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The Management Structures of Enterprises in the South African Financial Sector

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Abstract

Black economic empowerment is a South African government policy that was deemed necessary to remedy the economic imbalances caused by the policies underpinning apartheid. The Broad-Based Black Economic Empowerment Act 53 of 2003, as amended (B-BBEEA), contains the provisions that govern black economic empowerment (BEE) in South Africa. The B-BBEEA was enacted inter alia to promote the achievement of the constitutional right to equality and to promote economic transformation by increasing broad-based and effective participation of black people in the economy. One of the objectives of the B-BBEEA is to achieve a substantial change in the racial composition of ownership and management structures and the skilled occupations of existing and new enterprises. The BEE Codes of Good Practice (B-BBEE Codes) that have been issued in terms of the B-BBEEA provide principles and formulae that enterprises must observe for the determination of their compliance with the relevant targets; however, Sector Codes have also been issued in terms of the B-BBEEA that apply to enterprises within specific sectors. The Financial Sector Code (FSC) was issued in terms of section 9(1) of the B-BBEEA and provides a standard by which the BEE rating of enterprises in the financial sector to which the FSC applies may be calculated. Research shows that there has not been a substantial change in the racial composition of the management

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structures of enterprises in the financial sector. This is the case despite the existence of the provisions contained in the B-BBEEA and the FSC. This paper examines the provisions contained in the FSC and the B-BBEEA to determine whether the provisions in the latter two legal frameworks play a role in hindering the rate at which progress is made in achieving a substantial change in the racial composition of the management structures of these enterprises.

Keywords: Black Economic Empowerment (BEE); Broad-Based Black Economic Empowerment Act 53 of 2003, as amended (B-BBEEA); financial sector; Financial Sector Code (FSC); racial composition of management structures

1 INTRODUCTION

The year 1994 officially marked the end of apartheid and the beginning of democracy in South Africa. It was a time during which it was still too early to regard political equality as sufficient to correct past economic inequalities that were still present. At the time, approximately 80 per cent of black business owners were of the view that they could not compete fairly with white business owners.¹ To level the playing field, the government introduced Black Economic Empowerment (BEE) policy with the aim to rectify the injustices caused by the apartheid policies.² BEE is an integrated and coherent socio-economic process that is aimed at redressing the inequalities that resulted from the laws that existed during apartheid.³ The roots of BEE are found in the Constitution which states that legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken for the purposes of promoting the achievement of equality.⁴

There are two approaches to BEE in South Africa. The first is the maximalist approach that entails a “comprehensive restructuring of institutions and society, which would effectively alter power relations in the political and economic spheres rather than the replacement of white individuals with black ones.”⁵ This approach consists of the redistribution and generation of resources to the majority of people in South Africa ranging from skills training to land redistribution.⁶ This approach “stresses the overall democratisation and transformation of institutions and organisational cultures rather than the mere inclusion of a few individuals from the previously disadvantaged communities in the ownership and management structures of the economy.”⁷ In terms of this approach BEE includes the empowerment of black people as individuals and black people as a collective.⁸

The minimalist approach to BEE, the second approach, which may be viewed as the narrow approach, takes the professional and managerial class into account. It emphasises “proportional representation of previously marginalized groups of people in the public and

1 Dreyer *et al.* “Broad-Based Black Economic Empowerment and Corporate Financial Health” 2021 (24) *South African Journal of Economic and Management Sciences* 1.

2 *Ibid.*

3 Shava “Black Economic Empowerment in South Africa: Challenges and Prospects” 2016 *Journal of Economics and Behavioral Studies* 161 162.

4 Section 9(2) of the Constitution of the Republic of South Africa, 1996.

5 Edigheji “Rethinking Black Economic Empowerment in the Post-apartheid South Africa” (1999) 9.

6 *Ibid* 10.

7 Gqubule *Making Mistakes Righting Wrongs: Insights into Black Economic Empowerment* (2006) 11; Edigheji “Rethinking Black Economic Empowerment” 10.

8 *Ibid* 10.

private sectors.”⁹ It focuses BEE “discourse and practice on the career mobility or advancement of black managerial, professional and business ranks.”¹⁰ This approach does not aim to “alter the conditions that simultaneously engendered privileges for the minority on the one hand and sustained exploitation and marginalisation of the majority on the other.”¹¹ Instead, it seeks to “alter the racial composition of privileges and exploitations, that is, to create a new circuit of racial capital accumulation. In its narrow sense, the minimalist approach defines BEE in terms of the development of black-owned businesses or creation of a black business class.”¹² The minimalist approach fosters

a process of social exclusion in the new South Africa as majority of blacks, and mostly rural women remain unemployed and, are denied the fruits of social transformation – without access to physical and social infrastructure. At the same time, a new filthy rich black and professional class enjoys the benefits of the democratic transition – with access to corporate ownership, leading positions in the public sector and live in previously white-suburbs. Put differently, a minimalist to BEE promotes the empowerment of a few black individuals and the disempowerment of the vast majority of the black population.¹³

The maximalist approach consists of restructuring on a broader scale that involves the improvement of the conditions of the majority, while the minimalist approach promotes the empowerment of black professional people. In its policy paper the African National Congress said that “BEE is part of the overall transformation and democratization of the South African state and society.”¹⁴ This confirms that BEE should be aimed at enhancing the number of ordinary communities who increase their participation in the economy.¹⁵ The BEE Commission established in 1998¹⁶ proposed an Integrated National BEE strategy that would provide for principles and measurements to implement broad-based black economic empowerment. Government decided to use the maximalist approach as opposed to the minimalist approach.¹⁷

The Broad-Based Black Economic Empowerment Act 53 of 2003, as amended in 2013¹⁸ (B-BBEEA) is the legislative framework which contains the provisions that govern the implementation of black economic empowerment (BEE). The enactment of the legislative framework governing BEE was government’s legislating intent by which it aimed to legally benefit black people at large. The beneficiaries the B-BBEEA are directed at for redress are black people.¹⁹ While drafting the B-BBEEA, the Black Economic Empowerment

9 Edigheji “Rethinking Black Economic Empowerment” 5.

10 Edigheji “Rethinking Black Economic Empowerment” 5; Gqubule *Making Mistakes Righting Wrongs* 5.

11 Gqubule *Making Mistakes Righting Wrongs* 5.

12 Edigheji “Rethinking Black Economic Empowerment” 5.

13 *Ibid* 7.

14 African National Congress “The State and Social Transformation” (1996) 10.

15 Edigheji “Rethinking Black Economic Empowerment” 11.

16 This Commission was established in May 1998 because of a resolution taken at the Black Management Forum National Conference in November 1997; van de Rheede “Black Economic Empowerment in South Africa: Is Transformation of the Management Structures of Enterprises as Essential as it Should Be?” 2022 (26) *LDD* 95.

17 Gqubule *Making Mistakes Righting Wrongs* 11.

18 Black Economic Empowerment Amendment Act 46 of 2013 *GG* 37271.

19 “Black people” is a generic term that refers to Africans, Coloureds, Indians and Chinese –

a) who are citizens of the Republic of South Africa by birth or descent; or

Commission²⁰ advocated that BEE “be a people-centred strategy which should empower all black people in every sphere of life.”²¹

The B-BBEEA aims to achieve a number of objectives, one being to achieve “a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.”²² To achieve its aims the Act empowers the Minister of Trade and Industry (the minister) to issue Codes of Good Practice on BEE.²³ The BEE Codes of Good Practice (B-BBEE Codes) have since been issued in terms of the B-BBEEA in 2007, and was amended in 2013²⁴ and 2019.²⁵ Sector Codes of Good Practice (Sector Codes) have also been issued that apply to enterprises within specific sectors. An enterprise that falls in a sector within which the minister has issued a Sector Code may only make use of the specific Sector Code when measuring its BEE rating.²⁶

Within the financial sector, the Financial Sector Charter (the Charter) came into effect in January 2004. This came about by way of a suggestion made by the financial sector at the National Economic Development and Labour Council (NEDLAC) Financial Sector Summit to create an industry transformation Charter.²⁷ Up until 2008 financial services organisations used the latter Charter and the scorecard to measure their efforts to effect transformation.²⁸ The Charter was drafted by various organisations: the Association of Black Securities and Investment Professionals (ABSIP), the financial sector trade associations, and government acting as an observer.²⁹ The Charter provided for the establishment of a Financial Sector Charter Council (FSCC)³⁰ to serve the purpose of overseeing the implementation of the Charter. The FSCC initiated a process to align the Charter to the Codes of Good Practice and converting it into a sector code, however, the conversion did not take place.³¹ In terms of the B-BBEEA the Charter had no legal standing, and as a result the financial sector submitted its reports in terms of the B-BBEE Codes during the period 2009 to 2012.³²

The Financial Sector Code (FSC) was promulgated in 2012³³ and was later amended in 2017. Its issuance was in terms of section 9(1) of the B-BBEEA. The FSC

b) who became citizens of the Republic of South Africa by naturalization -

i) before 27 April 1994; or

ii) on or after 27 April 1994 and who became entitled to acquire citizenship by naturalisation prior to that date; s 1 of the B-BBEEA.

20 This is the Commission that was established in 1998.

21 Dreyer 2021 *SAJEMS* 2.

22 Section 2(b) of the B-BBEEA.

23 Section 9(1) of the B-BBEEA.

24 B-BBEE Codes in *GG* 36928 of 11 October 2013.

25 B-BBEE Codes in *GG* 42496 of 31 May 2019.

26 Section 10(3) of the B-BBEEA.

27 Preamble to Amended Financial Sector Code in *GG* 41287 of 1 December 2017.

28 Financial Sector Charter Council “2013 Annual Review Report on the Transformation of the Financial Sector in South Africa” 5. The Financial Sector Charter Council issued four annual reports on transformation between 2006 and 2009.

29 Preamble to Amended Financial Sector Code 2017.

30 Financial Sector Charter Council “2013 Annual Review Report” 4.

31 *Ibid.*

32 *Ibid* 5.

33 Financial Sector Code in *GG* 35914 of 26 November 2012.

commits all participants to actively promoting a transformed, vibrant and globally competitive financial sector that reflects the demographics of South Africa, which contributes to the establishment of an equitable society by providing accessible financial services to black people and by directing investment into targeted sectors of the economy. The FSC is the product of the interaction between the financial sector trade associations, ABSIP, labour, community and government. The FSC reflects the accord reached by all the stakeholders³⁴ regarding their joint commitment to fostering B-BBEE in the financial sector and in the South African economy.³⁵

The FSC provides a standard by which the BEE rating of enterprises to which the FSC applies may be calculated. Therefore, the purpose of this paper is twofold. First, since one of the objectives of the B-BBEEA is to achieve a substantial change in the racial composition of management structures of existing and new enterprises,³⁶ and the FSC has been enacted in terms of the B-BBEEA, it is important to determine whether, since the enactment of the FSC, this objective has been achieved. Second, if answered in the negative, then the paper determines whether the provisions contained in the FSC and the B-BBEEA play or have played a role in hampering the rate of progress in achieving change in the racial composition of management structures in existing and new enterprises.

This contribution acknowledges that there exist various views when it comes to the meaning of transformation. Recognising that to some authors a substantial increase in black representation in enterprises constitutes transformation, other authors are of the view that this is not the case.³⁷ Notwithstanding the divergent views, the substantial increase in black representation in an enterprise is an important first step in ensuring that transformation is achieved.

The determination begins with a discussion on the extent of representation of the racial groups in management positions within enterprises in the financial sector and sets out how the BEE ratings are determined in terms of the FSC. The discussion proceeds to touch on the provisions contained in the FSC and the B-BBEEA to determine whether these provisions play a role in hindering the rate at which progress is made in achieving a substantial change in the racial composition of the management structures of enterprises in the financial sector. Perhaps, at the onset it should be acknowledged that research has been conducted to expose the shortcomings in the B-BBEE Codes. These make it possible for enterprises to obtain good BEE ratings in circumstances where a substantial change in the racial composition of the management structures has not been achieved.³⁸ The critical part of the research is that it exposes shortcomings in respect of the B-BBEE Codes which, *inter alia*, include: the manner in which points have been allocated;³⁹ management control not being one of the priority elements;⁴⁰ the

34 Financial sector trade associations, government, ABSIP, labour and community.

35 Preamble to Amended Financial Sector Code 2017.

36 Section 2(b) of the B-BBEEA.

37 It has been said that “a representative institution does not in and of itself translate into being a transformed institution.” Adonis and Silinda “Institutional Culture and Transformation in Higher Education in Post-1994 South Africa: a Critical Race Theory Analysis” 2021 (13)*Critical African Studies* 73 75. Radical economic transformation includes expanding opportunities for the previously disadvantaged, addressing economic inequalities and providing education and skills development, Musonda *et al.* “An Assessment of Transformation Strategies in South Africa: A Multi-case Study of the Accounting, Financial Services, Government, and Construction Sectors” 2019 (26) *Acta Structilia* 73.

38 van de Rheede “Black Economic Empowerment in South Africa” 2022 *LDD* 94.

39 *Ibid.*

40 *Ibid* 95.

existence of opportunity hoarding⁴¹ and enterprises' involvement in fronting practices.⁴²

This contribution zooms into the analyses of the position of a specific sector (the financial sector) to which a Sector Code (the FSC) applies. Thus, concomitant with the latter, this article further examines whether or not the provisions contained in the FSC are improvements on the provisions contained in the B-BBEE Codes, so far as the transformation of management structures of enterprises is concerned.

2 THE REPRESENTATION IN THE MANAGEMENT STRUCTURES

The representation of race groups at top and senior levels of management structures of enterprises in the financial sector is outlined below in Tables 1 and 2. The information set out in the tables has been extracted from the Annual Reports of the Commission for Employment Equity (CEE). Since the information that appears in Tables 1 and 2 has been extracted from the reports compiled by the CEE, the corollary is that it is based on the employment equity reports which have been submitted by designated employers.⁴³

41 Opportunity hoarding takes place where dominant positions are reserved for persons of a particular race group. See van de Rheede 2022 *LDD* 95.

42 van de Rheede 2022 *LDD* 100.

43 During 2009, 3695 employment equity reports were received of which 3369 reports were analysed. see Department of Employment and Labour "10th Commission for Employment Equity Annual Report" 2009-2010 8. In 2011, 4492 employment equity reports were received of which 4370 reports were analysed. see Department of Employment and Labour "12th Commission for Employment Equity Annual Report" 2011-2012 11. In 2012, 23 312 employment equity reports were received of which 22 012 were analysed; see Department of Employment and Labour "13th Commission for Employment Equity Annual Report" 2012-2013 15. During 2017, 27 163 employment equity reports were submitted of which 3094 were from the finance and insurance sector; see Department of Employment and Labour "18th Commission for Employment Equity Annual Report" 2017-2018 17. In 2019, 27 127 employment equity reports were received of which 1299 were from the finance and insurance sector; see Department of Employment and Labour "20th Commission for Employment Equity Annual Report" 2019-2020 13. In 2021, 27 017 employment equity reports were received of which 1146 reports were received from the finance and insurance sector; see Department of Employment and Labour "22nd Commission for Employment Equity Annual Report" 2021-2022 20. For 2022, 27 532 reports were received of which 1139 are from the finance and insurance sector; see Department of Employment and Labour "23rd Commission for Employment Equity Annual Report" 2022-2023" 34. For 2023, 28 015 reports were received of which 1138 are from the finance and insurance sector. See Department of Employment and Labour "24th Commission for Employment Equity Annual Report" 2023-2024 15. For 2024, 29 269 reports were received of which 1171 are from the finance and insurance sector. See Department of Employment and Labour "25th Commission for Employment Equity Annual Report" 2024-2025 17.

Table 1: Population groups in Top Management

	African Male	Coloured Male	Indian Male	White Male	African Female	Coloured Female	Indian Female	White Female
2009 ⁴⁴	12.8%	3.0%	6.8%	51.5%	6.8%	1.4%	1.9%	12.7%
2011 ⁴⁵	10.9%	2.5%	6.7%	51.5%	5.1%	2.4%	2.4%	14.7%
2012 ⁴⁶	8.2%	2.4%	5.0%	57.2%	3.8%	1.6%	2.0%	16.0%
2017 ⁴⁷	9.2%	2.9%	5.6%	50.8%	5.7%	2.2%	3.1%	16.0%
2019 ⁴⁸	10.8%	3.2%	6.9%	49.9%	6.5%	2.3%	3.5%	12.8%
2021 ⁴⁹	10.0%	2.9%	7.7%	47.7%	7.4%	2.4%	3.8%	14.3%
2022 ⁵⁰	10.5%	2.8%	8.0%	45.5%	8.3%	2.5%	4.1%	13.8%
2023 ⁵¹	10.6%	2.9%	8.2%	44.7%	8.2%	2.8%	4.3%	14.1%
2024 ⁵²	11.1%	3.0%	8.2%	43.0%	9.1%	2.6%	4.2%	14.9%

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- 44 Department of Employment and Labour “10th Commission for Employment Equity Annual Report” 2009–2010’ 11.
- 45 Department of Employment and Labour “12th Commission for Employment Equity Annual Report” 2011–2012” 13.
- 46 Department of Employment and Labour “13th Commission” 30.
- 47 Department of Employment and Labour “18th Commission” 21.
- 48 Department of Employment and Labour “20th Commission” 17.
- 49 Department of Employment and Labour “22nd Commission” 25.
- 50 Department of Employment and Labour “23rd Commission” 41.
- 51 Department of Employment and Labour “24th Commission” 20.
- 52 Department of Employment and Labour “25th Commission” 22.

Table 2: Population groups in Senior management

	African Male	Coloured Male	Indian Male	White Male	African Female	Coloured Female	Indian Female	White Female
2009 ⁵³	9.4%	3.6%	6.7%	45.6%	5.4%	2.1%	3.2%	20.9%
2011 ⁵⁴	9.9%	4.0%	7.3%	42.4%	6.0%	2.4%	3.8%	20.6%
2012 ⁵⁵	9.0%	3.5%	6.7%	40.8%	6.1%	2.7%	4.1%	23.5%
2017 ⁵⁶	9.6%	3.7%	7.5%	36.4%	7.3%	3.3%	5.4%	22.2%
2019 ⁵⁷	10.9%	4.0%	8.9%	33.2%	8.6%	3.6%	6.3%	19.6%
2021 ⁵⁸	12.0%	4.0%	9.3%	30.3%	10.1%	3.7%	6.8%	19.0%
2022 ⁵⁹	11.7%	4.1%	9.6%	28.6%	11.2%	4.2%	7.3%	18.6%
2023 ⁶⁰	12.4%	4.3%	9.5%	27.4%	12.1%	4.5%	7.4%	18.0%
2024 ⁶¹	13.1%	4.5%	9.5%	26.0%	12.6%	4.5%	7.5%	17.8%

Since the FSC was initially enacted in 2012 and amended in 2017 it is important to examine the extent of racial representation in management structures of enterprises from 2012 onwards to determine whether the FSC has made a significant contribution in enabling substantial change in the representation of management structures. Much as the analysis of the data begins in 2012, for a contextual picture it is prudent to include in Tables 1 and 2 percentages from 2009 onwards so as to show the position with reference to the representation of race groups in management structures prior to the enactment of the FSC. From the information in Tables 1 and 2 one can glean that there has been a change in the representation of race groups in the management structures in enterprises in the financial sector at top management and senior management levels, however, the negative is that the categories of race groups that fall within the meaning of black people remain under-represented in comparison to white people.⁶² Unfortunately, this is the case, despite the existence of the provisions contained in the B-BBEEA and the FSC that aim to achieve a substantial change in the racial composition of management structures of enterprises. These tables show that some change has come about, but at a slow pace.

Thus, since 2012 positive changes have been made with regard to the racial composition of the top management levels when the categories African males, Indian males and coloured males are examined, except for the year 2021 for African males, 2024 for Indian males and the years 2021 and 2022 for coloured males. At top and senior management levels progress has been made in certain categories, namely African females (except for top management in 2023), coloured females (except for top and senior management in 2024) and Indian females (except

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- 53 Department of Employment and Labour “10th Commission” 13.
54 Department of Employment and Labour “12th Commission” 17.
55 Department of Employment and Labour “13th Commission” 31.
56 Department of Employment and Labour “18th Commission” 25.
57 Department of Employment and Labour “20th Commission” 21.
58 Department of Employment and Labour “22nd Commission” 29.
59 Department of Employment and Labour “23rd Commission” 46.
60 Department of Employment and Labour “24th Commission” 26.
61 Department of Employment and Labour “25th Commission” 27.
62 The possible reasons for this underrepresentation are discussed below.

for top management in 2024)—however this change has not been *substantial*. When it comes to senior management levels, there has been a change in the racial composition since 2012 when considering the categories of coloured males (except for 2021), Indian males (except for 2023 and 2024) and African males (except for 2022), but once again, these changes have not been *substantial*. Tables 1 and 2 show that a *substantial* change in the racial composition of management structures of existing and new enterprises in the financial sector has, disappointingly, not been achieved. For this reason, the FSC should be amended to ensure that there is a substantial change in the management structures of enterprises. Specific recommendations in this regard are discussed throughout the remaining section of this article. The BEE ratings of enterprises in the financial sector further expand on this submission as discussed below.

3 DETERMINING THE BEE RATING OF ENTERPRISES IN THE FINANCIAL SECTOR

Tables 1 and 2 above illustrate that no *substantial* change has emerged in the racial composition of management structures of existing and new enterprises over the relevant period. For this reason, it is important to determine the contributory factors that curtail progress of this objective being achieved. The FSC contains detailed explanations of the measurement principles, scorecards and mathematical formulae that apply to determine the number of points that may be allocated to an enterprise in respect of each element. Points are obtained by enterprises in terms of the FSC based on the extent of such enterprises' compliance with the criteria and principles in the FSC. The table below sets out the way the BEE status of an enterprise is determined.

Table 3: BEE recognition levels⁶³

B-BBEE Status	Qualification Points	BEE Recognition Level
Level One Contributor	≥100/109	135%
Level Two Contributor	≥95/109 but < 100/109	125%
Level Three Contributor	≥90/109 but < 95/109	110%
Level Four Contributor	≥80/109 but < 90/109	100%
Level Five Contributor	≥75/109 but < 80/109	80%
Level Six Contributor	≥70/109 but < 75/109	60%
Level Seven Contributor	≥55/109 but < 70/109	50%
Level Eight Contributor	≥40/109 but < 55/109	10%
Non-compliant contributor	<40/109	0%

Table 3 above contains eight contributor levels and their respective recognition levels. Based on the activities and performance of an enterprise, the enterprise will receive points that will determine its corresponding BEE contribution level (BEE status) and recognition level.⁶⁴ The contents of the table above with its contributor levels, qualifications points and BEE recognition levels are similar to those which appear in the B-BBEE Codes.⁶⁵ This means that the number of points that an enterprise would be required to gain to obtain a specific BEE recognition level is no different in terms of the FSC as it is in the B-BBEE Codes.

63 Amended Financial Sector Code series FS000 in GG 41287 of 1 December 2017 para 8.2.1.

64 Amended Financial Sector Code series FS000 2017 para 8.2.1.

65 B-BBEE Code series 000 in GG 42496 of 31 May 2019 para 9.2.1.

Similar to the B-BBEE Codes that distinguishes between four types of enterprises (an exempted micro-enterprise; a start-up enterprise, a qualifying small enterprise and a large enterprise), the FSC makes a distinction between four types of enterprises of a similar nature: an exempted micro enterprise (EME); a start-up enterprise; a qualifying small financial institution; (QSFI) and a large enterprise (LE).

An EME is an enterprise with a total annual revenue of ZAR10 million or less.⁶⁶ An enterprise falling into this category is permitted to use either the generic scorecard or the QSFI scorecard to obtain points. An EME is deemed to have a BEE status of a level 4 contributor.⁶⁷ An EME that is 100 per cent black owned, however, qualifies for elevation to a level 1 contributor⁶⁸ and an EME which is more than 50 per cent black-owned (where there is an equity deal in place), but less than 100 per cent black-owned qualifies for elevation to a level 2 contributor.⁶⁹

A start-up enterprise should be measured as an EME for the first year of its operations.⁷⁰ In circumstances where a start-up enterprise tenders for a contract of R50 million or more, such an enterprise should submit a generic scorecard and where it tenders for a contract or seeks any other economic activity in terms of section 10 of the Act which is more than ZAR10 million, but less than ZAR50 million such an enterprise should submit a QSFI scorecard.⁷¹

A QSFI is an entity with a total annual turnover of more than ZAR10 million, but less than ZAR50 million.⁷² A QSFI should comply with all the elements unless such a QSFI is exempted from complying with a specific element.⁷³ A QSFI which is more than 50 per cent black-owned, but less than 100 per cent black-owned qualifies for a level 2 recognition level,⁷⁴ while a QSFI which is 100 per cent black-owned qualifies for level 1 BEE recognition.⁷⁵ A LE is an enterprise with an annual total turnover of ZAR50 million or more. A LE is required to use the generic scorecard.⁷⁶

In 2018 the Financial Sector Charter Council was renamed the Financial Sector Transformation Council (FSTC).⁷⁷

66 Amended Financial Sector Code series FS000 2017 para 4.1.

67 *Ibid* para 4.2.

68 *Ibid* para 4.3.1.

69 *Ibid* para 4.3.2.

70 *Ibid* para 6.1.

71 *Ibid* para 6.4.

72 *Ibid* para 5.1.

73 *Ibid* para 5.2.

74 *Ibid* para 5.3.2.

75 *Ibid* para 5.3.1.

76 *Ibid* para 8.1.

77 See Association for Savings and Investment (ASISA) “A five-year transformation journey” (2018–2022) 4.

Subsequently, the FSTC compiled a report on the state of transformation in the financial sector for the period 2021/2022.⁷⁸ The report contains the BEE contribution levels of enterprises in the financial sector. The contribution levels of large enterprises that have been extracted from the report are set out below.

Table 4: B-BBEE contribution levels⁷⁹

	Level 1	Level 2	Level 3	Level 4	Level 5	Level 6	Level 7	Level 8	Non-compliant
Percentage of enterprises that achieved the contribution level	30.99	7.02	7.02	5.79	5.37	3.7	2.07	8.26	29.75

The report compiled by the FSTC shows that when it comes to large enterprises, 30.99 per cent of enterprises obtained a level 1 contributor level and that 56.19 per cent of large enterprises obtained a BEE rating from level 1 contributor level to level 5 contributor level. The report states that 14 per cent of EMEs that submitted reports obtained a level 1 contributor level, 2 per cent of EMEs obtained a level 2 contributor level, and 84 per cent of EMEs obtained a level 4 contributor level.⁸⁰ Regarding QSFIs, 22 per cent of enterprises obtained a level 1 contributor level and 78 per cent of QSFIs obtained a level 2 contributor level.⁸¹ This means that a higher percentage of enterprises in the financial sector that submitted reports, had good BEE ratings (levels 1 to 5) during the period compared to the lower ratings (levels 6 to non-compliant).⁸²

78 The 2021/2022 report is the latest report. There were 763 reports submitted by enterprises in the financial sector during this period. The Financial Sector Transformation Council “State of Transformation Annual Report” 2021/2022 17. A call for the submission of reports for the period 2023 to 2024 was published by the FSTC. Enterprises in the financial sector were required to submit their reports by 31 March 2025.

79 The Financial Sector Transformation Council “State of Transformation Annual Report” 2021/2022 18.

80 *Ibid* 66.

81 *Ibid* 67.

82 Low and high ratings are determined by the median score, where high consists of levels 1 to 5 and low consists of levels 6 to non-compliant; Acemoglu, Gelb and Robinson “Black Economic Empowerment Performance in South Africa” (2007) 31.

The contributor levels discussed above indicate that generally enterprises in the financial sector had satisfactory BEE ratings during the period in question, despite the meagre extent of the representation of racial groups in management structures. Bearing the preceding information in mind, it is thus important to determine whether the FSC and the B-BBEEA play a role in hindering the rate of progress in achieving substantial change in the racial composition of management structures of enterprises in the financial sector and whether the provisions contained in the FSC can be categorised as constituting an improvement *vis-à-vis* the provisions contained in the B-BBEE Codes. Determination of whether the provisions in the FSC are an improvement on what appears in the B-BBEE Codes is important because it will illustrate whether it is possible for a sector code to do more than the B-BBEE Codes to substantially change the management structures of enterprises, thereby eventually transforming these enterprises and the South African economy.

4 THE FSC, THE B-BBEEA AND THE B-BBEE CODES

While BEE has its benefits,⁸³ the arguments against BEE include *inter alia*: a reduction in investment in certain instances;⁸⁴ its capacity to benefit a few black people only, while leaving a large percentage of black people in poverty;⁸⁵ and its lack of transparency and difficulty in monitoring and enforcing.⁸⁶ One of the differences between the FSC and the B-BBEE Codes relates to the application of the respective Codes. The B-BBEE Codes apply to all organs of state, public entities⁸⁷ and measured entities⁸⁸ that undertake any business activities with public entities and organs of state.⁸⁹ An entity is also required to comply with the B-BBEE Codes where such an entity either directly or indirectly undertakes an economic activity with any other entity that is required to comply with the B-BBEE Codes and which seeks to be BEE compliant.⁹⁰ This implies that generally, compliance with the B-BBEE Codes is voluntary for measured entities, unless the afore-mentioned exceptional circumstances apply.⁹¹

The FSC does not apply to juristic persons or natural persons who do not have any trading operations in South Africa, neither does it apply when the trading operations of such persons are located outside South Africa.⁹² It also does not apply to managers of investments who act on behalf of the public who are not subject to regulation by the Financial Services Board, such as attorneys who hold funds in intermediate trusts.⁹³ The FSC applies to

83 The benefits of BEE include promoting skills development and promoting economic inclusion through preferential procurement; B-BBEE Codes series 000 in *GG 42496* of 31 May 2019 para 9.1.

84 Samaai-Abader “EU Investors Responses to Broad-Based Black Economic Empowerment (B-BBEE): A Skills Enhancement Model” (2020) 9.

85 Kruger “South African Managers’ Perceptions of Black Economic Empowerment (BEE): A ‘Sunset’ Clause May Be Necessary to Ensure Future Sustainable Growth” 2014 (18) *Southern African Business Review* 94.

86 Cader and Mazhazha-Nyandoro “Broad- Based Black Economic Empowerment in Selected Small and Medium Enterprises in Cape Town, South Africa” 2023 (29) *Journal of Contemporary Issues in Business and Government* 396.

87 B-BBEE Code series 000 in *GG 42496* of 31 May 2019 para 3.1.1.

88 A measured entity is defined as an entity, as well as an organ of state or public entity which is subject to measurement in terms of the B-BBEE Codes.

89 B-BBEE Code series 000 in *GG 42496* of 31 May 2019 para 3.1.2.

90 *Ibid* para 3.1.3.

91 *Ibid* para 3.1.1; para 3.1.2; para 3.1.3.

92 Preamble to Amended Financial Sector Code in *GG 41287* of 1 December 2017.

93 *Ibid*.

any natural or juristic person conducting a business or trade or profession in the South African financial sector including, but not limited to banking, long-term insurance, short-term insurance; reinsurance; retirement fund administration; the management of collective investment scheme assets; financial services intermediation and brokerage; public entities involved in the financial sector;⁹⁴ asset management, consulting and administration; private equity, venture capitalist and impact investors; management of investments on behalf of the public, including, but not limited to, private equity, members of any exchange licensed to trade equities or financial instruments in South Africa and entities listed as part of the financial index of a licensed exchange; underwriting management agents and Industry Trade Associations operating in the sector.⁹⁵

As indicated above, parties in the financial sector are required to comply with the FSC.⁹⁶ In the case of the B-BBEE Codes on the other hand, where an entity is not an organ of state, a public entity or measured entity that undertakes any business activities with public entities and organs of state,⁹⁷ or an entity that undertakes a business activity with any other entity that is required to comply with the B-BBEE Codes and which seeks to be BEE compliant,⁹⁸ such an entity is not required to comply with the B-BBEE Codes.⁹⁹ This means that generally, compliance is voluntary for entities in the private sector to which a sector code does not apply. Since the application provisions in the B-BBEE Codes discussed above have the effect of exempting a wide range of enterprises from applying the provisions governing BEE,¹⁰⁰ this could be one of the reasons the perception exists that BEE is only benefitting a few black people, while leaving many black people in poverty.¹⁰¹ While the decision was made to use the maximalist approach as opposed to the minimalist approach, the limited scope of application of the B-BBEE Codes may be one of the reasons for the BEE legislative framework being criticised for not benefitting all black people in general and leaving a large percentage of black people in poverty.¹⁰²

While it is possible for an entity to circumvent compliance with the B-BBEE Codes, this is not generally possible for a natural person or juristic person in the financial sector.¹⁰³ The way in which the application provisions contained in the FSC are drafted is thus an improvement on the B-BBEE Codes. The fact that compliance with the FSC has been determined by a specific sector (financial sector) which is not the case with the B-BBEE Codes, is of no consequence when it comes to the difference in the application of the codes,¹⁰⁴ because there are no reasons for the B-BBEE Codes not also applying to a broader range of entities than is the case at present other than reasons not aimed at promoting transformation.

4 1 Point Allocation

94 Such as the Land Bank.

95 Preamble to Amended Financial Sector Code in *GG* 41287 of 1 December 2017.

96 This is subject to the limited exceptional circumstances mentioned above.

97 B-BBEE Code series 000 in *GG* 42496 of 31 May 2019 para 3.1.2.

98 *Ibid* para 3.1.3.

99 *Ibid* para 3.1.1; para 3.1.2; para 3.1.3.

100 *Ibid* para 3.1.1; para 3.1.2; para 3.1.3.

101 Kruger 2014 *SABR* 94.

102 This is one of the arguments against BEE mentioned above.

103 This is because it is only juristic and natural persons that do not have any trading operations in South Africa and juristic and natural persons whose trading operations are located outside South Africa, as well as managers of investments who act on behalf of the public (who are not subject to regulation by the Financial Services Board) that the FSC exempts from its application.

104 The B-BBEE Codes and the FSC.

The BEE status of an enterprise that is determined in terms of the B-BBEE Codes is determined by using five elements: ownership; management control; skills development; enterprise and supplier development; and socio-economic development. The FSC contains the following elements: ownership;¹⁰⁵ management control;¹⁰⁶ skills development;¹⁰⁷ procurement and enterprise and supplier development;¹⁰⁸ socio-economic development; empowerment financing; and access to financial services.¹⁰⁹ Empowering financing and access to financial services were inserted in the scorecard to “broaden and hasten the transformation process as they focus on making financial services accessible to the previously unbanked and under-served”.¹¹⁰ The Generic and the QSFI scorecards that appear in the FSC are set out below (Table 5 and Table 6). For the purposes of comparison, the Generic and QSE scorecards outlined in the B-BBEE Codes also appear below (Table 7 and Table 8).

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- 105 The ownership element measures “effective ownership of entities by black people”; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 7.1.
- 106 Management control measures the “effective control of entities by black people”; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 7.2.
- 107 Skills development measures the “extent to which employers carry out initiatives designed to develop the competencies of black employees and black people internally and externally”; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 7.3.
- 108 Enterprise and supplier development measures the “extent to which entities buy goods and services from empowering suppliers with certain BEE recognition levels”; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 7.4.
- 109 Socio-economic development and the sector specific contributions elements measure the extent to which enterprises carry out activities that contribute towards sector specific initiatives or socio-economic development that promote access to the economy by black people; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 7.5.
- 110 Financial Sector Code in *GG 35914* of 26 November 2012 2.

Table 5: The Generic scorecard (FSC)¹¹¹

ELEMENT	Banks and Life Offices Scorecard	Short Term Insurers Scorecard	Stock Exchanges and Stock Exchange Members	Other Institutions Scorecard	Code Series Reference
Ownership	23	23	23	25	FS100
Management control	20	20	20	20	FS200
Skills development	20	20	20	20	FS300
Procurement and ESD ¹¹²	15	35	35	35	FS400
Socio Economic Development and Consumer Education	5	5	5	5	FS500
Empowerment Financing and ESD	25	0	0	0	FS600
Access to Financial services	12	12	0	0	FS700
TOTAL	120	115	103	105	

Table 6: The QSFI scorecard (FSC)¹¹³

Element	Weighting	Code Series Reference
Ownership	25 points	FS801
Management control	15 points	FS802
Skills Development	25 points	FS803
Enterprise and supplier development	30 points	FS804
Socio-Economic development	5 points	FS806
Total	100 points	

111 Amended Financial Sector Code series FS000 in GG 41287 of 1 December 2017 para 8.1.

112 Enterprise and Supplier development.

113 Amended Financial Sector Code series FS000 in GG 41287 of 1 December 2017 para 8.2.

Table 7: The B-BBEE Generic scorecard¹¹⁴

Element	Weighting	Code Series Reference
Ownership	25 points	100
Management control	19 points	200
Skills development	20 points (plus 5 bonus points)	300
Enterprise and supplier development	40 points (plus 4 bonus points)	400
Socio-economic development	5 points	500
Total	109 (118) points	

Table 8: The B-BBEE QSE scorecard¹¹⁵

Element	Weighting	Code Series Reference
Ownership	25 points	601
Management control	15 points	602
Skills development	25 points (plus 5 points)	603
Enterprise and supplier development	30 points (plus 3 points)	604
Socio-economic development	5 points	605

When comparing the QSFI scorecard that appears in the FSC to the QSE scorecard in the B-BBEE Codes the highest points in both scorecards have been allocated to enterprise and supplier development, with the second highest points being allocated to the ownership element and to skills development in both scorecards, thereby confirming that the position in the FSC and the B-BBEE Codes is the same as far as points are concerned. As a result of the highest points being allocated to enterprise and supplier development, ownership and skills development, it seems obvious that this allocation has the potential to influence or encourage enterprises in the financial sector to comply more with these elements than with management control.

When comparing the generic scorecards in the FSC to that in the B-BBEE Codes, in the B-BBEE Codes the highest points have been allocated to enterprise and supplier development and then to ownership. In the FSC on the other hand when it comes to short-term insurers, stock exchanges and stock exchange members as well as to other institutions the highest points have been allocated to the procurement and ESD element and then to the ownership element. In respect of banks and life offices, the highest points are allocated to the empowerment financing and ESD element and then to the ownership element. The allocation of higher points appears skewed towards elements other than management control. If government's idea through its policy needed to promote management control, it would seem prudent that higher points be allocated to management control. It is acknowledged that research indicates that BEE affects both local and foreign active investors.¹¹⁶ since legislation governing BEE applies to foreign

114 B-BBEE Codes series 000 in *GG 42496* of 31 May 2019 para 9.1.

115 B-BBEE Codes series 600 in *GG 38766* of 6 May 2015 para 3.1.

116 Samaai-Abader "EU Investors' Responses to B-BBEE" 10.

and locally owned businesses.¹¹⁷ It has been reported that there is an ongoing cost involved in recruiting the correct people in managerial positions,¹¹⁸ which would also influence investors' decision to comply with the management control element. While the direct impact of an increased level of compliance with the management control element on investment is uncertain, such an increase may have a negative impact on investment. While this may be the case, research has shown that "investors are more likely to provide capital to compliant companies as they have significantly higher returns than their non-compliant counterparts."¹¹⁹

The possible reason for the election that was made to allocate more points to elements other than management control could be due to government's election to use the maximalist approach as opposed to a minimalist approach.¹²⁰ However, using the maximalist approach also requires that a low number of points should not have been allocated to the socio-economic development element. This is because the maximalist approach focuses on improving the conditions of the majority.¹²¹

As far as ensuring the financial sector's commitment to complying with the management control element is concerned, the points allocated to the respective elements do not assist in ensuring that enterprises in the financial sector comply with the management control element. This is because by allocating higher points to other elements as opposed to the management control element in both the QSFI and the generic scorecards this will act as an incentive that may encourage enterprises to comply with the elements to which the highest points have been allocated rather than to comply with management control. The point allocation thus plays a role in hindering the rate at which progress is made in achieving a substantial change in the racial composition of the management structures of new and existing enterprises in the financial sector.¹²² The legislature should thus increase the number of points that have been allocated to the management control element. Enterprises in the financial sector may require additional incentives to improve their commitment to this element. This is confirmed by a statement made in the 2020/2021 report compiled by the FSTC which states that "the sector is underperforming in the management control element raising concern about the sector's commitment to this

117 Baker McKenzie "Doing Business in South Africa" (2020) 20 <https://www.bakermckenzie.com/-/media/files/locations/south-africa/doing-business-in-south-africa-guide-2023.pdf> (accessed 10-06-2024).

118 Harry Curtis & Co. Chartered Accountants (S.A.) "The Top Challenges to B-BBEE" www.harrycurtis.co.za/top-10-challenges-b-bbee/ (accessed 09-06-2024).

119 Dreyer *et al.* 2021 *SAJEMS* 4. This information was obtained from a study conducted by Akinsomi, Kola, Ndlovu and Motloung. See Akinsomi, Kola, Ndlovu and Motloung 'The Performance of the Broad Based Black Economic Empowerment Compliant Listed Property Firms in South Africa' 2016 (34)*Journal of Property Investment & Finance* 23. This study is limited to an examination of the performance trends of listed and delisted property firms on the JSE from January 2006 to January 2012. This study does not make a specific reference to compliance with the management control element.

120 Gqubule *Making Mistakes Righting Wrongs* 11.

121 Edigheji "Rethinking Black Economic Empowerment" 10.

122 The report compiled by the FSTC includes the sub-sectors in the financial sector that have not met the target in respect of the management control element. See the Financial Sector Transformation Council "State of Transformation Annual Report" 2021/2022 19-31 and 37.

element of the scorecard.”¹²³

4.2 Priority Elements

The FSC prioritises certain elements similar to what is the case in the B-BBEE Codes. In terms of the FSC and the B-BBEE Codes the priority elements are ownership,¹²⁴ skills development,¹²⁵ enterprise and supplier development¹²⁶ with empowerment financing and enterprise and supplier development being an additional priority element in terms of the FSC.¹²⁷ In respect of ownership, the sub-minimum requirement is 40 per cent of net value (40 per cent of the six points).¹²⁸ When it comes to skills development the sub-minimum requirement is 40 per cent of the total weighting points (40 per cent of the 15 points) which excludes the bonus points.¹²⁹ The sub-minimum requirement of enterprise and supplier development is 40 per cent of the total weighting points of each of the broad categories excluding the bonus points¹³⁰ within the enterprise and supplier development element.¹³¹ As far as empowerment financing and enterprise and supplier development is concerned, the sub-minimum requirement is 40 per cent of the total weighting points of each of the three broad categories within this element¹³² which excludes the bonus points.¹³³

Similar to the B-BBEE Codes, the FSC states that an LE is required to comply with all the priority elements unless such an enterprise is exempted from complying with a relevant element.¹³⁴ A QSFI is required to comply with ownership as a priority element and with either skills development as a priority element or enterprise and supplier development.¹³⁵ This is also the case in the B-BBEE Codes in terms of which a QSE is required to comply with ownership as a compulsory element and has a choice to comply with either skills development or enterprise and supplier development as priority elements.¹³⁶

The Association for Savings and Investment South Africa (ASISA) that represents asset managers, collective investment scheme management companies, multi-managers, linked investment service providers and life offices, prepared reports on a “five-year transformation

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- 123 The Financial Sector Transformation Council “State of Transformation Annual Report” 2020/2021 78. The 2021/2022 report compiled by the Financial Sector Transformation Council contains information on the sub-sectors that have failed to meet the target for the management control element.
- 124 B-BBEE Codes series 000 in *GG 42496* of 31 May 2019 para 3.3.1.1; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 3.3.1(a).
- 125 B-BBEE Codes series 000 in *GG 42496* of 31 May 2019 para 3.3.1.2; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 3.3.1(b).
- 126 B-BBEE Codes series 000 in *GG 42496* of 31 May 2019 para 3.3.1.3; Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 3.3.1(c).
- 127 Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 3.3.1(d).
- 128 *Ibid* para 3.3.1(a).
- 129 *Ibid* para 3.3.1(b).
- 130 The broad categories within the enterprise and supplier development element are preferential procurement, supplier development and enterprise development.
- 131 Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 3.3.1(c).
- 132 The broad categories within the empowerment financing and enterprise and supplier development element are empowerment financing, supplier development and enterprise development.
- 133 Amended Financial Sector Code series FS000 in *GG 41287* of 1 December 2017 para 3.3.1(d).
- 134 *Ibid* para 3.3.2(a).
- 135 *Ibid* para 3.3.2(b).
- 136 B-BBEE Codes series 000 in *GG 42496* of 31 May 2019 para 3.3.2.2.

journey,”¹³⁷ as well as a “six-year transformation journey.”¹³⁸ As regards life offices the report on the five-year transformation journey states that:

a steady growth in the representation of black people as Executive Directors and executive management confirms a focus on new appointments in such positions by members. This is because of factors that include retirement of white people in those positions, active appointment of new black executives, and natural attrition. The reported levels, however, remain low compared to the targets although the trajectory of growth is promising.¹³⁹

Regarding life offices the report on the six-year transformation journey states that:

The participation of black people on boards remains consistent levels of around 45% slightly below the 50% target. The anomaly in 2021, attributed to changes in reporting by companies with already transformed boards, caused a slight increase that was not sustainable. This suggests that the overall progress towards diversity in board representation for black people has not significantly advanced, with reporting practices and potential data gaps impacting reported levels.¹⁴⁰

As regards asset managers, the report on the five-year transformation journey states that:

the participation by black people on boards improved in 2020 to levels exceeding the targets with respect to both sub-indicators related to board representation. Targets achieved for 2020 and 2021 were consistent although in the case of black women as executive directors and executive management they reduced to levels lower than reported in 2018. This is also the case with black people in executive management positions.¹⁴¹

Regarding the position of black women in executive management roles for asset managers, the report on the six-year transformation journey states that there was an improvement from 14.93 per cent in 2018 to 25.47 per cent in 2023, however still below the target of thirty per cent.¹⁴² These accounts signify that compliance with the management control element is not always as speedy as it should have been. It seems obvious that management control not being one of the priority elements, either under the B-BBEE or the FSC, has the potential to result in enterprises prioritising the expressly defined priority elements over management control. The elements that are priority elements at present could have been selected due to government’s election to use the maximalist approach as opposed to a minimalist approach.¹⁴³ As regards the maximalist approach focus is not placed on career mobility or advancement of black managerial, professional and business ranks. As such, management control was not prioritised. However, the advancement of black professionals is important in changing the composition of enterprises. Without this, the goal in achieving the objective of a substantial change in the racial composition of management structures of existing and new enterprises will continue to be challenging.

From the preceding discourse one can deduce that management control not being one of the priority elements could be one of the reasons for enterprises in the financial sector’s lack of

137 Association for Savings and Investment (ASISA) “A five-year transformation journey” (2018 – 2022).

138 Association for Savings and Investment (ASISA) “A six-year transformation journey” (2018 – 2023)

139 Association for Savings and Investment (ASISA) “A five-year transformation journey” (2018 – 2022) 15.

140 Association for Savings and Investment (ASISA) “A six-year transformation journey” (2018 – 2023) 30.

141 Association for Savings and Investment (ASISA) “A five-year transformation journey” (2018 – 2022) 16.

142 Association for Savings and Investment (ASISA) “A six-year transformation journey” (2018 – 2023) 31.

143 Gqubule *Making Mistakes Righting Wrongs* 11.

meaningful compliance with the management control element. This plays a role in impeding the rate at which progress is made in achieving the substantial change needed in the racial composition of management structures of enterprises in the financial sector. The achievement of a substantial increase in black representation in management structures of enterprises is an important first step in ensuring that transformation is achieved. Therefore, government needs to prioritise the management control element and the FSC should thus be amended accordingly.

4 3 Compliance

In terms of the B-BBEEA, a Broad-Based Black Economic Empowerment Commission (Commission) was established in 2014.¹⁴⁴ The functions of the commission are listed as:

- a) to oversee, supervise and promote adherence with [the B-BBEEA] in the interests of the public;
- b) to strengthen and foster collaboration between the public and private sector in order to promote and safeguard the objectives of broad-based black economic empowerment;
- c) to receive complaints relating to broad-based black economic empowerment in accordance with the provisions [contained in the B-BBEEA];
- d) to investigate, either of its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment;
- e) to promote advocacy, access to opportunities, and educational programmes and initiatives of broad-based black economic empowerment;
- f) to maintain a registry of major broad-based black economic empowerment transactions, above a threshold determined by the Minister by notice in the Gazette;
- g) to receive and analyse such reports as may be prescribed concerning broad-based black economic empowerment compliance from organs of state, public entities and private sector enterprises;
- h) to promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of broad-based black economic empowerment;
- i) to exercise such other powers which are not in conflict with [the B-BBEEA] as may be conferred on the Commission in writing by the Minister.¹⁴⁵

These functions placed on the commission are important in ensuring compliance with the provisions governing BEE. The commission is required to receive and analyse reports concerning BEE compliance that are received from organs of state, public entities, and private enterprises.¹⁴⁶ However, in terms of the B-BBEEA there is no obligation placed on all public entities, private enterprises and organs of state to report to the commission on compliance. The B-BBEEA only requires public companies listed on the Johannesburg Stock Exchange to report on compliance to the commission.¹⁴⁷ The B-BBEEA requires public entities, organs of state

144 Section 13B of the B-BBEEA. This Commission was established by section 13B of the Broad-Based Black Economic Empowerment Act 46 of 2013; Section 1 B-BBEEA.

145 Section 13F(1) of the B-BBEEA.

146 Section 13F(g) of the B-BBEEA.

147 Section 13G(2) of the B-BBEEA.

and spheres of government to report on compliance with the legislative framework governing BEE in their annual reports required in terms of the Public Finance Management Act 1 of 1999 and their audited annual financial statements.¹⁴⁸ All Sectoral Education and Training Authorities are required to report on skills development spending and programmes to the commission.¹⁴⁹ Even though the commission has the function to receive and analyse reports concerning BEE compliance from private sector enterprises, organs of state and public entities, the fact that there is no obligation placed on all these parties to report on compliance to the commission is problematic. All parties not being required to report on compliance to the commission could be one of the reasons for the argument against BEE, as mentioned above, that when it comes to BEE there is a lack of transparency and difficulty in enforcement.¹⁵⁰

The problem explained above does not exist in the financial sector. In circumstances where an enterprise falls within a sector in which the minister has issued a Sector Code, such an enterprise is required to report on their BEE compliance to its sector council on an annual basis.¹⁵¹ In terms of the FSC each enterprise in the financial sector is required to report to the council (FSTC), on an annual basis on its progress on implementing the provisions contained in the FSC.¹⁵² Entities in the financial sector who fail to report on compliance are automatically discounted by one level down in the rating that follows the non-submission.¹⁵³ The FSTC is empowered by the FSC to name the institutions that do not submit such reports.¹⁵⁴ This means that the FSTC is mandated to receive reports and enterprises in the financial sector are required to report on their BEE compliance to the relevant sector council. The provisions contained in the FSC are thus an improvement on those contained in the B-BBEEA when it comes to the monitoring of reporting and compliance.

The B-BBEEA contains provisions outlining the procedure to follow by parties where the provisions contained in the B-BBEEA are contravened or in the event of their being any complaints regarding BEE. The commission may, on its own initiative or on receipt of a complaint, investigate any matter that relates to the application of the B-BBEEA, including any BEE initiative or category of BEE initiatives.¹⁵⁵ In circumstances where the

commission is of the view that any matter it has investigated may involve the commission of a criminal offence in terms of the Act, or any other law, it may refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Service.¹⁵⁶

If a matter has been investigated by the commission and justifiable reasons exist, the commission may refer any concerns regarding conduct or behaviour that may be prohibited

148 Section 13G(1) of the B-BBEEA.

149 Section 13G(3) of the B-BBEEA.

150 Cader and Mazhazha-Nyandoro "Broad- Based Black Economic Empowerment in Selected Small and Medium Enterprises in Cape Town, South Africa" 2023 (29) *Journal of Contemporary Issues in Business and Government* 396; Shava 2016 *JEBS* 161 166.

151 Section 10(4) of the B-BBEEA.

152 Amended Financial Sector Code series FS000 in *GG* 41287 of 1 December 2017 para 8.5.

153 *Ibid.*

154 Amended Financial Sector Code series FS000 in *GG* 41287 of 1 December 2017 para 8.5.

155 Section 13J(1) of the B-BBEEA.

156 Section 13J(5) of the B-BBEEA.

to the South African Revenue Service¹⁵⁷ or any regulatory authority.¹⁵⁸

While this article focuses on the laws governing BEE, it is essential to outline additional legislative enactments that are also relevant when it comes to the transformation of the financial sector. These include the Employment Equity Act 55 of 1998, as amended (EEA); the Financial Sector Regulation Act 9 of 2017 and the Conduct of Financial Institutions Bill (COFI). In terms of section 2 of the EEA, this statute aims to achieve equity in the workplace by promoting equal opportunity and fair treatment within the employment space through the elimination of unfair discrimination, and implementing affirmative action measures to redress the disadvantages experienced by people from designated groups. The main purpose of the Financial Sector Regulation Act 9 of 2017 is to achieve a stable financial system that operates in the interests of financial customers and that supports sustainable economic growth by establishing a regulatory as well as supervisory framework that promotes *inter alia* transformation of the financial sector.¹⁵⁹ The Financial Sector Conduct Authority (FSCA), the authority established by the Financial Sector Regulation Act 9 of 2017¹⁶⁰ published a strategy with the aim of promoting transformation in the financial sector. In terms of the COFI Bill, financial enterprises will be required to have a plan in place for the purposes of promoting transformation.¹⁶¹

The FSCA's Strategy states that it has adopted a two-stage approach to promoting transformation with the first stage focusing on the role that the FSCA will play within the current legislative framework and the second stage focusing on the FSCA's role in the COFI legislative framework.¹⁶² As far as the first stage is concerned the FSCA's undertakings include engaging with enterprises regarding their existing transformation plans as well as the levels of compliance, improving the quality and availability of transformation data, and building a strong

157 Section 13J(6)(a) of the B-BBEEA.

158 Section 13J(6)(b) of the B-BBEEA.

159 Section 7(1)(g) of the Financial Sector Regulation Act 9 of 2017.

160 Section 56(1) Financial Sector Regulation Act 9 of 2017.

161 FSCA "The FSCA's Strategy for Promoting Financial Sector Transformation" 15.

162 *Ibid* 10.

cooperative relationship with the commission as well as the FSTC.¹⁶³ As far as the second stage is concerned the FSCA will engage with the commission and the FSTC on a regular basis, evaluate the effectiveness of legislation and its application and play a supervisory and regulatory role.¹⁶⁴ The FSCA and the FSTC concluded an MOU for the purposes of ensuring cooperation and coordination between the two institutions for the purposes of promoting financial sector transformation.¹⁶⁵

5 CONCLUSION

The FSC was enacted in terms of the B-BBEEA¹⁶⁶ to provide rules and formulae to be used to calculate the BEE rating of enterprises in the financial sector. One of the objectives of the B-BBEEA is to achieve a substantial change in the racial composition of ownership and management structures and the skilled occupations of existing and new enterprises.¹⁶⁷ This article shows that although there has been a change in the racial composition management structures of enterprises in the financial sector, it has not been substantial. Thus, in the absence of substantial change, one of the objectives of this article was to determine whether the provisions contained in the FSC and the B-BBEEA play a role in hindering the rate at which progress is being made to achieve the expected substantial change in the racial composition of the management structures of enterprises in the financial sector, given the number of years the provisions have been in existence.

When it comes to the points that appear in the scorecards, as far as the generic scorecard in the FSC is concerned, the highest points are allocated to the element known as procurement and ESD for short-term insurers, stock exchanges and stock exchange members as well as to other institutions and the element known as empowerment financing and ESD in respect of banks and life offices.¹⁶⁸ High points have also been allocated to the ownership element.¹⁶⁹ As far as the QSFI scorecard contained in the FSC is concerned, high points have been allocated to elements other than management control.¹⁷⁰ Since more points have been allocated to the aforementioned elements than what has been allocated to management control, the point allocation of elements in the scorecards will act as an incentive to encourage enterprises to comply more with elements comprising higher points, than with management control. The point allocation will thus play a role in hindering the rate at which progress is made in achieving a substantial change in the racial composition of the management structures of enterprises in the financial sector. The election to allocate more points to some of the other elements other than management control could be due to government's election to use the maximalist approach as opposed to a minimalist approach. While this decision is not criticised, it may be time to allocate more points to management control to ensure that the objective of the B-BBEEA discussed in this article is achieved.

In terms of the FSC the priority elements are ownership, skills development, enterprise and

163 *Ibid.*

164 *Ibid.*

165 *Ibid* 11.

166 Section 9(1) of the B-BBEEA.

167 Section 2(b) of the B-BBEEA.

168 Amended Financial Sector Code series FS000 in *GG* 41287 of 1 December 2017 para 8.1.

169 *Ibid.*

170 B-BBEE Codes series 600 in *GG* 38766 of 6 May 2015 para 3.1.

supplier development, and empowerment financing and ESD.¹⁷¹ An LE is required to comply with all the priority elements,¹⁷² while a QSFI is required to comply with ownership as a priority element and may choose to comply with either skills development as a priority element or enterprise and supplier development.¹⁷³ Since management control is not a priority element for either an LE or a QSFI in terms of the FSC this plays a role in hindering the rate at which progress is made in achieving a substantial change to the management structures of enterprises in the financial sector. Similar to the position with the allocation of points, the priority elements were possibly selected because the government chose to use the maximalist approach as opposed to a minimalist approach. The report compiled by the FSTC confirms that there are concerns about the financial sector's commitment to the management control element. Making management control a priority element may improve this commitment.

BEE has been criticised for not benefitting black people at large and leaving a large percentage of them in poverty,¹⁷⁴ however this could be due to the fact that it is possible for certain parties to circumvent the provisions contained in the B-BBEE Codes. The FSC does well in ensuring that this is not the case in the financial sector.

The strategy for promoting transformation in the financial sector, released by the FSCA is a step in the right direction. The FSC, the FSTC and the strategy released by the FSCA could result in the financial sector being one of the sectors in which a substantial change in the racial composition of management structures of enterprises could be achieved, which is essential because an increase in black representation in an enterprise is an important first step in ensuring that transformation takes place. It may also result in the financial sector becoming one of the sectors that will be ahead of the rest when it comes to BEE compliance.

171 Amended Financial Sector Code series FS000 in GG 41287 of 1 December 2017 para 3.3.1.

172 *Ibid* para 3.3.2(a).

173 *Ibid* para 3.3.2(b).

174 Kruger 2014 *SABR* 94.