

Returns to a Broader Base?

Presentation by

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B-BBEE Commissioner

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YES!

Question

Can Trusts, broad-based ownership schemes (BBOS) and employee share ownership schemes (ESOPS) contribute to the development of objectives of the B-BBEE Act?

Mandate of the B-BBEE Commission

- Monitor, supervise and promote adherence in the interest of the public
- Strengthen collaboration between private and public sectors to safeguard the objectives
- Receive complaints or initiate investigations
- Promote advocacy, access to opportunities and educational programmes
- Maintain register of major B-BBEE transactions (R25 million threshold)
- Receive and analyse prescribed reports (JSE listed entities, SETA, Public Entities, Organs of State)
- Promote good corporate governance and accountability
- Increase knowledge and public awareness (guiding, declaratory order, researching)

Major B-BBEE Transactions

- Section 13F(1)(f) of the B-BBEE Act requires the B-BBEE Commission to maintain a registry of major B-BBEE transactions. Regulation 18 guides the process.
- These are transactions with the value of which equals or exceeds twenty-five million rands (R25 million) excluding administration, professional and legal fees, and limited to Statement 100 and 102 of the Codes of Good Practice.
- The major B-BBEE transaction must be submitted for registration within 15 days of conclusion.
- This does not amount to a pre-approval of the said major B-BBEE transaction, but it will be tested for compliance with the B-BBEE Act upon registration.

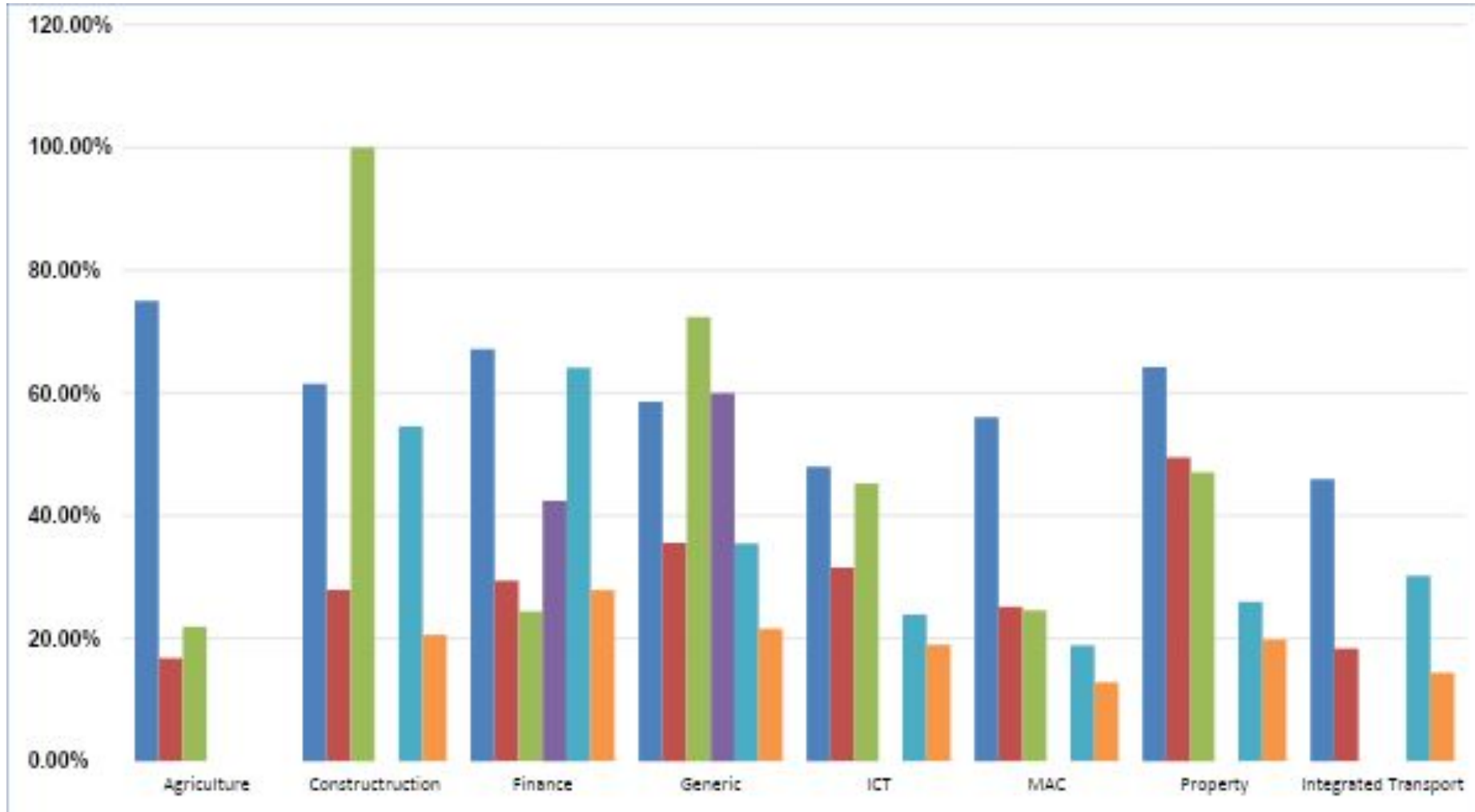
Major B-BBEE Transactions per Sector

Sectors	No. of Transactions Registered	No. of Transactions Registered	Growth
	2017/18	2018/19	
Agri-BEE	7	4	-3
Construction	4	6	2
Financial	63	21	-42
Generic	132	41	-91
Forestry	0	0	0
ICT	18	9	-9
MAC	6	4	-2
Property	8	5	-3
Tourism	14	0	-14
Transport	20	5	-15
Total	272	95	- 177

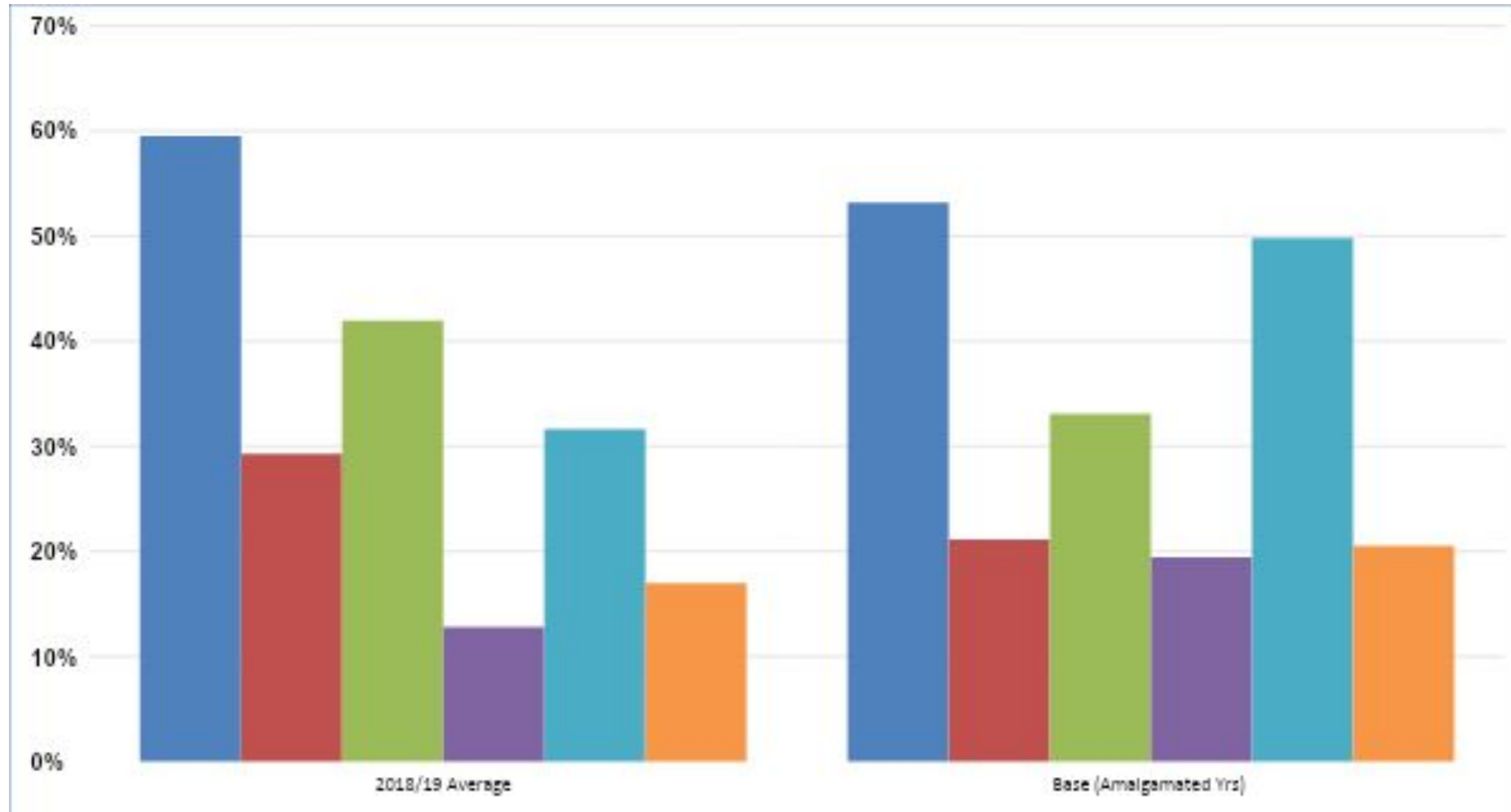
Transaction Value per Sector (Billion R)

Sector Code	2018/19 Transactions			Amalgamated Base		Movement
Agriculture	0,523	0%		2,252	1.2%	-R1,73
Construction	2,814	3%		0,352	0.2%	R2,46
Financial	44,155	39%		16,074	8.5%	R28,08
Generic	40,966	37%		78,091	41.4%	-R37,13
ICT	17,4	16%		19,896	10.5%	-R2,50
MAC	3,48	3%		0,632	0.3%	R2,85
Property	0,724	1%		9,037	4.8%	-R8,31
Tourism	0	0%		58,047	30.8%	-R58,05
Integrated Transport	1,876	2%		4,363	2.3%	-R2,49
Total	111,938	100%		188,745	100.0%	-R76.81

Major B-BBEE Transactions Findings



Ownership Comparison 2017/18 vs 2018/19



Summary of National Status Report

National Status and Trends on B-BBEE Report Summary		2017	2018	2019
Submitted Reports	JSE	51% (401)	43% (371)	42% (356)
	Organs of State & SOEs	1% (290)	10% (290)	15% (290)
	B-BBEE Certificate Portal	2861	1674	5818
Overall Ownership <i>(Overall include B-BBEE Certificate data information)</i>		27%	25%	29%
Overall Black Women Ownership <i>(Overall include B-BBEE Certificate data information)</i>		9%	10%	12%
JSE Listed Entities Average Black Ownership		29%	25%	31%
100% black owned entities on the JSE		1%	1%	3%
Management Control <i>(Overall include B-BBEE Certificate data information)</i>	JSE	38%	38%	44%
	Organs of State & SOEs	N/A	79%	68%
	Overall Management Control	43%	45%	39%
Skills Development <i>(Overall include B-BBEE Certificate data information)</i>	JSE	35%	63%	59%
	Organs of State & SOEs	N/A	64%	41%
	Overall Skills Development	37%	49%	49%
Enterprise and Supplier Development <i>(Overall include B-BBEE Certificate data information)</i>	JSE	47%	70%	59%
	Organs of State & SOEs	N/A	47%	59%
	Overall Enterprise and Supplier Development	44%	60%	51%
Socio-Economic Development <i>(Overall include B-BBEE Certificate data information)</i>	JSE	79%	92%	89%
	Organs of State & SOEs	N/A	65%	53%
	Overall Socio-Economic Development	88%	71%	68%
B-BBEE Rating Level 4 - Level 1	JSE	41%	51%	49%
	Organs of State & SOEs	N/A	45%	33%
B-BBEE Rating Level 5 - Non-Compliant	JSE	48% <i>(12% No data)</i>	45% <i>(5% No data)</i>	51%
	Organs of State & SOEs	N/A	55%	67%

B-BBEE Ownership

Objective: Achieve a **substantial change** in the **racial composition of ownership and management** structures of existing and new enterprises.

- Priority element – 40% sub-minimum on **NET VALUE**.
- Focus on ownership of enterprises and assets through shares and other instruments that provide the holder thereof with voting rights and economic benefits.
- Emphasis on control and participation. Therefore, need to guard against fronting because passive ownership is not sufficient to bring about real transformation.

B-BBEE Ownership

Exercisable Voting Rights

Exercisable voting rights means a voting right of a participant which is not subject to any limitation.

The rights of a shareholder to vote in meetings or in respect of decisions based on the number or percentage of shares held and the rights associated with the class of those shares in the entity.

B-BBEE Ownership

Economic Interest

Economic interest refers to a claim against the measured entity representing a return on ownership of the entity similar in nature to a dividend right, measured using the flow through and where applicable, the modified flow through principles.

This includes the rights of a shareholder to receive dividends and capital gains or growth.

B-BBEE Ownership

Net Value

Net value in the hands of black people as a result of either direct or indirect participation in the measured entity (which considers aspects such as loan repayments and issuance of dividends to ensure repayment of the loan amount in the event the shares to the black participants were acquired by means of a loan, guided by a formula and time-based graduation factor).

This envisages a vesting of ownership rights upon fulfilment of loan obligations, which rights are unencumbered, which means the owner can make own decisions about the underlying asset.

B-BBEE Ownership

Ownership Instrument/Vehicles

The ownership scorecard for practical reasons permits the measured entity in promoting ownership and management of new or existing enterprises by black people, to recognise B-BBEE ownership held by or through a Trust, BBOS or ESOP.

Black people may hold their rights of ownership in a measured entity as participants through some form of entity, including trust, BBOS, ESOP and any form of juristic person recognized under the law.

B-BBEE Ownership

Ownership Instruments/Vehicles

Implementation of ownership through a Trust, BBOS or ESOP must preserve the three (3) ownership criteria as well as the rights and obligations of **black participants** as indirect shareholders in the measured entity, and must afford such shareholders the right to exercise own discretion in relation to the benefits attached to their right of ownership. In addition, a Trust, ESOP or BBOS must adhere to the additional rules prescribed in the relevant Annexes of Statement 100 (Annexes B-D).



B-BBEE Ownership

Ownership Instruments/Vehicles

The term “participant” is defined as a natural person holding **rights of ownership** in a measured entity. Thus when measuring ownership through a BBOS, Trust or ESOP, the ownership rights of the participant are measured not the vehicle housing the scheme.

It follows therefore that the “participant” must meet the definition of “**black people**” in section 1 of the B-BBEE Act. On founding documents a defined class of people can be included to satisfy identification, but, it must link back to a participant (natural person) who meets the definition of black people must be found.

B-BBEE Ownership

Specialised Entities

Specialised entities such as NPCs/NPOs/PBO are measured under Statement 004 , and do not have beneficial ownership and are measured using the specialized score card.

But if it houses a BBOS or ESOP as per paragraph 3.11 of Statement 100, it can contribute to ownership of measured entity but must comply with the three ownership criteria and applicable rules as per Annexe 100 (B)-(D).

B-BBEE Ownership

In assessing the ownership structures the B-BBEE Commission identified the following concerns

- The difficulty to trace the **actual real black** beneficiary in the number of transactions registered.
- Most of the trusts presented do not satisfy the **requirements** of the ownership scorecard.
- The funding **arrangements extend the control** of the funder beyond what is reasonable to secure the funding.

B-BBEE Ownership

- There is also an increased trend in **limiting the ownership** rights through the application of one-sided clauses such non-compete clauses.
- Most of the black shareholders, especially when the shares are held through a trust are not able to **participate in the appointment of board of directors**.
- The inclusion of provisions that **limit the flow of economic** interest to black people, e.g. **preference shares** acquired, **dividend policy**, linking dividends to **share price** or **loan repayment**.

B-BBEE Ownership

Specific challenges regarding BBOS, ESOPs and Trusts

- **Lack of independence** as measured entities founders and involved in affairs and decisions of scheme
- No **record of participants** to test qualification to definition of participant and black people
- No **flow of economic interest** to participants who are effective owners of the asset, including restricted use of economic interest flowing
- No evidence of **exercisable voting rights** demonstrated from participants to the measured entity claiming black ownership
- Use of **charities or discretionary trusts** for ownership element instead of SED/ESD or skills development

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