

# HAND IN



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Andrew Bizzell, who is a Director at the BEE Chamber, holds a BSc Hons from Oxford Brookes University. He has been at the forefront of driving B-BBEE since its inception as a Director of BEESA, as well as the Founder of the National Association of BEE Consultants (aka ABP), the Institute for Enterprise Development, the BEE Institute and the BEE Chamber. Andrew is committed to the support and development of BEE Practitioners with an inherent belief that economic transformation relies on the competence of those mandated to drive the process.

Are you aware that, for the most, B-BBEE Practitioners are the weakest link in terms of fulfilling the country's economic growth framework? Economists have established that increasing the diversity of shareholding, improving skills and expanding small business participation in supply chains are all components which could contribute to economic growth. However, only if it is done strategically by aligning with economic growth principles.

The BEE Act (The Act) has specific but broad, qualitative objectives which organisations and verification agencies generally choose to overlook in favour of the quantitative measurement benchmark of B-BBEE, namely The Codes of Good Practice (The Codes). However, subsequent amendments to The Act introduced a risk as to the legitimacy of an organisation's B-BBEE claims if they fail to recognise the link between The Act and The Codes. The consequence of failing to acknowledge the objectives of The Act could result in up to 10 years imprisonment and up to 10% of a Juristic Person's annual revenue.

Entrusted with defending the principles of The Act, The B-BBEE Commission is responsible for investigating activities that undermine or frustrate the objectives thereof.

The mandate of the Commission is not only to evaluate the registrar of ownership transactions and listed company reports, but to oversee, supervise and promote adherence to the B-BBEE Act. The mandate of the B-BBEE Commission is not to draft, implement or amend policies, but to provide interpretive guidance based on the objectives set out in the B-BBEE Act. Since being established in 2015, the B-BBEE Commission has increased its capacity and competence, thus increasing the risk to any individual or juristic person who engages in Fronting Practices.

The people at risk of being prosecuted for Fronting Practices include, but are not limited to, directors, managers, administrators and verification agency employees.

The Act leaves no place to hide for those flouting its mandate, as it defines a 'knowing person' as one that either had actual knowledge of a matter in question or was in a position in which they reasonably ought to have known. It extends to a 'knowing person's' obligation to investigate any matter in question to the extent that the outcome would have provided the 'knowing person' with the actual knowledge.

The question is, if checks and balances were in place would there be a different outcome? With such checks and balances in place would it be reasonable to assume that a 'knowing person' would, in effect, have had actual knowledge of the matter in question?

For the most part, organisations have failed to develop internal competencies that create and drive B-BBEE Strategies. Consequently, there is a massive over-reliance on external B-BBEE consultants, verification agencies, accountants and lawyers. The Act indirectly defines the Board of Directors, the Executive Committee members and management teams as 'knowing people'. Such 'knowing people', due to their limited technical understanding of B-BBEE, accept guidance from external advisers often without question. Subsequently, by the nature of what they do in their daily functions, they are 'knowing people' therefore, they are potentially personally liable and accountable if an organisation is found guilty of Fronting Practices. Considering the risk of exposure such 'knowing people' have while carrying out their daily duties, one would think that addressing such internal competencies would be a high priority for them.

Solid internal competency is essential as it mitigates the risks to 'knowing people'. To achieve this, it is necessary to develop such people through high-quality broad theoretical training on all areas of B-BBEE legislation. The Development Team at the BEE Chamber is finalising training material that will mitigate the risk factors to a 'knowing person'. The course will be tailor-made to guide 'knowing people' to identify red flag areas, equip them to ask the right questions and open an avenue where they can gain an independent opinion on any issue of concern. However, most importantly it will provide insight into how The Act and The Codes align and work together.

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## THE ACT & THE CODES

The aim of developing a training model for 'knowing people' is to help organisations build internal competency so they can make informed decisions confidently. It is imperative that 'knowing people' have the ability to create a control point so they can manage the B-BBEE process without being exposed to Fronting Practices.

Core to mitigating such risk is introducing checks and balances on the processes in line with policy and procedure. This operational governance is imperative so that every 'knowing person' is secure in the claims they present for a B-BBEE Audit.

Examples of typical Fronting Practices that 'knowing people' should be fully aware of include, but are not limited to:

### Ownership

- > Fictitious Voting Rights claims whereby 'Black' People do not exercise these rights;
- > Economic Interest claims with limitations on the utilisation of dividends;
- > Net Value claims where 'Black' People do not benefit from the underlying value of their shareholding;
- > Voting Rights claims of 'Black' People on the Board of Directors where such 'Black' People are not afforded these rights.

### Skills Development

- > Expenditure claims for 'Black' persons living with disabilities whereby they do not meet the criteria of persons with a disability as defined in the Codes of Good Practice on Key Aspects of Disability in the Workplace issued under section 54 of the Employment Equity Act;
- > Failing to confirm that the content of informal training is indeed training in line with the requirements of the Learning Programme matrix. (please see page 24).

### Enterprise & Supplier Development

- > Preferential Procurement expenditure with suppliers that do not qualify as an EME or QSE, otherwise suppliers that are 51% 'Black'-owned, 30% 'Black'- Women-owned or 51% 'Black' Designated Group Suppliers.
- > Preferential Procurement expenditure where B-BBEE Certificates, presented by organisations without the resources to deliver, form part of the overall claim.
- > Enterprise Development and Supplier Development claims where Beneficiaries do not qualify as per the criteria, or contributions did not meet the required objectives.

### Socio-Economic Development

- > Claims where the status of the Beneficiaries is not confirmed;
- > Contributions where the requirements did not meet the criteria.

In conclusion, my advice to all 'knowing people' is always ascertain whether the B-BBEE advice you act on is indeed substantiated and aligns with both The Act and The Codes, whether or not it is for free or if you are paying for it. Be cognisant of the consequences of taking advice that cuts corners. Essentially, organisations should treat their B-BBEE Audit just as they would their financial audit by understanding the dynamics, using qualified suppliers and adhering to legislation in a meaningful and ethical manner.

*Contact [info@bee.co.za](mailto:info@bee.co.za) for more videos, weekly webinars and support or advice on internal competencies.*