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Broad-Based Black Economic Empowerment: Transformation of the Ownership Structure of Law Firms

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Abstract

Eradicating the inequalities that exist within the legal profession is an important component of South Africa's social, political, and economic transformation. During apartheid black students' access to an education in law was restricted and black attorneys were only allowed to practice law in specific areas in South Africa. Black economic empowerment was initiated to dismantle the economic inequalities caused by apartheid and to place black people in a position to participate fully in the South African economy. Broad-Based Black Economic Empowerment is not only an essential part of redressing the general inequalities that exist between black and white people that have been caused by apartheid but is also an important initiative that is capable of transforming the legal profession. The Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEEA), as amended in 2013, contains the provisions governing black economic empowerment (BEE). The B-BBEEA was promulgated to promote the achievement of the constitutional right to equality and to promote the transformation of the South African economy. An objective of the B-BBEEA is to achieve a substantial change in the racial composition of ownership and management structures and the

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skilled occupations of existing and new enterprises. The Codes of Good Practice that have been issued in terms of the Act provide rules and formulae that enterprises such as law firms should use to determine their BEE rating. Research shows that there has not been a substantial change in the racial composition of the ownership structure of law firms despite the existence of the legal framework governing BEE. This article contains a discussion on the shortcomings of the legal framework governing BEE that contribute to the slow pace of transformation in the ownership structure of law firms.

Keywords: black economic empowerment; black people; Broad-Based Black Economic Empowerment Act 53 of 2003, as amended; law firms; ownership; transformation

1 INTRODUCTION

Apartheid made it difficult for black people to undertake a career in law. In 1959, the segregated education scheme was extended to tertiary institutions.¹ The Extension of University Education Act 45 of 1959 restricted access to universities on the grounds of race.² To limit the number of applications made by black people to “white” universities, universities were established to provide tertiary education to black people.³ During the years of apartheid, universities offered a range of degrees in law. The historically disadvantaged universities were under-resourced which resulted in the education that was provided to black students not being of a comparable quality to what was offered by historically “white” universities.⁴ Similar to historically “white” universities, the historically disadvantaged universities offered an undergraduate qualification in law known as the four-year Baccalaureus Procuratoris (B. Proc) degree.⁵ A few historically disadvantaged universities also offered the graduate Baccalaureus Legum (LLB) degree similar to what was offered at “white” universities.⁶ However, very few black people were able to study for the LLB due to financial constraints.⁷ It was also difficult for black students who obtained an education in law to obtain articles resulting in aspiring black attorneys being excluded from private practice.⁸ Black attorneys were only allowed to practise law in the “homelands” and in the township areas as a result of the government policy which required separate trading areas for racial groups.⁹ The legal profession became dominated by white people, particularly white men.¹⁰

In 1995, debates began regarding developing a legal qualification that promoted transformation and there was strong support for introducing a single four-year undergraduate degree.¹¹ It was necessary to improve access to the profession and improve representation in the legal profession.¹² This was due to approximately 85 percent of the legal profession, in 1994, consisting of white

1 Pruitt “No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession” 2002 *Mich. J.INT’L* 545 563.

2 Godfrey “The Legal Profession: Transformation and Skills” 2009 *SALJ* 91 98.

3 Godfrey 2009 *SALJ* 98.

4 Greenbaum “Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with Our Educational Legacy” 2015/2016 *N.Y.L.Sch.LR* 463 465.

5 Pruitt 2002 *Mich. J.INT’L* 564.

6 Pruitt 2002 *Mich. J.INT’L* 564.

7 Pruitt 2002 *Mich. J.INT’L* 565.

8 Greenbaum 2015/2016 *N.Y.L.Sch.LR* 465.

9 Greenbaum “The Four-year Undergraduate LLB: Progress and Pitfalls” 2010 *Journal for Juridical Science* 1 9.

10 Godfrey 2009 *SALJ* 98.

11 Greenbaum 2015/2016 *N.Y.L.Sch.LR* 467.

12 Greenbaum 2015/2016 *N.Y.L.Sch.LR* 467.

attorneys.¹³ In 1997 all universities were required to establish a four-year undergraduate LLB degree.¹⁴

The enactment of the Constitution of the Republic of South Africa, 1996 resulted in a change in the legal profession compared to during the apartheid era. In terms of section 9(2) of the Constitution, “equality includes the full and equal enjoyment of all rights and freedoms.”¹⁵ The Constitution makes it clear that to “promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”¹⁶ The aforementioned provision confirms the fact that South Africa embraces a substantive notion of equality.¹⁷ A special planning unit of the Department of Justice and Constitutional Development published a strategic plan known as Justice Vision 2000 that contains a critique of the legal profession and a plan to transform the legal profession.¹⁸ Justice Vision 2000 states that the legal profession should become more representative of the South African population.¹⁹ The legal profession comprises legal practitioners, which consist of attorneys as well as advocates.²⁰ However, this article will deal solely with the transformation of the ownership structures of the attorneys’ profession. Making the attorneys’ profession more representative of the South African population entails making the skilled categories as well as the management and ownership structures of the law firms more representative of the South African demographic.

Parliament has promulgated statutes aiming to correct the racial imbalances caused by apartheid, one of them being the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEEA), which was amended in 2013.²¹ An additional statute that was enacted to rectify the legacy of apartheid which only applies to the legal profession is the Legal Practice Act 28 of 2014. The purposes of the Legal Practice Act 28 of 2014 include providing “a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution”²² and putting measures in place to “provide equal opportunities for all aspirant legal practitioners in order to have a legal profession that broadly reflects the demographics of the Republic.”²³ The B-BBEEA contains provisions that govern black economic empowerment (BEE) in South Africa. The legislature’s enactment of the B-BBEEA is an attempt to make progress in achieving substantive equality. The beneficiaries of the B-BBEEA are black people.

13 Greenbaum 2015/2016 *N.Y.L.Sch.LR* 468.

14 Qualification of Legal Practitioners Amendment Act 78 of 1997.

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

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

17 *Solidarity obo Barnard v South African Police Service* 2014 ZACC 23 para 31.

18 Whitear-Nel and Freedman “A Historical Review of the Development of the Post-apartheid South African LLB degree- with Particular Reference to Legal Ethics” 2015 *Fundamina* 234 240.

19 Ministry of Justice *Justice Vision 2000* 108.

20 In terms of s 1 of the Legal Practice Act 28 of 2014 a legal practitioner is defined as “an advocate or attorney admitted and enrolled as such in terms of ss 24 and 30, respectively.”

21 Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.

22 Section 3(a) Legal Practice Act 28 of 2014.

23 Section 3(b)(iii) Legal Practice Act 28 of 2014.

“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

b) who became citizens of the Republic of South Africa by naturalisation

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.²⁴

The B-BBEEA was enacted, *inter alia*, to “promote economic transformation in order to enable meaningful participation of black people in the economy”²⁵ and to “achieve a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises.”²⁶ The Codes of Good Practice (B-BBEE Codes) issued in terms of the B-BBEEA provide a standard by which the BEE rating of enterprises, such as law firms, can be calculated.

The objective of this article is to expose the shortcomings in the legal framework governing BEE that may contribute to the slow pace of transformation of the ownership structure of law firms. This article begins with a discussion on the relevant provisions contained in the Legal Practice Act 28 of 2014 after which the percentage of law firms²⁷ whose ownership structure is classified in each racial group is outlined. This is followed by a discussion of how BEE ratings are determined. The article progresses with an examination of the relevant provisions contained in the B-BBEEA and the B-BBEE Codes issued in terms thereof to illustrate what the shortcomings of the legal framework are insofar as it relates to ownership structures in the attorneys’ profession.

On 22 July 2022, the draft Broad-Based Black Economic Empowerment Legal Sector Code (LSC) was published for comment in terms of section 9(5) of the B-BBEEA. The draft LSC aims to provide a standard by which the BEE rating of enterprises in the legal profession would possibly be calculated in the future. The draft LSC describes an entity as a legal sector measured entity (LSME) and defines an LSME as a “law firm in the case of attorneys whether as sole practitioner, partnership or incorporated legal entity or an individual advocate.”²⁸ Since the LSC is still in draft format, law firms are still required to calculate their BEE ratings by using the B-BBEE Codes. For this reason, the provisions that appear in the LSC will be commented on as a means of establishing whether the proposed LSC makes any improvements to the current legal framework in this regard. However, this article will focus on the provisions contained in the B-BBEEA and the B-BBEE Codes.

2 THE LEGAL PRACTICE ACT 28 OF 2014

The Legal Practice Act 28 of 2014 (LPA) applies to all legal practitioners and candidate legal practitioners.²⁹ The South African Legal Practice Council (Council) is required to “facilitate the

24 Section 1 of the B-BBEEA.

25 Section 2(a) of the B-BBEEA.

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

27 The percentage of law firms is based on the sample of law firms who participated in the studies conducted by LexisNexis and the Law Society of South Africa.

28 LSC para 4.

29 Section 2 Legal Practice Act 28 of 2014.

realisation of the goal of a transformed and restructured legal profession that is accountable, efficient and independent.”³⁰

The Council is required to develop programmes to empower historically disadvantaged legal practitioners and candidate legal practitioners³¹ and to report to the Minister on an annual basis on the progress that has been made when it comes to implementing these programmes.³² The Minister is empowered to make regulations relating to the “establishment of a mechanism to monitor progress on the implementation of the programmes relating to the empowerment of historically disadvantaged legal practitioners as well as historically disadvantaged candidate legal practitioners.”³³

3 THE RACIAL CLASSIFICATION OF THE OWNERSHIP STRUCTURE OF LEGAL SECTOR MEASURED ENTITIES (LAW FIRMS)

LexisNexis and the Law Society of South Africa (LSSA) conducted research on the legal profession in 2008, 2016, and 2021 which resulted in the compilation of reports.³⁴ The table below sets out the racial classification of the ownership structure of law firms extracted from the aforementioned studies.

Table 1: The percentage of law firms whose ownership structure is classified in each population group³⁵

	2008	2016	2021
Fully White	80%	60%	49%
Fully African	7%	11%	19%
Fully Indian or Asian	6%	7%	9%
Fully Coloured	4%	4%	4%
Mixed Ownership	6%	20%	19%

In 2008, six per cent of law firms had mixed ownership, and in 2021 19 per cent of law firms in the sample had mixed ownership.³⁶ Since transformation includes an increase in mixed ownership and the table above showing that there has not been a substantial increase in mixed ownership from 2008 to 2021, a substantial change in the racial composition of the ownership structure of law firms has not been achieved. The report states that where there was “black ownership in mixed-ownership schemes, black owners [were] in the minority with 25% equity or less [and that there was] a high concentration of Coloured and Indian minority [shareholding].”³⁷ The table above shows that the percentage of white-owned law firms decreased from 2008 to 2021 and the percentage of coloured-owned law firms remained the same. In addition, the table shows that while the percentage of Indian, Asian and African-owned law firms increased from 2008 to 2021, it has not been a *substantial* percentage increase. Since there has not been

30 Section 5(a) Legal Practice Act 28 of 2014.

31 Section 6(1)(b)(v) Legal Practice Act 28 of 2014.

32 Section 6(5)(h)(iv) Legal Practice Act 28 of 2014.

33 Section 94(1)(b) Legal Practice Act 28 of 2014.

34 As far as the 2021/2022 report is concerned “of 1210 legal professionals who participated in the survey, majority come from small law firms. A total of 438 fully completed the survey, with 772 partially completing it”.

35 LexisNexis “Legal Tech Report 2016” 19; LexisNexis “Law Society of South Africa Legal Tech Report 2021/2022” 18.

36 Mixed ownership means ownership that consists of more than one race group.

37 LexisNexis “Legal Tech Report 2016” 19.

a substantial change in the racial composition of the ownership structure of law firms as the B-BBEEA aims to achieve, it is important to determine what the shortcomings are of the legal framework governing BEE insofar as it pertains to ownership in the attorneys' profession that contributes to the slow pace of transformation in this regard.

4 THE WAY BEE RATINGS ARE DETERMINED

Since one of the objectives of the B-BBEEA is to achieve substantial change in the racial composition of ownership structures, it is important to determine the role that the B-BBEE Codes and the B-BBEEA play insofar as the slow pace of racial transformation of the ownership structure of law firms is concerned. The B-BBEE Codes contain five elements: Code series 100³⁸ is the Code governing the ownership element;³⁹ Code series 200⁴⁰ governs the management control element;⁴¹ Code series 300⁴² governs the skills development element;⁴³ Code series 400⁴⁴ governs the enterprise and supplier development element;⁴⁵ and Code series 500⁴⁶ governs the socio-economic development element.⁴⁷ The B-BBEE Codes contain scorecards, measurement principles and formulae that apply to each element. The B-BBEE Codes refer to entities who use the B-BBEE Codes to obtain a BEE rating as "measured entities". Points are obtained by measured entities, such as law firms, based on the extent of their compliance with the criteria and measurement principles contained in the B-BBEE Codes. Table 2 below is used to determine the BEE rating of measured entities and, thus, law firms.

38 B-BBEE Code series 100 in *GG* 36928 of 11 October 2013.

39 The ownership element measures the effective ownership of measured entities by black people. See B-BBEE Code series 000 in *GG* 42496 of 31 May 2019 para 8.1. The ownership scorecard contains points which may be obtained in respect of voting rights, economic interest, and realisation points.

40 B-BBEE Code series 200 in *GG* 36928 of 11 October 2013.

41 The management control element measures the extent to which a measured entity is managed by black people. See B-BBEE Code series 000 in *GG* 42496 of 31 May 2019 para 8.2. The management control scorecard contains points that may be obtained with respect to board participation, other executive management, senior management, middle management, junior management, and employees with disabilities.

42 B-BBEE Code series 300 in *GG* 42496 of 31 May 2019.

43 The skills development element measures the extent to which initiatives are carried out by measured entities that are designed to train and develop black people. See B-BBEE Code series 000 in *GG* 42496 of 31 May 2019 para 8.3. The skills development scorecard contains points that may be obtained regarding skills development expenditure on any programme specified in the Learning Programme Matrix for black people as a percentage of the leviable amount.

44 B-BBEE Code series 400 in *GG* 42496 of 31 May 2019.

45 The enterprise and supplier development element measures *inter alia* the extent to which measured entities buy goods or services from empowering suppliers that have high BEE ratings. See B-BBEE Code series 000 in *GG* 42496 of 31 May 2019 para 8.4. The enterprise and supplier development scorecard contains points that may be obtained in terms of preferential procurement, supplier development, and enterprise and supplier development.

46 B-BBEE Code series 500 in *GG* 36928 of 11 October 2013.

47 The socio-economic development element measures "the extent to which entities implement initiatives that contribute towards socio-economic development or sector specific initiatives that promote access to the economy for black people." See B-BBEE Code series 000 in *GG* 42496 of 31 May 2019 para 8.5.

Table 2: BEE recognition levels:⁴⁸

Contribution Level	Qualification Points	BEE Recognition Level
Level 1 contributor	≥100	135%
Level 2 contributor	≥95 but < 100	125%
Level 3 contributor	≥90 but < 95	110%
Level 4 contributor	≥80 but < 90	100%
Level 5 contributor	≥75 but < 80	80%
Level 6 contributor	≥70 but < 75	60%
Level 7 contributor	≥55 but < 70	50%
Level 8 contributor	≥40 but < 55	10%
Non-compliant contributor	<40	0%

The aforementioned table contains eight contribution levels and their respective BEE recognition levels. A law firm obtains points based on its overall performance, which will determine its BEE recognition level and contribution level.⁴⁹ A law firm that obtains less than 40 points will be non-compliant.

While the LSC is still in draft format, it is noteworthy to mention that Table 2 with its contribution levels, qualification points, and BEE recognition level also appears in the LSC with exactly the same content.⁵⁰ This means that the number of points that a law firm would be required to gain to obtain a specific contribution level is the same in terms of the B-BBEE Codes as it is in the draft LSC.

Since law firms make use of the B-BBEE Codes to obtain a BEE rating, it is important to outline the BEE contribution levels of law firms. The percentage of law firms that fall within each contribution level appears below.

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

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

50 LSC para 16.1.

Table 3: Contribution levels of law firms⁵¹

Contribution Level	Percentage Per Level
Level 1	23%
Level 2	9%
Level 3	3%
Level 4	16%
Level 5	2%
Level 6	1%
Level 7	0%
Level 8	1%
Non-compliant	3%
No BEE rating	42%
TOTAL	100%

The table above shows that 42 per cent of law firms who participated in the study do not have a BEE rating.⁵² The percentages reflected in Table 3 above show that more law firms have BEE ratings from Level 1 to Level 5 than Levels 6 to no BEE rating. The table above presents data on the BEE ratings of law firms based on the surveys conducted in the various studies. Although the percentages are based solely on the number of participating law firms, the data shows a clear trend: a higher percentage of law firms have high BEE ratings compared to low ratings. Here, “low and high [are] determined by the median BEE score”,⁵³ with high encompassing Level 1 to Level 5 and low covering Level 6 to no BEE rating at all.

The issue that arises is that such BEE ratings may not always be obtained as a consequence of transforming the ownership structure of the law firms concerned and it is important to determine the reason(s) for this.

5 THE SHORTCOMINGS OF THE LEGAL FRAMEWORK GOVERNING BEE

5.1 Application of the B-BBEE Codes

All organs of State, public entities,⁵⁴ and all measured entities that undertake any business activities with public entities and organs of State are required to comply with the B-BBEE Codes.⁵⁵ An entity is also required to comply with the B-BBEE Codes where such an entity undertakes a business activity with any other entity that is required to comply with the B-BBEE Codes and who seeks to be BEE compliant.⁵⁶ This implies that generally, compliance with the B-BBEE Codes is voluntary for measured entities in the private sector, therefore law firms, unless a law firm undertakes any business activities with public entities or organs of State⁵⁷ or with any other entity that is required to comply with the B-BBEE Codes and who seeks to establish its own BEE rating.⁵⁸ The voluntary nature of BEE compliance for law firms (except

51 LexisNexis “Law Society of South Africa Legal Tech Report 2020/2022” 16.

52 See the discussion that appears in paragraph 5.1 below.

53 Acemoglu, Gelb and Robinson “Black Economic Empowerment Performance in South Africa” 2007 31.

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

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

56 B-BBEE Code series 000 in *GG 42496* of 31 May 2019 para 3.1.3.

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

58 B-BBEE Code series 000 in *GG 42496* of 31 May 2019 para 3.1.3.

in exceptional circumstances as mentioned above) represents a shortcoming of the legal framework that hinders the pace of transformation within the ownership structures of law firms. This is reinforced by the fact that 42 per cent of the law firms who participated in the study conducted by LexisNexis and the LSSA have no BEE rating. Compliance with the B-BBEE Codes should be compulsory for more law firms than is the case at present. It is recommended that compliance with the B-BBEE Codes should be based on the annual turnover of law firms and that an obligation should be placed on these firms to obtain no less than a specified number of points in respect of each of the categories in the ownership scorecard to ensure that more progress is made in achieving a substantial change to the ownership structure of these firms.

In terms of the draft LSC, it proposes to apply to all organs of State and public entities to the extent mentioned in the LSC.⁵⁹ The draft LSC proposes to apply to the office of the State Attorney as well as to all public entities and organs of State “whose primary focus is the procurement of legal services on behalf of the state from law firms and advocates.”⁶⁰

In addition, the LSC also intends to apply to all organs of State other than those referred to above that “procure legal services from law firms and advocates”⁶¹ as well as to Legal Aid South Africa.⁶² In terms of the draft LSC, it also proposes to apply to advocates and private entities who choose to be measured in terms of the B-BBEEA and thus establish their compliance with the LSC.⁶³ The fact that the LSC recommends that its application should be optional for law firms is problematic since an objective of the draft LSC is “to achieve a substantial, meaningful and accelerated change in the racial and gender composition of ownership, control and management of legal practices in the legal services sector.”⁶⁴ It will be difficult to achieve this objective in circumstances where law firms have an election to comply with the LSC. In the event of the draft LSC coming into effect, it should apply to law firms based on their annual turnover, with the possible exception of sole practitioners since such entities are established and registered by a single attorney.

5 2 B-BBEE Codes

The B-BBEE Codes contain two scorecards that may be used: the Generic scorecard and the Qualifying Small Enterprise (QSE) scorecard. These scorecards should be used by enterprises such as law firms to obtain points to determine their BEE ratings. Measured entities, which include law firms, may fall into one of four categories. The first category is an exempted micro-enterprise (EME). A law firm that has “an annual total revenue of R10 million or less qualifies as an [EME].”⁶⁵ An EME is deemed to have a BEE status of a level four contributor with a BEE recognition level of 100 per cent.⁶⁶ However, there are circumstances under which the BEE recognition level of an EME may be enhanced. The first circumstance allows an EME to obtain a BEE status of a level one contributor having a B-BBEE recognition level of 135 per cent which occurs where an EME is 100 per cent black-owned, measured by using the flow-through principle.⁶⁷ The second circumstance allows an EME to have a BEE status of a level two contributor with a B-BBEE recognition level of 125 per cent which occurs when an EME

59 LSC para 9.2.

60 LSC para 9.4.1.

61 LSC para 9.4.2.

62 LSC para 9.4.3.

63 LSC para 9.2.

64 LSC para 8.2.1.

65 B-BBEE Code series 000 in GG 42496 of 31 May 2019 para 4.1.

66 *Ibid.* para 4.3.

67 *Ibid.* para 4.4.1.

is at least 51 per cent black-owned measured using the flow-through principle.⁶⁸ Despite the aforementioned, two circumstances mentioned, an EME may make use of the QSE scorecard should it choose to do so.⁶⁹

The second category in which an enterprise may fall is known as a start-up enterprise. A start-up enterprise is “a recently formed or incorporated entity that has been in operation for less than one year.”⁷⁰ Such an enterprise excludes any newly constituted enterprise that is a mere continuation of a pre-existing enterprise.⁷¹ A start-up enterprise is usually regarded as an EME, unless such a start-up enterprise tenders for a contract that is more than the relevant threshold for EMEs.⁷² Should a start-up enterprise tender for a contract that is more than the threshold for EMEs, the relevant scorecard (Generic or QSE scorecard) should be used.⁷³

The third category is known as a qualifying small enterprise (QSE). A law firm qualifies as a QSE when such a firm has an annual turnover that is between R10 million and R50 million.⁷⁴ A QSE is required to comply with all the elements to determine its BEE rating.⁷⁵ A QSE’s BEE recognition level may be enhanced in two instances. The first instance is when the QSE is 100 per cent black-owned measured using the flow-through principles in which event the QSE “qualifies for elevation to a B-BBEE level one contributor having a B-BBEE recognition level of 135%.”⁷⁶ The second instance is when a QSE is at least 51 per cent black-owned, measured by making use of the flow-through principle, in which case such a QSE “qualifies for elevation to a B-BBEE level two contributor having a B-BBEE recognition level of 125%.”⁷⁷ Despite the aforementioned, a black-owned QSE may make use of the QSE scorecard should it choose to do so.⁷⁸ The final category is a large enterprise (LE). A law firm will qualify as a large enterprise if it has an annual turnover of R50 million or more.⁷⁹ A LE is required to use the Generic scorecard.

The draft LSC changes the threshold of entities and identifies four types of LSMEs. The first category is an exempted legal entity (ELE), which is an exempted law firm or advocate.⁸⁰ The draft LSC states that an ELE is an entity with a monetary threshold of R3 million or less,⁸¹ however, the ELE scorecard refers to three requirements that should be present for an LSME to fall within the meaning of an ELE: the number of partners or directors should be between one and three; the monetary annual threshold should be from R0 to R3 million; and the law firm should be in existence for a period less than three years.⁸² The second category is a start-up LSME which is defined as a recently formed, established, constituted or incorporated law firm or advocate who has been practicing for less than three years and generates an annual revenue of not more than R3 million.⁸³ The third category is a qualifying small measured LSME which is an LSME with a minimum of four partners or directors, but no more than 15 directors or

68 *Ibid.* para 4.4.2.

69 *Ibid.* para 4.5.

70 B-BBEE Schedule 1 in GG 42496 of 31 May 2019.

71 *Ibid.*

72 B-BBEE Code series 000 in GG 42496 of 31 May 2019 para 4.2.

73 *Ibid.*

74 B-BBEE Code series 000 in GG 42496 of 31 May 2019 para 5.1.

75 *Ibid.* para 5.2

76 B-BBEE Code series 000 in GG 42496 of 31 May 2019 para 5.3.1

77 *Ibid.* para 5.3.2.

78 *Ibid.* para 5.4.

79 *Ibid.* para 6.1

80 LSC para 4.

81 LSC para 17.

82 LSC para 14.

83 LSC para 15.1.

partners with an annual turnover of not more than R15 million and not less than R3 million.⁸⁴ The final category is a large enterprise which is an LSME that has more than 15 partners or directors with a total revenue of more than R15 million per year.⁸⁵

The scorecards contained in the B-BBEE Codes that apply to law firms at present contain priority elements. Ownership, skills development and enterprise and supplier development are the three priority elements.⁸⁶ An LE law firm that complies with the B-BBEE Codes should comply with all three priority elements in the Codes⁸⁷ However, a law firm that is a QSE is required to comply with ownership as a compulsory element and then either with enterprise and supplier development as one priority element, or skills development as the other.⁸⁸ The fact that LEs and QSEs are required to comply with the ownership element is a step in the right direction. Even though the LSC is in draft format, it is noteworthy to mention that ownership, skills development, and enterprise and supplier development are also the priority elements in terms of the LSC.⁸⁹

In terms of the B-BBEE Codes, as far as the priority elements are concerned, there are certain sub-minimum requirements. When it comes to the ownership element, points may be obtained in respect of three categories: voting rights, economic interest and realisation points (net value). The sub-minimum requirement for ownership is 40 per cent of the net value (40 per cent of the eight (Generic and QSE) points).⁹⁰ The sub-minimum requirement for skills development is 40 per cent of the total weighting points which excludes bonus points (40 per cent of the 20 (Generic) or 25 (QSE) points).⁹¹

[The] sub-minimum requirement for enterprise and supplier development is 40% of the total weighting points for each of the three categories excluding bonus points, within the enterprise and supplier development element, namely preferential procurement (40% of the 25 (Generic) or 20 (QSE) points), supplier development (40% of the 10 (Generic) or 5 (QSE) points) and enterprise development (40% of the 5 (Generic and QSE) points).⁹²

The scorecards contained in the B-BBEE Codes appear below.

Table 4: The B-BBEE Generic scorecard:⁹³

Element	Weighting	Code series reference
Ownership	25 points	100
Management control	19 points	200
Skills development	20 points (plus 5 points)	300
Enterprise and supplier development	40 points (plus 4 points)	400
Socio-economic development	5 points	500

The Generic scorecard above shows that the highest points are allocated to enterprise and

84 LSC para 18.4.

85 *Ibid.* para 4.

86 B-BBEE Codes Code series 000 in GG 42496 of 31 May 2019 para 3.3.1.

87 *Ibid.* para 3.3.2.1.

88 *Ibid.* para 3.3.2.2.

89 LSC para 11.1.

90 B-BBEE Codes Code series 000 in GG 42496 of 31 May 2019 para 3.3.1.1.1.

91 *Ibid.* para 3.3.1.2.1.

92 *Ibid.* para 3.3.1.3.1.

93 *Ibid.* para 9.1.

supplier development. The fact that higher points have been allocated to the enterprise and supplier development element than what has been allocated to the ownership element is due to the government being compelled to prioritise the redistribution of resources to the majority of black South Africans as opposed to the narrower approach which focuses mainly on “the deracialisation of business ownership and control.”⁹⁴

Table 5: The B-BBEE QSE scorecard:⁹⁵

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

Similar to the Generic scorecard, in the QSE scorecard the highest points have been allocated to enterprise and supplier development. Since the highest points are allocated to the enterprise and supplier development element in the Generic and QSE scorecard, this acts as an incentive that may encourage law firms to comply more with the enterprise and supplier development element than with the ownership element.

In the QSE scorecard, equal points have been allocated to the ownership element and to the skills development element, except for the fact that bonus points may be obtained in respect of the skills development element. This provides QSEs with an option to comply more with the skills development element than with the ownership element.

While ownership being a priority element assists in transforming the ownership structure of law firms, it does not eliminate the option that LEs and QSEs will have to comply more with enterprise and supplier development than with ownership. It also does not eliminate the option that QSEs will have to comply more with the skills development element than with the ownership element. This is because entities, such as law firms, are only required to ensure that they comply with the sub-minimum requirement with respect to the ownership element.

The higher weighting given to the enterprise and supplier development element compared to the ownership element in the Generic and QSE scorecards coupled with the equal weightings for ownership element and skills development (except for the bonus points that may be obtained in respect of the skills development element) in the QSE scorecard, represents a shortcoming in the legal framework. This contributes to the slow pace of transformation of the ownership structure of law firms. This shortcoming is not cured by the sub-minimum requirements which should be complied with in respect of the priority elements set out in the B-BBEE Codes. This is because even if these sub-minimum requirements are complied with, in circumstances where law firms aim to obtain a high BEE rating these firms could be more inclined to obtain the additional points by complying with the elements allocated with the most weight. It is thus recommended that the weighting be increased of the ownership element in both the Generic and QSE scorecards.

94 Kloppers “Driving Corporate Social Responsibility through Black Economic Empowerment” 2014 18 *LDD* 58 60; Gqubule *Making Mistakes Righting Wrongs: Insights into Black Economic Empowerment* (2006) 5.

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

5.3 Enforcement Measures

Enforcement measures are found in the B-BBEEA which are designed to eliminate the commission of fronting practices. The B-BBEEA established a Broad-Based Black Economic Empowerment Commission (Commission), which has jurisdiction throughout South Africa.⁹⁶ Some of the functions of the Commission contained in section 13(F)(1) are:

- a) to oversee, supervise and promote adherence with this Act in the interest of the public,⁹⁷
- c) to receive complaints relating to broad-based black economic empowerment in accordance with the provisions [contained in the B-BBEEA],⁹⁸
- d) to investigate either on its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment,⁹⁹
- 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.¹⁰⁰

The functions that have been provided to the Commission are important in ensuring that the provisions contained in the B-BBEEA and the B-BBEE Codes are complied with, however it does not provide much assistance in all circumstances. According to the B-BBEEA, the Commission is required to oversee, supervise and promote adherence to the B-BBEEA. However, compliance with the B-BBEEA is not compulsory when it comes to law firms that do not undertake business activities with public entities or organs of State or any other measured entity that is required to comply with the B-BBEE Codes. As a result, there is no obligation that rests on such law firms to comply with the provisions contained in the B-BBEEA and the B-BBEE Codes and thus no reason for the Commission to exercise any supervisory functions when it comes to such law firms that do not comply with the B-BBEEA and the B-BBEE Codes.

The Commission is required to receive and analyse reports concerning broad-based black economic empowerment compliance from organs of State, public entities and private sector enterprises. Since the B-BBEEA only requires public entities, spheres of government, organs of State¹⁰¹ and public companies listed on the JSE¹⁰² to report on compliance and requires the Sectoral Education and Training Authorities to report on skills development spending and programmes,¹⁰³ law firms are not required to submit such reports. As a result, the Commission will not be in a position to exercise the aforementioned function in relation to law firms that do not submit such reports. Nonetheless, in circumstances where such law firms comply with the B-BBEEA and the B-BBEE Codes and submit their reports, the Commission will be able to exercise this function in respect of such law firms. The fact that law firms are not required to report on compliance is an additional shortcoming of the legislative framework governing B-BBEE that contributes to the slow pace of transformation in law firm ownership structures.

The B-BBEEA contains provisions relating to relief that may be obtained by aggrieved parties and the procedure to be followed to obtain relief where the provisions contained in the B-BBEEA

96 Section 13 (B)(3)(a) B-BBEEA.

97 Section 13 (F)(1)(a) B-BBEEA.

98 Section 13 (F)(1)(c) B-BBEEA.

99 Section 13(F)(1)(d) B-BBEEA.

100 Section 13(F)(1)(g) B-BBEEA.

101 Section 13(G)(1) B-BBEEA.

102 Section 13(G)(2) B-BBEEA.

103 Section 13(G)(3) B-BBEEA.

are contravened or in the event of there being any complaints regarding BEE. The Commission is empowered to investigate any matter that relates to the application of the B-BBEEA¹⁰⁴ and has the power to make a finding concerning whether an initiative amounts to a fronting practice.¹⁰⁵

Even though the LSC is in draft format, it is important to mention that in terms of the LSC, compliance is likely to be monitored by the Charter Council¹⁰⁶ which may be established by the Minister of Justice once stakeholders in the legal profession are consulted.¹⁰⁷ The Charter Council is likely to be responsible for reporting “all suspected incidents of fronting and fraudulent scorecards to the office of the B-BBEE Commission to enable investigation of any fronting and circumvention practices within the legal services profession.”¹⁰⁸ The function of the Charter Council “will not override the function of the Commission and in circumstances where there are any ambiguities in interpretation, the directives and/or decisions of the Commission will be final and binding”.¹⁰⁹

Returning to the B-BBEEA, section 13(O)(1) of the B-BBEEA states that

a person commits an offence if such a person knowingly:

- (a) misrepresents or attempts to misrepresent the broad-based black economic empowerment status of enterprise;
- (b) provides false information or misrepresents information to a B-BBEE verification professional in order to secure a particular broad-based black economic empowerment status or any benefit associated with the compliance of this Act;
- (c) provides false information or misrepresents information relevant to assessing the broad-based black economic empowerment status of an enterprise to any organ of state or public entity; or
- (d) engages in a fronting practice.¹¹⁰

The fact that the commission of fronting practices is an offence is a step in the right direction. The BEE Commissioner stated that “of the 822 complaints received since 2016, 687 (83.5%) dealt with fronting”,¹¹¹ thereby demonstrating that the administration of such practices remains a challenge. The fact that the deliberate misrepresentation or attempt to misrepresent the broad-based black economic empowerment status of an enterprise is an offence, is a positive enactment. However, while there is no obligation on law firms to comply with the B-BBEE Codes (except for the specific circumstances), this positive enactment will have little effect on law firms.

The B-BBEEA does provide for some sanctions. When a person knowingly engages in fronting practices, that person will be liable to pay a fine and/or be imprisoned for a period not exceeding

104 Section 13(J)(1) B-BBEEA.

105 Section 13(J)(3) B-BBEEA.

106 LSC para 10.6.1.

107 LSC para 10.2.

108 LSC para 10.7.7.

109 LSC para 10.9.

110 Section 13(O)(1)(a-d) B-BBEEA.

111 Department of Trade and Industry “More than 680 Cases of Fronting Place Pressure on Success of B-BBEE Act” <http://www.thedtic.gov.za/more-than-680-cases-of-fronting-place-pressure-on-success-of-b-bbee-act/> (accessed 02-12-2022); Liedtke “Fronting Still a Major Issue in Delivering on Economic Transformation, says Commission” <https://www.engineeringnews.co.za/article/fronting-still-a-major-issue-in-delivering-on-economic-transformation-says-commission-2020-10-22> (accessed 02-12-2022).

ten years or both a fine and imprisonment.¹¹² Measured entities that include legal sector measured entities may also face an administrative penalty of up to ten per cent of their annual turnover.¹¹³ The B-BBEEA contains several punitive measures, however, these measures are not always effective. This is because for some law firms who are required or choose to comply with the B-BBEE Codes, their main objective is to obtain or improve their BEE rating even where the provisions contained in the B-BBEEA and the B-BBEE Codes are contravened.¹¹⁴

6 CONCLUSION

The segregated education scheme that existed during apartheid made it arduous for black people to embark on a career in law. While the introduction of the single four-year undergraduate degree increased diversity of law students, it has not translated into a significant change in the demographics of law firms,¹¹⁵ particularly as far as the law firm ownership structure is concerned.

The legal framework governing BEE was promulgated *inter alia* to achieve a substantial change in the racial composition of the ownership structure of entities, such as law firms. While there has been a change in the racial composition of the ownership structure of law firms, there has not been a *substantial* change.

The first shortcoming of the legal framework that contributes to the slow pace of transformation of the ownership structure of law firms is that generally compliance with the B-BBEE Codes is voluntary for law firms. It is only where law firms fall within exceptional circumstances are they required to comply with the B-BBEE Codes. Compliance with the scorecards contained in the B-BBEE Codes should be compulsory for more law firms than is the case at present. It is recommended that compliance with the B-BBEE Codes should be based on the annual turnover of law firms and that an obligation should be placed on such law firms to obtain no less than a specified number of points in respect of each of the categories in the ownership scorecard so that more progress is made in achieving a substantial change to the racial composition of the ownership structure of such law firms.

As far as the priority elements are concerned, an LE is required to comply with all the priority elements, while a QSE is required to comply with ownership as a compulsory element and may choose to comply with either skills development as a priority element or enterprise and supplier development. The fact that LEs and QSEs are required to comply with the ownership element is a positive step, however while law firms are not always required to comply with the B-BBEE Codes, the fact that ownership is a priority element does not assist much in ensuring that a substantial change in the racial composition of the ownership structure of law firms is achieved.

The next shortcoming of the legal framework that plays a role in the slow pace of transformation of the ownership structure of laws is that higher points have been allocated to the enterprise and supplier development element than what has been allocated to the ownership element in both the Generic and QSE scorecards. In addition, in the QSE scorecard, the same number of points

112 Section 13(O) (3) B-BBEEA.

113 *Ibid.*

114 Manyathi-Jele “Report: Transformation of the Legal Profession” 2014 *De Rebus* 15. Fronting practices take place in law firms. It has also been reported that within law firms, black attorneys are required to attend meetings where their employers are pitching or tendering for work from potential clients, however once the work is obtained from the clients in question the black attorneys who were present to attract the clients are not included in the work that has been obtained. This illustrates that window dressing takes place in law firms, despite the prohibition against the commission of fronting practices. The information included in Manyathi-Jele’s report was obtained from a research report compiled by the Centre for Applied Legal Studies (CALs) and the Foundation for Human Rights.

115 LexisNexis ‘Legal Tech Report 2021/2022’ 18.

that have been allocated to the ownership element has been allocated to the skills development element (except for the bonus points that may be obtained for skills development). This may encourage law firms to comply more with the enterprise and supplier development element and skills development than with the ownership element after the sub-minimum requirement for the ownership element has been complied with. It is thus recommended that more points be allocated to the ownership element in both the Generic and QSE scorecards.

The final shortcoming of the legal framework governing B-BBEE that contributes to the slow pace of transformation of the ownership structure of law firms is the fact that law firms are not required to report on compliance. Since the B-BBEEA only requires public entities, spheres of government, organs of State, and public companies listed on the JSE to report on compliance and requires the Sectoral Education and Training Authorities to report on skills development spending and programmes, law firms are not required to submit such reports. As a result, the Commission will not be able to receive and analyse reports concerning BEE compliance from law firms. In circumstances, however, where such law firms comply with the B-BBEEA and the B-BBEE Codes and submit their reports, the Commission will be able to exercise this function in respect of such law firms. Since a law firm's compliance with the B-BBEE Codes is not always required, the Commission will also not be able to exercise any supervisory functions over such firms.

It is concerning that there is a slow pace of transformation of the ownership structure of law firms. This is especially concerning since a legislative framework exists governing BEE that aims to dismantle the inequalities caused by apartheid and aims to achieve a substantial change in the racial composition of the ownership structure of enterprises, such as law firms. Since this article shows that there are shortcomings of the legislative framework governing BEE that hinder the racial transformation of law firm ownership structures, amendments must be made to the relevant legislation to ensure that a substantial change to the racial composition of the ownership structure of law firms is achieved.