

# The Broad-Based Black Economic Empowerment Act 53 of 2003 and the ways in which the commission of fronting practices affects the achievement of its objective

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## Résumé

La loi no 53 de 2003 sur l'autonomisation économique élargie des Noirs est l'une des mesures prises en vue de promouvoir le droit à l'égalité qui est inscrit dans la Déclaration des Droits de la Constitution de la République sud-africaine. Son objectif est donc d'équilibrer le terrain économique sur lequel jouent les Noirs et les Blancs en Afrique du Sud. L'autonomisation économique élargie des Noirs est une initiative gouvernementale pour permettre aux Noirs de participer pleinement dans l'économie. La loi était promulguée notamment pour faciliter une autonomisation économique élargie des Noirs en apportant des changements en profondeur dans la composition raciale des structures de propriété et de gestion ainsi que dans les emplois qualifiés des sociétés existantes et nouvelles. La question qui se pose est de savoir si un tel objectif est en train d'être atteint et quel rôle la Commission de contrôle des pratiques malhonnêtes joue pour atteindre cet objectif. Les statistiques montrent que cet objectif est encore loin d'être atteint et la Commission joue plutôt un rôle négatif dans sa réalisation.

## Abstract

The Broad-Based Black Economic Empowerment Act 53 of 2003 is one of the statutes enacted to promote the right to equality, which is enshrined in the Bill of Rights of the Constitution of the Republic of South Africa. It is therefore aimed at balancing the economic playing field of black and white people in South Africa. Broad-based black economic empowerment is a governmental policy initiated to enable the black people to participate in the economy meaningfully. The Act was promulgated *inter alia* to facilitate broad-based black economic empowerment by achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises. The issue that arises is whether this objective is being achieved and how the Commission of fronting practices affects the achievement of this objective. Statistics show that this objective is not being achieved and that the Commission of fronting practices plays a negative role in its achievement.

**Key Words:** Broad-Based Black Economic Empowerment Act 53 of 2003; Black Economic Empowerment; Constitution of 1996; Equality; Fronting practices; South Africa

## Introduction

Parliament enacted equality legislation to redress the imbalances caused by apartheid in South Africa. The Broad-Based Black Economic Empowerment Act 53 of 2003 ('B-BBEEA') is the legislative framework which governs black economic empowerment ('BEE'). BEE is defined as "a specific government policy to advance economic transformation and enhance the economic participation of black people in the South African economy" (Kruger 2011: 209). According to Osode, BEE is

a process aimed at strategically transforming the South African economy by *inter alia* spreading equity holdings to incorporate previously disadvantaged South Africans, re-organising management structures and ensuring greater participation of the majority in the economy to achieve economic justice (Osode 2004: 108).

BEE is seen as necessary to remedy the economic imbalances, which occurred because of apartheid (Ncwadi, Onceya & Siswana 2014: 268). Subsequent to the 1994 elections, discussions were held to determine what the appropriate mechanisms were to pursue BEE (Horwitz & Jain 2011: 301). A Broad-Based Black Economic Empowerment Commission ('B-BBEECom') was established in May 1998 to determine which barriers existed to "black participation in the economy and to propose a viable BEE strategy" (Horwitz & Jain 2011: 301). The B-BBEECom recommended that national legislation be enacted to facilitate BEE, which resulted in the B-BBEEA (Horwitz & Jain 2011: 301).

The B-BBEEA was enacted in terms of section 9(2) of the Constitution, which makes provision for legislation to be enacted in order to achieve equality and to remedy historical imbalances. As time progressed, BEE had different meanings. However, two dominant approaches emerged the minimalist approach and the maximalist approach. As far as the minimalist approach is concerned, this approach

emphasises a proportional representation of previously marginalised groups of people in the public and private sectors. It focuses BEE discourse and practice on the career mobility or advancement of black managerial, professional and business ranks (Gqubule 2006: 5).

Career mobility or the advancement of black professionals and those on managerial levels is important in order to change the composition of the structures who not only manage enterprises, but also those who own enterprises. The minimalist approach defines BEE in terms of the creation of a black business class (Gqubule 2006: 5). This implies that BEE takes place every time a group of black individuals secures government tenders or obtains share certificates in previously white businesses (Daniel & Southgate 2006: 456).

This approach emphasises the “distribution of the positions of the privileged between a few people within existing structures” (Daniel & Southgate 2006: 456). It “does not seek to alter the conditions that simultaneously engendered privileges on the one hand and sustained exploitation and marginalisation of the majority on the other. Rather, it seeks to alter the racial composition of privileges and exploitations to create a new circuit of racial capital accumulation. A minimalist approach promotes the empowerment of a few black individuals and the disempowerment of the majority of the black population who do not have access to the new circuit of racial accumulation” (Gqubule 2006:5). While this approach may not promote the empowerment of the majority of black people, it does promote the empowerment of black professionals.

The maximalist approach to BEE on the other hand entails restructuring on a wide scale involving an improvement of the conditions of the majority as well as more inclusive decision-making (Daniel & Southgate 2006: 456). The maximalist approach

entails the generation and redistribution of resources to the vast majority of the people, ranging from skills and educational training to land redistribution. Additionally [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 (Gqubule 2006: 11).

The B-BBEECom decided to adopt the maximalist approach (Gqubule 2006: 11). BEE should thus be viewed within the broad scope of empowerment processes which includes *inter alia* meaningful ownership, skills and management development, rural development, specific measures to empower black females and job creation (Gqubule 2006: 11). Meaningful ownership refers to a change in the racial composition of ownership structures of both existing and new enterprises (B-BBEEA: section 2(b)). Skills and management development refers to the increase in access to economic activities and skills training (B-BBEEA: section 2(c)). Rural development entails the empowerment of both rural and local communities by enabling access to economic activities, land, infrastructure, ownership and skills (Musahara 2016: 128). Women should also be empowered to own and manage enterprises and to increase their access to economic activities, skills training and infrastructure (B-BBEEA: section 2(d)). Job creation consists of the promotion of economic transformation to enable black people to participate in the economy meaningfully (B-BBEEA: section 2(1)).

The B-BBEEA contains a number of objectives. However, this article is limited to a discussion on the objective contained in section 2(b) of the B-BBEEA. The purpose of this article is to determine whether the objective contained in section 2(b) of the B-BBEEA has been achieved and how the commission of fronting practices affects the achievement of this objective.

In order to address the aforementioned, this paper will commence by providing a discussion on the application of BEE, after which the objective contained in section 2(b) of the B-BBEEA will be discussed. This will be followed by an assessment to determine whether the objective contained in section 2(b) of the B-BBEEA has been achieved. The paper will then proceed to a discussion on fronting practices as well as the legislative efforts made in order to prevent fronting practices from taking place.

### **Broad-Based Black Economic Empowerment**

BEE is aimed at “effecting a more equitable distribution of economic wealth and has been branded as the essential second wave of transformation after democratisation” (Balshaw & Goldberg 2014: 13). The beneficiaries of BEE are black people.

“Black people” is “a generic term which means Africans, Coloureds, Indians and Chinese who are citizens of the Republic of South Africa by birth or descent; or who became citizens of the Republic of South Africa by naturalisation before 27 April 1994, or on or after 27 April 1994 and who have been entitled to acquire citizenship by naturalisation prior to that date” (B-BBEEA: section 1).

Unlike other legislative enactments, compliance with the legislation governing BEE is voluntary insofar as the private sector is concerned. However, BEE affects almost every participant in the South African economy one way or another (Balshaw & Goldberg 2014: 14). The practical working of BEE requires an enterprise to measure its BEE status in order to obtain a rating (Seate & Pooe 2016: 696).

The Codes of Good Practice enacted in terms of the B-BBEEA (‘B-BBEE Codes’) contain various scorecards, which are utilised by enterprises to obtain a BEE rating. The B-BBEE Codes refer to the enterprises that make use of the B-BBEE Codes to calculate their BEE ratings as “measured entities”. The BEE rating is used by the measured entity's customers, to whom goods are supplied and/or services are rendered, as a basis upon which service providers are chosen (Balshaw & Goldberg 2014: 17). The level of a measured entity's rating is important by the virtue of the fact that it provides a competitive advantage in circumstances where entities are competing for the same business. It is for this reason that enterprises are choosing to have a BEE rating, even in circumstances where compliance is voluntary.

Enterprises give BEE serious consideration since it has become an issue which is relevant in obtaining business and in the retention thereof (Balshaw & Goldberg 2014: 25), one example being tenders for government work where it is imperative for an enterprise to have a competitive BEE rating (Seate & Pooe 2016: 697). The B-BBEEA and the Preferential Procurement Policy Framework Act 5 of 2000 (‘Procurement Policy Act’), together with its Regulations provide “the parameters within which organs of state may give preferential treatment to historically disadvantaged suppliers when making procurement decisions” (Marais & Coetzee 2016: 113).

At times compliance is a prerequisite in order to obtain and secure business (Horwitz 2011: 309) even in circumstances where government work is not being obtained. Such circumstances arise where private companies seek to obtain business from other private companies who require their service providers to be BEE compliant. This is similarly the case in a number of transactions with financial institutions that are reluctant to lend funds or to provide business to non-compliant enterprises (Horwitz 2011: 309). In order to determine whether the objective contained in section 2(b) of the B-BBEEA has been achieved, it is necessary to outline what this objective entails.

### **Section 2(b) of the Broad-Based Black Economic Empowerment Act 53 of 2003**

The main objective of the B-BBEEA is to ensure that wealth is distributed across as broad a spectrum of previously disadvantaged South Africans as possible.

In terms of section 2(b) of the B-BBEEA, the B-BBEEA was enacted in order to facilitate broad-based black economic empowerment by achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises. Statistics have been extracted from the reports compiled by the Department of Labour and the B-BBEE Commission to illustrate whether the said objective has been achieved.

#### **The statistics**

The tables below reflect the percentages of race groups in ownership structures, top and senior management structures of enterprises as well as on the skilled levels to determine whether the objective contained in section 2(b) of the B-BBEEA has been achieved.

**Table 1:** Percentages of race groups on ownership levels (B-BBEE Commission 2019: 71)

Description	Black ownership 2017	Black ownership 2018
Agriculture	11.64	14
Financial Sector	19.06	18.5
Forestry	43.03	39.10
Generic Codes	12.28	25
Information communication Technology sector	23.31	24.7
Integrated transport sector	31.51	26
Property sector	81.19	14
Tourism sector	15.17	40.50

The table above shows that in 2017 the percentage of black people on the ownership level was low, with the exception of the property sector. However, even within the property sector the percentage of black people on the ownership level decreased considerably by 2018, thus indicating that there has not been a substantial improvement in the racial composition of ownership structures.

**Table 2:** Percentages of race groups in top management (Department of Labour 2013 – 2014: 15; Department of Labour 2016 – 2017: 12; Department of Labour 2018 – 2019: 20)

Top Management	2003	2005	2007	2009	2011	2013	2016	2018
Whites	76.3	72.6	68.2	63.8	65.4	62.7	68.5	66.5
Africans	14.9	17.9	18.8	20.3	18.5	19.8	14.4	15.1
Coloureds	4	3.7	3.9	5.0	4.8	5.1	4.9	5.3
Indians	4.9	5.6	6.1	6.9	7.5	8.4	8.9	9.7

**Table 3:** Percentages of race groups in senior management (Department of Labour 2013 – 2014: 16; Department of Labour 2016 – 2017: 17; Department of Labour 2018 – 2019: 25)

Senior Management	2003	2005	2007	2009	2011	2013	2016	2018
Whites	72.7	72.4	65	61.9	59.1	57	58.1	54.4
Africans	14.2	14.5	18.1	20	12.8	23	22.1	23.2
Coloureds	6.3	6	6.1	6.4	7	7	7.7	8
Indians	6.8	7	8.2	9.1	9.6	10.1	10.6	11.1

The tables above show that since 2003 there has been a decline in the percentage of white people occupying positions at the levels of both top management and senior management (except during 2016). In addition, it shows that the percentage of African people at both the levels of top management and senior management has increased (except during 2011 and 2016); however, they remain under-represented. Tables 2 and 3 show that there has not been a substantial change in the racial composition of management structures.

**Table 4:** Percentages of race groups on the professionally qualified level (Department of Department of Labour 2013 – 2014: 17; Department of Labour 2016-2017: 21; Department of Labour 2018 - 2019: 29)

Professionally qualified level	2003	2005	2007	2009	2011	2013	2016	2018
Whites	49.2	61.3	57.2	43.7	42.3	40.6	37.5	37.4
Africans	39	38.8	24.1	32.8	36.3	38.4	41.5	40.2
Coloureds	6.1	9.3	8.5	13.5	10.2	9.6	9.7	10
Indians	5.5	7.9	8.7	8.1	9.1	9.4	8.5	9.4



**Table 5:** Percentages of race groups on the skilled technical level  
(Department of Labour 2013 – 2014: 18; Department of Labour 2016-2017: 26; Department of Labour 2018 - 2019: 34)

Skilled level	2003	2005	2007	2009	2011	2013	2016	2018
Whites	38.2	37.9	35.6	24	24	22	20.8	18.5
Africans	42.1	38.8	44.1	57	57	59.2	60.2	63.3
Coloureds	12.9	17	12.8	11.5	11.5	11.3	11.5	11.2
Indians	6.8	6.2	6.7	6.2	6.2	5.9	5.8	5.4

The tables above show that there has been a decline in the percentage of white people on the professionally qualified (except during 2005) and skilled technical levels. While there has been a decline in the percentage of Coloured (except during 2005 and 2016) and Indian people (except during 2007), there has been an increase in the number of African people (except during 2005) on the skilled technical level. As far as the professionally qualified level is concerned, there has been an increase in the percentage of African people (except during 2005 and 2007). Tables 4 and 5 illustrate that there has not been a substantial improvement in the representation of African, Coloured and Indian people on the professionally qualified level and within skilled technical occupations respectively.

When one considers the slow rate at which change in the racial composition of the ownership and management structures of enterprises as well as in skilled occupations is taking place, it is understandable that the objective contained in section 2(b) has been included in the B-BBEEA. The figures reflected in the tables above illustrate that the objective contained in section 2(b) of the B-BBEEA has not been achieved. Fronting practices and the ways in which fronting practices affect the achievement of the objective contained in section 2(b) of the B-BBEEA are discussed below.

### **The commission of fronting practices**

Some enterprises have been accused of contravening the B-BBEEA deliberately by misrepresenting facts about the extent of their compliance (Sibanda 2015: 24).

Fronting is seen as “tokenism for the superficial inclusion of historically disadvantaged individuals with no actual transfer of wealth or control” (M’Paradzi & Kalula 2007: 41). What this implies practically is that regulatory requirements are manipulated to such an extent that it amounts to fraud (M’Paradzi & Kalula 2007: 41).

Fronting practices are defined by the B-BBEEA as “a transaction or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEEA or the implementation of any of the provisions of the B-BBEEA including, but not limited to practices in connection with a BEE initiative” (B-BBEEA: section 1). The B-BBEEA lists a number of practices, which fall within the definition of fronting practices.

The commission of fronting practices frustrates and undermines the achievement of the objectives set out in the B-BBEEA or its implementation, because the objective of an enterprise committing a fronting practice is to create the impression that the enterprise is BEE compliant when this is not in fact the case, or to create the impression that an enterprise has a BEE recognition level higher than what that enterprise is entitled to.

The wording used by the legislature in the definition of fronting is broad. It comprises the three most commonly known forms of fronting namely window dressing, benefit diversion and the use of opportunistic intermediaries (Warikandwa & Osode 2017: 17). The meaning of window dressing is covered by the wording used in subsection (a) of the definition of fronting (Warikandwa & Osode 2017: 17). Window dressing is where black persons “who are appointed to a position in an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise” (B-BBEEA: section 1 (a)). This could involve appointing or promoting black people to senior positions without them having the necessary skills or experience and/or without providing them with work while in such positions (M’Paradzi & Kalula 2007: 41).

The impression is provided that the black person will be involved in certain work, however the black person in question is not provided with the opportunity to demonstrate his or her skills. An example of window dressing is found in the facts which formed the subject matter of the case of *Peel and others v Hamon J&C Engineering (Pty) Ltd and Others*. In this case Hamon & Cie (International SA) sold its shares in Hamon SA (Pty) Ltd to two black women to improve the BEE rating of Hamon SA (Pty) Ltd (Peel 2013: para 17).

In terms of the Agreement for the sale of shares concluded between the parties, 13% of the shares in the company were sold to each woman (Peel 2013: para 17). The two black shareholders did not participate in any decision-making processes of the company (Peel 2013: para 19). Hamon & Cie (International SA) subsequently repurchased the shares from the two black women (Peel 2013: para 31).

In the case of *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd and Another*, a complaint was lodged by Hydro-Tech that historically disadvantaged individuals were not remunerated or allowed to “participate in the management of Viking to the degree commensurate with their shareholding and their positions as directors” (Viking 2010: para 7). As a result, the Constitutional Court ordered that an investigation be launched into the alleged fraudulent conduct (Viking 2010: 59). These cases show that at times black people form part of ownership or management structures, however such black people are not always allowed to participate in the decision-making processes of the enterprises concerned.

The meanings of benefit diversion and opportunistic intermediaries are covered by the wording used in subsections (b) and (d) of the definition of fronting respectively (Warikandwa & Osode 2017: 17). Benefit diversion includes “initiatives implemented where economic benefits received by an enterprise as a result of its BEE status fail to flow to black people in the ratio which is specified in relevant legal documents” (BBBEEA: section 1(b)).

Opportunistic intermediaries include enterprises who have concluded agreements with other enterprises with the objective of “leveraging the opportunistic intermediary’s favourable BEE status” (Warikandwa & Osode 2017: 17) where the agreement concluded involves “significant limitations or restrictions on the identity of the opportunistic intermediary’s suppliers, service providers, clients or customers; the maintenance of their business operations in a context reasonably considered improbable having regard to resources and terms and conditions that are not negotiated at arm’s-length and on a fair and reasonable basis” (B-BBEEA: section 1(d)).

In the *Viking* case discussed above, Viking was characterised as being an opportunistic intermediary for tender procurement, because the actual benefits which were derived from tenders awarded to Viking were in fact channelled to a company known as Bunker Hills (Pty) Ltd (Viking 2010: para 9).

BEE has been said to have become a system of redistribution of wealth as opposed to being a process, which draws black people into productive activity as owners of capital. Minister Davies has been quoted as stating that

the initial intention was that if you are a newcomer, you go into a partnership and there is active learning. But in practice there are deals made on paper and black people are not involved in its operations...Instead of an active partnership that empowers people to become real players, BEE has been for too few people and based too much on ownership. When people do a deal they think they are getting a partnership, but when they look at the fine print they find out that they are not (Paton 2011: 1).

Davies refers to this as sophisticating fronting (Paton 2011: 1).

In circumstances where window dressing takes place, where black people are appointed to positions, but are prevented from demonstrating their skills, there is a possibility that the black people who are victims of such practices will be ineligible for future promotions to more senior management positions. This ineligibility may arise as a result of black people not being allowed to demonstrate their skills in the position which constituted window dressing. It has been reported that window dressing is a reason for black employees leaving enterprises (Centre for Applied Legal Studies: 43). This would have a negative effect on the percentage of black people who occupy positions on management and ownership levels and those who form part of skilled occupations. Benefit diversion also affects black people negatively. Benefit diversion not only results in black people not receiving economic benefits which they are entitled to, but this failure to receive such benefits may also result in black people choosing to leave enterprises who employ them.

In the *Peel* case discussed above, the company may have received economic benefits due to the company's improved BEE rating. If legal documents existed which made provision for the two black females concerned to have received economic benefits, the two black females would not have received some or all of the economic benefits as a result of their shares being repurchased. Practices such as these have a negative effect on the percentage of black people who form part of the ownership structures of enterprises.

Fronting practices such as window dressing and benefit diversion negatively affect the percentage of black people who form part of management and ownership structures, as well as skilled occupations.

Where enterprises commit fronting practices, this negatively affects not only the already low percentages of black people reflected as occupying positions on the ownership and management levels as well as in skilled occupations, but also negatively affects the achievement of the objective contained in section 2(b) of the B-BBEEA. The B-BBEEA does make provision for a number of enforcement measures that are available in the event of an enterprise being involved in the commission of fronting practices. These measures are discussed below.

#### **Enforcement measures enacted by the B-BBEEA**

The B-BBEEA establishes an advisory council (B-BBEEA: section 4). The council reviews the progress made in achieving BEE in order to make policy recommendations to address any challenges that are experienced by black people and enterprises insofar as BEE implementation is concerned.

The B-BBEEA also establishes a Broad-Based Black Economic Empowerment Commission ('B-BBEE Commission'). The Commission is mandated to

oversee, supervise and promote adherence with the B-BBEEA, to strengthen and foster collaboration between the public and the private sector in order to promote and safeguard the objectives of the B-BBEEA, to receive complaints relating to BEE, to investigate either on its own initiative or in response to complaints received any matter concerning BEE, to promote advocacy, access to opportunities and educational programmes and initiatives of BEE, to maintain a registry of major BEE transactions above a threshold determined by the Minister, to receive and analyse such reports as may be prescribed concerning BEE compliance from organs of state, public entities and private sector enterprises, to promote good governance and accountability by creating an effective environment for promotion and implementation of BEE and to exercise such powers which are not in conflict with the B-BBEEA (B-BBEEA: section 13F (i) – (i)).

With reference to the functions of the B-BBEE Commission, a commissioner of the B-BBEE Commission has stated that “we are here to fill the monitoring gap that existed since 2003 and to make sure that black economic empowerment really does take place and that it benefits the many and not the few. We are also here to ensure that the mistakes of the recent past are not repeated” (Ntuli 2018: 1). The B-BBEE Commission was established in 2016 with the main objective of combating fronting practices (Ntuli 2018: 1).

Compliance with the provisions governing BEE is voluntary, however organs of state, public entities (B-BBEE Codes 2013: para 3.1.1) and all measured entities which undertake any financial activities with public entities are required to be BEE compliant (B-BBEE Codes 2013: para 3.1.2). The B-BBEEA places an obligation on spheres of government, public entities, organs of state, public companies listed on the Johannesburg Stock Exchange and all Sectoral Educational and Training Authorities contemplated in the Skills Development Act 97 of 1998 to report to the Commission on their compliance with BEE (B-BBEEA: section 13G).

In the event of contraventions of the B-BBEEA or any complaints regarding BEE, the B-BBEEA has included provisions relating to relief, which may be obtained by aggrieved parties and the procedure to be followed to obtain the said relief. As regards the procedure, a complaint may be lodged with the B-BBEE Commission in a form prescribed by the B-BBEEA (B-BBEEA: section 13F (2) (a)). Complaints may be investigated by the B-BBEE Commission both on receipt of a complaint and on the B-BBEE commission's own initiative (B-BBEEA: section 13J (1)). The procedure and format of the investigation must be determined by the B-BBEE Commission in which case the circumstances of the particular case are taken into consideration (B-BBEEA: section 13J(2)). The B-BBEE Commission may make a finding on whether any BEE initiative involves a fronting practice (B-BBEEA: section 13J (3)).

Legal proceedings may be instituted in a court by the B-BBEE Commission to restrain any breach of the B-BBEEA, “including any fronting practice, or to obtain appropriate remedial relief” (B-BBEEA: section 13J (4)). In the event of the B-BBEE Commission being of the view that the investigated matter involves the commission of a criminal offence, the B-BBEE Commission must refer the matter to an appropriate division of the South African Police Service, or the National Prosecuting Authority (B-BBEEA: section 13J(5)).

The B-BBEE Commission may refer any concerns regarding behaviour or conduct that may be prohibited or regulated by legislation to the South African Revenue Service (B-BBEEA: section 13(J)(6)(a)) or any regulatory body where the B-BBEE Commission has conducted an investigation and justifiable reasons exist for the B-BBEE Commission to do so (B-BBEEA: section 13(J)(6)(b)).

The B-BBEE Commission has the power to publish any recommendation or finding on the investigation which was conducted (B-BBEEA: section 13(J)(7)(a)). The B-BBEE Commission may issue a summons to any person who is believed to be able to furnish information on the investigation conducted or to be in possession of any book or document that has any bearing on the investigation, to appear before the B-BBEE Commission (B-BBEEA: section K(1)(a)).

In terms of section 13(O) (1) (a) of the B-BBEEA, a person commits an offence by knowingly either misrepresenting or attempting to misrepresent the BEE status of a measured entity. It is also an offence to misrepresent or provide false information to a BEE verification professional to secure a BEE status or to misrepresent or provide false information in assessing the BEE status of an enterprise to any organ of state or public entity or to engage in a fronting practice (B-BBEEA: section 13(O)(1)).

Criminal liability is also extended to other parties, which include procurement officers, verification agencies, or officials of a public entity or an organ of state who become aware of the commission or attempt to commit any offence and fail to report it to an appropriate law enforcement agency (B-BBEEA: section 13(O)(2)). As regards sanctions for a contravening section 13(O)(1), a person convicted of an offence in terms of the B-BBEEA is liable for payment of a fine or for imprisonment not exceeding 10 years or to both a fine and imprisonment, or if the convicted person is not a natural person, to a fine not exceeding 10% of its annual turnover (B-BBEEA: section 13(O)(3)(a)). In the event of there being a contravention of section 13(O)(2), a person is liable to pay a fine or may be imprisoned for a period not exceeding 12 months or both a fine and imprisonment (B-BBEEA: section 13(O)(3)(b)).

The B-BBEEA provides a number of punitive measures against enterprises who choose to circumvent its objectives. One of the most important features of the B-BBEEA is its criminalisation of fronting.



The legislature can be commended for the heavy sanctions, which are provided in section 13(O) (3) against persons, or businesses that are found guilty of contravening sections 13(O) (1) and (2) of the B-BBEEA.

The legislative provision for the criminal liability of additional parties where they fail to report to the appropriate law enforcement agency in the event of their knowledge of the commission or attempted commission of an offence, has been described as being an effective deterrent (Sibanda 2015: 38). This is because these parties are positioned to detect contraventions of the B-BBEEA (Sibanda 2015: 38). However, this may not be an effective deterrent in all circumstances. Smith has argued that this is because fronting has become sophisticated, where black people may occupy executive positions, without obtaining any control or benefits and are unaware that they are being used for fronting (Smith 2019: 1). The additional parties to whom criminal liability has been extended will seldomly be aware of the fact that while occupying senior positions the black people are not obtaining the benefits and control which usually flow from these positions.

The enforcement measures discussed above illustrates that the legislature has enacted a number of provisions aimed at reducing the number of fronting practices, which are committed. It does, however, raise the question whether these measures are effective in achieving its goals.

### **Conclusion**

The B-BBEEA contains a number of objectives. However, this article focused on the objective contained in section 2(b). In terms of section 2(b), the B-BBEEA is aimed at facilitating broad-based black economic empowerment by achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises. The statistics reflected above show that this objective has not been achieved. Fronting practices negatively affect the achievement of this objective.

Enforcement measures have been enacted by the legislature in order to eliminate fronting practices. The existence of these enforcement measures does raise the question whether the enforcement measures are successful in reducing fronting practices and whether in the event of this being the case, whether it reduces the fronting practices which negatively affect the achievement of the objective contained in section 2(b) of the B-BBEEA.



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