively on the construction and property industry.

H_A: The government will achieve BEE transformation objectives at the expense of negatively affecting the construction and property industry.

6. Data: The impact of BEE on shareprice

From Nsibandé and Pienaar (2009), further research was undertaken in the last twelve months to investigate the impact of BEE on shareprice. Fifteen construction and property companies have made BEE transactions since the enacting of the BEE Act. They all made their BEE transactions public through the investors’ news agency of the Johannesburg Securities Exchange (SENS). The fifteen companies are all listed on the JSE Securities exchange and include the following companies and the dates of their BEE transactions:

Construction companies:

Company	Date of BEE Transaction -SENS announcement
Aveng	16 February 2005
Basil Read	15 December 2005
Group 5	10 August 2005
Murray and Roberts	31 August 2005
WBHO	12 September 2006

Property companies:

Company	Date of BEE Transaction - SENS announcement
Acupac	13 February 2006
Ambit	11 June 2007
ApexHi	09 May 2006
Emira	05 June 2006
Growthpoint	30 August 2005
Hyprop	29 March 2006
RedefineMadison	30 August 2007
Redefine Income Fund	11 October 2007
Resilient	08 June 2006
Vukile	31 January 2006

7. Methodology

Brown and Warner (1980, 1985) gave a good background on the use of event studies' methodology in measuring shareprice performance. The event date for the research project was the SENS announcement date when the details of the BEE transaction were divulged. For each company, the shareprice was tracked and analysed around the SENS announcement date, as the event date (day 0) for the research. The performance of the shareprice was monitored 20 days prior to the announcement and 10 days after the announcement, to determine if there was any abnormal movement on the shareprice around the announcement date. The cumulative average residuals (CAR) technique, as employed by Fama, Fischer, Jensen and Roll (1969), was used to determine the exact point of impact on the shareprice.

8. Results and discussion

The results of the BEE transactions, analysed using the methodology discussed above, are tabulated below.

Company	No impact	Impacted
Basil Read	X	
Ambit (Ownership)	X	
Group 5		X
Aveng		X
Vukile	X	
Redefine Income Fund		X
WBHO	X	
Growthpoint (Ownership)	X	
Emira		X
Murray and Roberts	X	
Acupac		X
ApexHi A	X	
ApexHi B	X	
Resilient		X
Ambit (Managerial control)	X	
Growthpoint (Managerial control)	X	
Group 5 (Enterprise development)		X
Hyprop	X	
Madison	X	
Redefine	X	
Total	13	7

Thirteen of the companies' shareprices were not impacted by the BEE transactions while seven were impacted. The results clearly indicate that a majority of the BEE transactions did not impact the shareprices of the companies that implemented BEE post the enacting of the BEE Act.

9. Conclusion

As it has been shown in Nsibandé and Pienaar (2009) updated work, BEE does not have a negative impact on the majority of construction and property companies hence it can be drawn that it will not negatively impact on the industry. However, more analysis of data, looking at different aspects of BEE, as in the other papers reviewed, needs to be undertaken to fully understand the overall impact of BEE on the construction and property industry of South Africa. There will be follow on work from this paper.

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