



## *Are Fronting Tendencies Prevalent In The Fishing Industry?*

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## GLOSSARY

In *The Whistle*, the phrases and words commonly used have the following meaning, unless specified otherwise:

B-BBEE Act	Broad Based Black Economic Empowerment Act 53 of 2003 as amended by Act 46 of 2013
B-BBEE Commission	Broad Based Black Economic Empowerment Commission established by section 13B
B-BBEE Regulations	Regulations issued by the Minister in terms of section 14 of the B-BBEE Act
Codes	Generic Codes of Good Practice issued by Minister
DFI	Development Finance Institution
EME	Exempted Micro Enterprise
Entity	Any measured entity, including company, close corporation or trust
ESD	Enterprise and Supplier Development
IRBA	Independent Regulatory Board for Auditors
JSE	Johannesburg Stock Exchange
Minister	Minister of Trade, Industry and Competition
QSE	Qualifying Small Enterprise
Sector Codes	Sector Codes gazetted by Minister in terms of section 9(1)
SED	Socio-Economic Development
SANAS	South African National Accreditation Systems



# Editorial

## Dear Valued Stakeholders

We bring you the first edition of 2022 with stories and information that features the work of the B-BBEE Commission from the previous quarter of the financial year.

At the core of the mandate of the B-BBEE Commission, amongst others, is the need to investigate matters that relate to any form of transgression on the B-BBEE legislation and policy. With the latter, we feature a number of stories that are related to our investigation mandate as the means to make you, the reader understand the strides taken to ensure that corrective measures are taken in cases where violations of the legislation have occurred. One of the recurring transgressions that we continue to witness through our work is the unlawful practice of “Fronting”.

The main feature article for this Edition of the Whistle is projected with a question as to whether Fronting practices are prevalent within the Fisheries Industry in South Africa. In raising this question, we provide you with facts that are pertinent to making up your mind as to what the status quo is, in relation to possible Fronting activities in the Fisheries Industry.

The second feature is a list of cases that we have investigated and closed with recommendations as well as remedial actions. In the second feature, we also bring you a landmark case of the CRRC E-LoCo Supply (Pty) Ltd. The B-BBEE Commission successfully defended the attack on its mandate by CRRC E Loco Supply (Pty) Ltd, a joint venture for the Transnet locomotives contract between CSR Zhuzhou Electrical Locomotives Company Limited, a Chinese owned entity with 70% shareholding, and Matsete Basadi Consortium (Pty) Ltd (MBC), a B-BBEE partner with 30% shareholding.

The High Court found that the B-BBEE Commission acted correctly and that its findings were rational in respect of allegations that MBC and its members were denied participation, economic benefits and access to information.

The court characterised the shareholders' agreement between the parties as “...just a ruse designed to disguise a window dressing type of a relationship as an empowerment deal.” This is a precedence setting case which clarifies a possible misinterpretation of the notion of participation and economic benefits in cases that are related to “Fronting”.

Apart from the news of our investigation and enforcement mandate we also, provide you with information on outcomes of stakeholder engagements that were aligned to the national events calendar, i.e. Youth Month and Women's Month webinars. The importance of holding these stakeholder webinars is directly linked to Section 1(c) of our mandate which expressly states that the B-BBEE Commission ought to give priority to youth and women amongst other population groups. Issues related to youth and women remain important as our mandate dictates and it is pleasing to note that these webinars on women and youth and have brought about key recommendations that are critical to ensure that youth and women included in the mainstream economy of the country.

We hope that this edition adds value to your existing knowledge of functions of the B-BBEE Commission.

Regards  
**Mofihli Teleki**  
Editor



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# Credits

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**B-BBEE**

**COMMISSION**

a member of **the dtic**

# *Feature Story*



## *Are fronting tendencies prevalent in the fishing industry ?*

The B-BBEE Commission has to date received four complaints emanating from the fishing industry alleging worrying practices where employees are used as fronts for white owned businesses to obtain fishing rights allocation. These employees are allegedly not involved in the B-BBEE scheme concerned and are not allowed any access to information or participation, let alone economic benefits as so-called shareholders/owners. This article deals with one of the cases where the B-BBEE Commission has issued findings after an investigation for stakeholders to confirm if such practices may be the order of the day in the fishing industry.

The B-BBEE Commission received a complaint lodged by Mr Phephe Elias Khekhe against Africa Tuna Traders CC, a close corporation registered in terms of close corporations laws of the Republic of South Africa with registration number 1998/059520/23, Umbhalo Trading (Pty) Ltd,

a company registered in terms of company laws of the Republic of South Africa under registration number 2003/031218/07 and Homotsego Trading (Pty) Ltd, a company registered in terms of company laws of the Republic of South Africa under registration number 2003/031218/07, alleging conduct/practice that appeared to be contrary to the objectives of the B-BBEE Act.

### ***The complainant alleged amongst other things that:***

- on or about the year 2001, the complainant was employed as a driver of Africa Tuna Traders CC, an entity which had two members namely: Christopher Fergus Hamel (also referred to as Mr Chris Hamel or CF Hamel) having a shareholding of 50% and Jonathan Ronald van Breda (also referred to as Mr van Breda) with a shareholding of 50%;

- Mr Christopher Fergus Hamel and Jonathan Ronald van Breda approached the complainant to help with the completion of his house in 2005, and since then until 2008 he did not receive the commission that was due to him in terms of his employment contract;
- the reason for depriving him the said commission was that they have built him a house, and the commission was equivalent to the financial assistance that Mr Christopher Fergus Hamel and Mr Jonathan Ronald van Breda had provided;
- he was approached on or about 2003 to assist Mr Christopher Fergus Hamel in obtaining a fishing licence as he needed a BEE partner;
- the two entities were formed namely; Umbhalo Trading (Pty) Ltd, Homotsego Trading (Pty) Ltd and it was the complainant's understanding that he had 60% shares in Homotsego Trading (Pty) Ltd which owned 60% of Umbhalo Trading (Pty) Ltd;
- he was appointed as a director of both entities on 01 August 2004. Eventually in 2010, he was promised that African Tuna Traders CC would invest money in Allan Gray for him from 2001 until 2011 to serve as his provident fund in case he wants to retire; and
- he resigned as director of Umbhalo (Pty) Ltd on the 14 April 2010 and Homotsego Trading (Pty) Ltd on the 24 November 2014 and he has not received what was promised to him and that his employment was also terminated in 2010.

The B-BBEE Commission noted that although some of the allegations made by the complainant are labour related matters that fall outside the mandate of the B-BBEE Commission, it concluded that an investigation is warranted into the allegations relating to the use credentials of black people in Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd for the fishing rights.

The B-BBEE Commission followed due process to notify the parties of the complaint and afforded them an opportunity to respond to the allegations in line with the *audi alteram partem* rule,

and to submit documentation required in the investigation of the complaint. Upon investigation, the B-BBEE Commission afforded the respondents an opportunity to respond to adverse findings. After consideration of the response, the B-BBEE Commission issued its final findings as follows:

- The records of CIPC for African Tuna Traders CC reflect Jonathan Ronald van Breda and Christopher Fergus Hamel as members with 50% members interest each. The historical records do not reflect Mr Phephe Elias Khekhe as one of the members of the close corporation at any time, which confirms his version that he was an employee of African Tuna Traders CC from 2001. African Tuna Traders CC also confirmed in its letter of 22 August 2018 that Mr Phephe Elias Khekhe was employed as a driver since 2 April 2001. Therefore, African Tuna Traders CC is a wholly white owned close corporation.
- The records of CIPC for Umbhalo Trading (Pty) Ltd reflect the current director of the company as Hamel Christopher Fergus effective from 01 August 2004, while the historical records confirm that Mr Phephe Elias Khekhe was a director from 02 November 2004 and resigned effective 16 April 2010. According to the letter from Greenwoods Accountants dated 3 September 2005, the shareholders of Umbhalo Trading (Pty) Ltd are Homotsego Trading (Pty) Ltd which holds 80% of the issued share capital, and Walter Bell, who holds 20% of the issued share capital. According to the letter dated 22 August 2018 from African Tuna Traders CC, Umbhalo Trading (Pty) Ltd is 80% black owned.
- The records of CIPC for Homotsego Trading (Pty) Ltd depict Nicholas Phumlane Mphili as the current director of the company effective from 01 September 2013 while the historical records reflect that Mr Phephe Elias Khekhe was a director from 02 November 2004 and resigned effective from 22 January 2015. According to the letter from Greenwoods Accountants dated 6 September 2005, the shareholders of Homotsego Trading (Pty) Ltd are as follows with Mr Phephe Elias Khekhe holding 14.29% shareholding:



<i><b>Name</b></i>	<i><b>I.D Numbers</b></i>	<i><b>Gender</b></i>	<i><b>Number of Shares</b></i>
Fillemon Amateta	Confidential	Male	20 ordinary shares
Theodore Claassen	Confidential	Male	20 ordinary shares
Faustinu Nakunda	Confidential	Male	20 ordinary shares
Fillypus Titus	Confidential	Male	20 ordinary shares
Moses Hishekwa	Confidential	Male	20 ordinary shares
Robert Stevens	Confidential	Male	20 ordinary shares
Phephe Elias Khekhe	Confidential	Male	20 ordinary shares

- The records of CIPC for Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd confirm the allegations made by Mr Phephe Khekhe Elias that he resigned as a director of both entities on the 16 April 2010 and 22 January 2015 respectively, which resignations did not have any effect on his employment, as confirmed by African Tuna Traders CC, and consequently had no effect on his ownership rights arising from the 20 ordinary shares in Homotsego Trading (Pty) Ltd which in turn held 80% shareholding in Umbhalo Trading (Pty) Ltd.
- According to the letter from Greenwoods Accountants dated 18 November 2013 and Baker Tilly Greenwoods Services (Pty) Ltd dated 9 November 2015, Homotsego Trading (Pty) Ltd had 80% shareholding in Umbhalo Trading (Pty) Ltd. There is no record of a sale of shares agreement relating to the shares of Mr Phephe Elias Khekhe in Homotsego Trading (Pty) Ltd and therefore the 20 ordinary shares he held directly in Homotsego Trading (Pty) Ltd make him the indirect shareholder in Umbhalo Trading (Pty) Ltd. According to the letter of Baker Tilly Greenwoods Services (Pty) Ltd dated 9 November 2015, the shareholding of Umbhalo Trading (Pty) Ltd was to change post licence award to 20% of the issued share capital held by African Tuna Traders CC and 80% of the issued share capital by Umbhalo Empowerment Trust.
- According to the letter of African Tuna Traders CC of 22 August 2018, Umbhalo Trading (Pty) Ltd is deemed a Level 4 B-BBEE Contributor, and Homotsego Trading (Pty) Ltd which holds 80% of the issued share capital, from which Umbhalo Trading (Pty) Ltd derived its black ownership, is dormant and does not have any financial statements and that African Tuna Traders CC has 0% black ownership and no B-BBEE certificate. Both Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd did not have any employees and the administrative functions for Umbhalo Trading (Pty) Ltd are performed by African Tuna Traders CC, with emphasis made also that Umbhalo Trading (Pty) Ltd did not have any trading operations that necessitated employees and that its revenue is generated only from license fees charged to other related companies.
- Based on the B-BBEE certificate of Umbhalo Trading (Pty) Ltd for the period of 2013/2014 and 2015/2016, the entity operates in the Agricultural Sector in which the Agriculture-Sector Code is applicable. The B-BBEE certificate of Umbhalo Trading (Pty) Ltd, for the 2013/2014 illustrates that the entity did not have any black ownership while the 2015/2016 B-BBEE certificate reflects 80% black ownership. The information regarding black ownership of Umbhalo Trading (Pty) Ltd on the

2013/2014 B-BBEE certificate is inconsistent with the confirmation letters of its accountants /auditors Greenwoods Accountants dated 3 September 2005 and 18 November 2013 regarding its black ownership.

- The records received from the Department of Agriculture, Forestry & Fisheries on 26 April 2018 following the B-BBEE Commission's letter of 14 February 2018 indicate that during 2005/2006 Long Term Fishing Rights Allocation Process, Umbhalo "Fishing (Pty) Ltd" was allocated fishing rights for a period of 8 years, the right allocated during long term rights allocation process expired on 31 December 2013, and further that in the 2013 Fishing Rights Allocation Process, African Tuna Traders CC and Umbhalo Trading (Pty) Ltd were both allocated fishing rights on 30th December 2013 for a period of 7 years in the Tuna Pole Fishing Sector. The Rights allocated to African Traders CC and Umbhalo Trading (Pty) Ltd will expire on 31 December 2020. Also, during the 2015/2016 Fishing Rights allocation process, Umbhalo Trading (Pty) Ltd was allocated a right in the Large Pelagic Fishing Sector on 06 February 2017 for a period of 15 years. The Fishing Rights allocated to Umbhalo Trading (Pty) Ltd will expire on 31 January 2032.
- The documents from the Department of Agriculture, Forestry & Fisheries regarding Umbhalo Trading (Pty) Ltd indicated in a letter which was submitted in support of their application that the shareholding of Umbhalo Trading (Pty) Ltd will be 20% African Tuna Traders CC and 80% Umbhalo Empowerment Trust pending approval of section 21 application and Homotsego Trading (Pty) Ltd's 80% shareholding will be transferred to Umbhalo Empowerment Trust and that the beneficiaries of the Umbhalo Empowerment Trust are black persons as set out in the trust deed. Section 21 of Marine Living Resources Act No.18 of 1998 provides that subject to the provisions of the Act, a commercial Fishing Right may be leased, divided or otherwise transferred. African Tuna Traders CC submitted a copy of the Trust Deed for Umbhalo Empowerment Trust signed on 20 October 2015.
- The black ownership credentials used in the 2005, 2013 and 2015 above for the rights applications to Department of Agriculture, Forestry & Fisheries for Umbhalo Trading (Pty) Ltd included 80% shareholding of Homotsego Trading (Pty) Ltd, in which 20 ordinary shahekhe, res amounting to 14.29% shareholding were held by Mr Phephe Elias Khekhe, and these credentials were used for purposes of acquiring Fishing Rights for Umbhalo Trading (Pty) Ltd in that in 2013 Fishing Rights Allocation Process, African Tuna Traders CC and Umbhalo Trading (Pty) Ltd were both allocated rights on 30th December 2013 for a period of 7 years in the Tuna Pole Fishing Sector, which will expire on 31 December 2020. Furthermore, the allocation of Fishing Rights to Umbhalo Trading (Pty) Ltd on the 30th December 2013, considered 80% shareholding of Homotsego Trading (Pty) Ltd, which included the 14.29% shareholding of Mr Phephe Elias Khekhe.
- According to the letter of African Tuna Traders CC, in 2015 Umbhalo Trading (Pty) Ltd changed its ownership structure by creating Umbhalo Empowerment Trust which acquired 80% shareholding of Homotsego Trading (Pty) Ltd, this as stated in the letter of 22 August 2018 unsolicited by Mr Chris Hamel, however, there is no record of the transfer of shares from Homotsego Trading (Pty) Ltd to Umbhalo Empowerment Trust also reflecting consent by Mr Phephe Elias Khekhe for the sale of his 20 ordinary shares or 14.29% shareholding in Homotsego Trading (Pty) Ltd. Effectively this means the 14.29% black shareholding of Mr Phephe Elias Khekhe in Homotsego Trading (Pty) Ltd was unilaterally transferred to Umbhalo Empowerment Trust, evidently with no authorisation by Mr Phephe Elias Khekhe and with no compensation for such shareholding based on fair valuation and appraisal. Respondents submitted a copy of Securities Transfer Form purported to be signed by Mr Phephe Elias Khekhe transferring his 20 ordinary shares for nominal amount of R20.00, however, the signature on the Securities Transfer Form differ significantly from the signature of Mr Phephe Elias Khekhe which appears on the B-BBEE7 Form for the filing of this complaint.

- The ownership structure of Umbhalo Trading (Pty) Ltd allegedly consists of Umbhalo Empowerment Trust with 80% shareholding and Africa Tuna Traders CC with 20% shareholding, as also indicated in the letter of 22 August 2018 signed by Mr Chris Hamel, although there is no record or proof of sale of shares and consent by Mr Phephe Elias Khekhe as a shareholder of Homotsego Trading (Pty) Ltd. Umbhalo Empowerment Trust was recognised as a shareholder in Umbhalo Trading (Pty) Ltd by Department of Agriculture, Forestry and Fisheries during 2015/2016 Fishing Rights allocation process, wherein Umbhalo Trading (Pty) Ltd was allocated a Right in the Large Pelagic Fishing Sector on 06 February 2017 for a period of 15 years, which will expire on 31 January 2032. The Department of Agriculture, Forestry & Fisheries recognised the B-BBEE Certificate that was issued for verification period of 2015/2016 which reflects 80% black ownership emanating from Umbhalo Empowerment Trust.
- According to the submission of African Tuna Traders CC to **the dtic** on 14 May 2010, African Tuna Traders CC has various companies within the group with the main operating entity being African Tuna Traders CC and they also set up two other empowerment companies, Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd. African Tuna Traders CC performs the administrative work for the group of companies, which includes Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd. It is therefore evident that African Tuna Traders CC and/or its members established Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd and operated the entities without participation by the black shareholders whose black ownership credentials were used in these entities.
- African Tuna Traders CC did not have any black ownership or B-BBEE credentials and Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd were facilitated for purposes of achieving the B-BBEE compliance and/or black ownership that is required in applications for licences or any other authorisation for which B-BBEE compliance is a requirement.
- Whereas it cannot be said that the awarding of rights to Umbhalo (Pty) Ltd on the 30th December 2013 was solely based on Mr Phephe Khekhe Elias's 14.29% indirect shareholding in Umbhalo Trading (Pty) Ltd as part of the 80% shareholders of Homotsego Trading (Pty) Ltd, his credentials were part of the black ownership presented for the purpose of this application. This is clear and confirmed by supporting letters issued by the accountants/auditors of Umbhalo Trading (Pty) Ltd Greenwoods Accountants.
- Whereas black ownership of Mr Phephe Elias Khekhe was recognised in the ownership structure of Homotsego Trading (Pty) Ltd and indirectly in Umbhalo Trading (Pty) Ltd, there is no evidence that Mr Phephe Elias Khekhe was afforded any economic interest, which is defined as a claim against an entity representing a return on ownership of an entity similar in nature to a dividend right measured using a flow through, and where applicable, a modified flow through principle.
- African Tuna Traders CC and/or its members failed to provide financial statements for Homotsego Trading (Pty) Ltd and minutes of the meetings of the board and the shareholders, despite having created the entity and being responsible for its administration, and merely indicated that the entity is dormant. This contradicts the fact that African Tuna Traders CC and/or its members continued to present as part of its rights applications credentials of Homotsego Trading (Pty) Ltd as the 80% shareholders of Umbhalo Trading (Pty) Ltd, without stating that the entity is dormant and has no real operations or shareholder activity. The financial statements of Umbhalo Trading (Pty) Ltd as submitted for 2015 to 2017 reflect Homotsego Trading (Pty) Ltd as the shareholder with no reference to its dormancy.
- Contrary to the letter of African Tuna Traders CC dated 22 August 2018 as supported by the letters of Greenwoods Accountants and Baker Tilly Greenwoods Services (Pty) Ltd regarding the shareholding of Umbhalo Trading (Pty) Ltd, and as submitted to the Department of Agriculture, Forestry & Fisheries for the 2005,

2013 and 2015 rights allocation processes, the financial statements submitted for 2015-2017 reflect the shareholders of Umbhalo Trading (Pty) Ltd as African Tuna Traders CC with 40% and Homotsego Trading (Pty) Ltd with 60%, it being noted that African Tuna Traders CC stated that the change of ownership in Umbhalo Trading (Pty) Ltd occurred in 2015 in terms of which the 80% stake held by Homotsego Trading (Pty) Ltd was transferred to Umbhalo Empowerment Trust which owns 80% with African Tuna Traders CC owning 20% shareholding. It is only in the 2017 financial statements of Umbhalo Trading (Pty) Ltd that any reference is made to Umbhalo Empowerment Trust as a related party, not as a shareholder in Umbhalo Trading (Pty) Ltd. Therefore, the black ownership credentials and the ownership structure of Umbhalo Trading (Pty) Ltd submitted to Department of Agriculture, Forestry & Fisheries are completely different from the ownership reflected in the financial statements of Umbhalo Trading (Pty) Ltd for 2015, 2016 and 2017 and these were approved and signed off by Mr CF Hamel.

- It is clear from all records relating to Umbhalo Trading (Pty) Ltd that Mr CF Hamel as the sole director controls the affairs of the entity as there are no other directors representing the majority shareholder, Homotsego Trading (Pty) Ltd or Umbhalo Empowerment Trust, as the case may be, given the glaring inconsistencies in the documents and information submitted by African Tuna Traders CC and/or its members. There are clearly no black shareholders exercising rights of ownership as majority shareholders in Umbhalo Trading (Pty) Ltd, and none of the black shareholders, if they exist, have derived any economic interest from Umbhalo Trading (Pty) Ltd. Instead, any transaction in reference to any other entity in the financial statements of Umbhalo Trading (Pty) Ltd is in respect of African Tuna Traders CC and ADR Fishing (Pty) Ltd, an entity that African Tuna Traders CC stated is 100% owned by African Tuna Traders CC, both of which are wholly white owned entities.

- There is no record that indicates that Mr Phephe Elias Khekhe derived any economic interest

emanating from his 14.29% shareholding in Homotsego Trading (Pty) Ltd, nor that he derived any capital gains from the purported sale or transfer of his 14.29% shareholding in Homotsego Trading (Pty) Ltd to any other entity, and further Mr CF Hamel failed to provide any record of participation by black shareholders in both Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd, which is indicative of a fronting practice.

- African Tuna Traders CC and/or its members and Umbhalo Trading (Pty) Ltd have presented the credentials of Homotsego Trading (Pty) Ltd in respect of the shareholding in Umbhalo Trading (Pty) Ltd in a manner that misrepresented the actual black ownership status of Umbhalo Trading (Pty) Ltd, which is indicative of misrepresentation of the B-BBEE status of Umbhalo Trading (Pty) Ltd. Further, the contradiction in the information submitted for the rights allocation processes at Department of Agriculture, Forestry & Fisheries, and the information on the financial statements of Umbhalo Trading (Pty) Ltd is also indicative of false information provided to an organ of state for purposes of determining the black economic empowerment status of an entity.
- Even if it were to be argued successfully that Umbhalo Empowerment Trust is the black majority shareholder of Umbhalo Trading (Pty) Ltd, the Trust Deed of Umbhalo Empowerment Trust does not meet the test for black ownership within the meaning of the B-BBEE Act in that there is no evidence of it being represented to exercise its voting rights on the board of Umbhalo Trading (Pty) Ltd, there is no record of economic interest that accrued to the trust commensurate with the 80% shareholding it is purported to hold, and further there is no record of whether real ownership would vest in the hands of the beneficiaries behind the trust in accordance with the time based graduation factor.
- Further, as an Employee Share Ownership Programme and a Trust, Umbhalo Empowerment Trust is required to comply with the rules in Statement 100 Annexe 100 (C) – ESOPS RULES and (D) – TRUST RULES and on assessment,



the Trust deed fails to meet the requirements for basic aspects such as, more than 50% of the trustees are appointed by ADR Fishing (Pty) Ltd when the rules require the employees as beneficiaries to appoint 50% of the trustees, the trustees have absolute discretion including on when and if they should make any distributions, decisions on the board of trustees are on majority when ADR Fishing (Pty) Ltd has the majority of the trustees, all of which place ADR Fishing (Pty) Ltd and African Tuna Traders CC effectively in control of the Trust that is purported to be a shareholder. The principles applied for testing ownership in respect of this aspect are consistent in both the AgriBEE sector Code and the generic codes.

- Mr Phephe Elias Khhekhe was indeed employed as a driver by African Tuna Traders CC from 2001 until his dismissal, and he was made a shareholder in Homotsego Trading (Pty) Ltd with 14.29% shareholding, which in turn held 80% shareholding in Umbhalo Trading (Pty) Ltd, both of which are companies that were established by African Tuna Traders CC and/or its members as empowerment companies, and it is true that Mr Phephe Elias Khhekhe held directorship but resigned in Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd in 2010 and 2015 respectively, however, the resignation as a director did not affect his status as the owner of the shares directly in Homotsego Trading (Pty) Ltd and indirectly in Umbhalo Trading (Pty) Ltd.

In light of the above, the B-BBEE Commission found that African Tuna Traders CC, Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd engaged in conduct that is contrary to the B-BBEE Act and would amount to a fronting practice which is an offence in terms of section 130 (1) (d) of the B-BBEE Act and misrepresentation of the B-BBEE status, which is an offence in terms of section 130 (1) (a) of the B-BBEE Act, and provision of false information relevant for assessing black economic empowerment status to an organ of state, in this case Department of Agriculture, Forestry & Fisheries, which is an offence in terms of section 130 (1) (c) of the B-BBEE Act.

African Tuna Traders CC, Homotsego Trading (Pty)

Ltd and Umbhalo Trading (Pty) Ltd were controlled by the same person, Mr CF Hamel, to the detriment of Mr Phephe Elias Khhekhe, who was denied economic interest commensurate with the shareholding he held in Umbhalo Trading (Pty) Ltd indirectly through his 14.29% shareholding in Homotsego Trading (Pty) Ltd which owned 80% of Umbhalo Trading (Pty) Ltd. The members of African Tuna Traders, by their own admission, operated the entities as part of their group and controlled both operations and finances, and the manner in which Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd were run presents a typical opportunistic intermediary arrangement that goes against the objectives of the B-BBEE Act in that Mr CF Hamel used Umbhalo Trading (Pty) Ltd to secure rights to operate in the fishing industry in terms of which B-BBEE compliance is required.

Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd were not operated in a manner that adheres to basic corporate governance in that no records of meetings were found and financial statements of the entities were not prepared at required intervals in a manner that may be inconsistent with the Companies Act, as amended. The manner in which information regarding the ownership of Umbhalo Trading (Pty) Ltd is reflected is different depending on the document assessed, an indication that the information regarding the ownership of the entity may be manipulated to suit the circumstances of its sole director, Mr CF Hamel and or African Tuna Traders CC. It being noted that the information relating to the shareholders' agreement purported to be concluded reflect Homotsego Trading (Pty) Ltd as having 60% shareholding in Umbhalo Trading (Pty) Ltd contrary to what was submitted to the Department of Agriculture, Forestry & Fisheries.

The B-BBEE Commission also found that the current B-BBEE credentials of Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd do not meet the ownership requirements for B-BBEE compliance.

Further, it is not clear what verification or due diligence was conducted by the Department of Agriculture,

Forestry & Fisheries in assessing the black ownership credentials of Umbhalo Trading (Pty) Ltd when allocating the rights to determine compliance with section 10 of the B-BBEE Act, which requires the organ of state to apply the codes of good practice in awarding a licence, or any other authorisations.

Further, the B-BBEE Commission could not determine benefit diversion from operations of Umbhalo Trading (Pty) Ltd to African Tuna Traders CC as African Tuna Traders CC declined to provide its financial statements for this assessment to be performed, thus obstructing and limiting the investigation.

The allegations relating to non-payment of a commission that was due to Mr Phephe Elias Khekhe in terms of his employment contract and the promise allegedly made regarding investment in the Allan Gray Fund for his provident fund are matters that fall outside the mandate of the B-BBEE Commission, and have therefore not been considered.

The B-BBEE Commission is concerned about the use of black people's credentials to secure the fishing rights without the corresponding participation and economic benefits in the entities, Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd, which were clearly created to facilitate the benefits of the fishing rights in question to African Tuna Traders CC, a wholly white owned entity.

The complainant and others argue that this kind of practice is prevalent in the fishing industry, however, without an in-depth inquiry or formal hearing, it is not at this stage possible to draw that conclusion. It is alleged that entities in the fishing industry often submit credentials of their employees passing them off as owners of shares, directly or through trusts, but exclude them after the licence is awarded.

For this reason, the B-BBEE Commission has referred the findings to the Department of Agriculture, Forestry & Fisheries to consider initiating the withdrawal of the rights issued to African Tuna Traders CC and/or Umbhalo Trading (Pty) Ltd in terms of section 13A of the B-BBEE Act, without prejudice to any other remedy they have in law.

Should the department fail to act on this, the B-BBEE Commission will consider approaching the court of law for appropriate remedy, including cancellation of the fishing rights already allocated to the entities in question.

Given that the matter relates to fishing rights allocated by the Minister of Agriculture, Forestry & Fisheries, the B-BBEE Commission resolved to refer the report and its findings to Minister of Agriculture, Forestry & Fisheries and the relevant Portfolio Committee to consider this matter and other rights allocated in the fishing industry and determine if any steps should be taken in accordance with the laws governing the allocation fishing rights to prevent similar occurrences in the future.

The parliamentary process will afford the opportunity for stakeholders in the fishing industry to have their say in the event that Parliament holds hearings on the matter and more systemic interventions can be recommended. Clearly a systemic approach would be warranted if the practice is prevalent is alleged. Organs of state responsible for awarding rights and licences must ensure that entities so awarded do not engage in fronting practices, where they are found wanting, such rights must be withdrawn forthright.





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# *Investigations*





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## ***White People, Foreign Nationals, Permanent Residents, Do Not Qualify For A Benefit Under The B-BBEE Act: It Is Illegal Conduct***

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The B-BBEE Commission has appealed to organs of state and public entities to enhance due diligence processes to detect and reject invalid B-BBEE claims made by entities during procurement, licensing, granting of economic incentives, sale of state assets or public private partnership processes to ensure compliance with the B-BBEE Act.

This follows public concerns that B-BBEE seems to benefit those that are not intended under the law, which includes foreign nationals, permanent residents, those with refugee/asylum status and white people that claim to be black. The B-BBEE Commission plans to conduct site visits to check compliance status of entities it has previously found to have violated the B-BBEE Act and where it has received tipoffs to eradicate this illegal conduct.

According to the B-BBEE Act, “black people” is a generic term which refers to Africans, Coloureds and Indians (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 would have been entitled to acquire citizenship by naturalisation prior to that date.

The B-BBEE Act specifically defines black people to exclude any non-black South African citizens, foreign nationals and black people who acquired citizenship by naturalisation after 27 April 1994. It is also the responsibility of verification agencies to ensure that the people they recognise as black during the verification process do actually qualify and meet the requirements in section 1 of the B-BBEE Act.



Ms Moipone Kgaboesele who heads the Investigations and Enforcement of the B-BBEE Commission indicated that her office has dealt with cases that show the extent to which entities would go to achieve a higher B-BBEE status or to appear B-BBEE compliant for purposes of accessing contracts, authorisations and benefits, with some verification professionals being complicit in most of the cases.

“This conduct was rife in the early stages of the B-BBEE Commission around 2016/2017 but we are now seeing verification professionals becoming more vigilant in improving the quality of the verifications and reporting entities that attempt to cut corners. Misrepresentation and fronting are serious criminal offences. Now that we have focused our attention on raising awareness over the years, we will not hesitate to refer entities for prosecution and for cancellation of licences and contracts awarded. We also provide free advice, so there is no excuse not to do the right thing now.” she added.

Ms Kgaboesele clarified the issue of Chinese people and said upfront that not every Chinese person who is in South Africa qualifies for recognition under the B-BBEE Act. It is only Chinese people who were born in South Africa before 1994; who were classified as coloureds, hence they are included in the definition of 'black people' as coloureds by virtue of a court case initiated in 2007. The Department of Home Affairs, as they are the custodian of the population register, would have details of the Chinese people born in South Africa prior to 1994. Therefore, to give effect to the above requires proper verification methodologies to determine which South African Chinese qualify under the B-BBEE Act, with sufficient proof thereof.

“A number of complaints involving people from other countries, including Eswatini, Lesotho and Zimbabwe are under investigation, hence it is important that we always test black ownership claimed by entities up to the natural black person claimed, with proof thereof”, Ms Kgaboesele concluded.

The following are the examples of some of the pronouncements the B-BBEE Commission has made regarding who may or may not benefit under the B-BBEE Act:

## ***B-BBEE Commission // Forklift Parts World (Pty) Ltd***

We responded to an anonymous complaint alleging that Forklift Parts World (Pty) Ltd was using and circulating a fraudulent B-BBEE certificate that was issued by Ridwaan Jeena and AuditEx SA LLC, which certificate depicted the entity as being 50% black owned and 25% black women owned. On investigation, we found that the B-BBEE certificate issued to Forklift Parts World (Pty) Ltd was invalid on the basis that Rui Li and Zhou Jiang, who Forklift Parts World (Pty) Ltd claimed as its black owners are Chinese nationals that are merely permanent residents in the Republic of South Africa.

This means these Chinese nationals do not qualify to regard themselves as black people under the B-BBEE Act. Forklift Parts World (Pty) Ltd argued that Ridwaan Jeena and AuditEx SA LCC coordinated the issuing of such a B-BBEE certificate. We found that Forklift Parts World misrepresented its B-BBEE status in violation of the B-BBEE Act.

We also noted that AuditEx SA LLC and Ridwaan Jeena knowingly issued the invalid B-BBEE certificate to Forklift Parts World (Pty) Ltd without ascertaining the credentials of Rui Li and Zhou Jiang, contrary to the verification methodologies required by the Verification Manual and further perpetuated the misrepresentation of Forklift Parts World (Pty) Ltd's B-BBEE status. Forklift Parts World (Pty) Ltd agreed to and implemented the remedial recommendations issued by the B-BBEE Commission and remedied the matter.

## ***B-BBEE Commission // FRS Warehousing CC t/a EPS Courier Services***

We investigated in response to a concern submitted by Mr Keith Levenstein of EconoBEE that FRS Warehousing CC t/a EPS Courier Services (EPS Courier Services) presented itself as a 100% black-owned entity and further obtained a B-BBEE level 7 (seven) based on incorrect ownership credentials, when the entity is 100% owned by Mr Evert Philip Serfontein, a white South African male.

Mr Evert Phillip Serfontein through his lawyers Lee and McAdam Attorneys, argued that Mr. Evert Philip Serfontein was apparently informed by his mother that his biological father is actually a coloured man and that his white father is not real his father. In this regard they promised to provide proof to substantiate this claim, which to date had not been provided.

On investigation we found that indeed Mr Evert Phillip Serfontein and EPS Courier Services misrepresented the B-BBEE status in violation of the B-BBEE Act and what was of further concern was that even after the B-BBEE certificate was withdrawn by the verification professional, Mr D. Kalmin at the time, EPS Courier Services continued to trade with the said withdrawn certificate. Mr Evert Phillip Serfontein is a white South African male, who is not entitled to a benefit under the B-BBEE Act.

Although Mr Serfontein threatened to approach the courts to have himself declared a black man, we have not been served with any court papers to that effect, and we will vigorously oppose such an application. At the time of findings Mr Serfontein had ceased using the B-BBEE certificate in question and the B-BBEE credentials of EPS Courier Services, if any, would be scrutinised for compliance.

### ***B-BBEE Commission // Stellar Events (Pty) Ltd & Others***

We initiated an investigation against Stellar Events (Pty) Ltd, Finsolve Solutions CC and GNL Management Services CC in respect of the B-BBEE certificates issued to Stellar Events (Pty) Ltd recognising black ownership on the basis of the credentials of Ms. Marion Mbeiza Kafuko, who is a permanent resident of the Republic of South Africa, which certificates were issued by the technical signatories, namely; Gavin Beretta of Finsolve Solutions CC and Mr. Grant Nathan Louw of GNL Management Services CC. We found that Stellar Events (Pty) Ltd engaged in misrepresentation of its B-BBEE status, aided by Finsolve Solutions CC and GNL Management Services CC who failed to follow the methodology provided for verification. Despite Mr. Gavin Beretta and Finsolve Solutions CC's averment that Finsolve Solutions CC rejects applications for B-BBEE verifications when they noticed that such clients are not South Africans,

we found that Mr. Gavin Beretta commissioned a B-BBEE sworn affidavit deposed to by a certain Mr. Munyaradzi Marufu of Animania CC which declared that the entity is 100% black owned despite the fact that Mr. Munyaradzi Marufu is a permanent resident of the Republic of South Africa, not a citizen, also thereby misrepresenting the actual B-BBEE status of Animania CC, contrary to the objectives of the B-BBEE Act.

We also noted that Mr Grant Nathan Louw of GNL Management Services CC also issued a B-BBEE certificate to Stellar Events (Pty) Ltd resulting in Stellar Events (Pty) Ltd obtaining 100% black ownership based on the same credentials of Ms. Marion Mbeiza Kafuko, a permanent resident of the Republic of South Africa, thus misrepresenting the entity's B-BBEE status. Both Mr Gavin Beretta and Mr Grant Nathan Louw apologised for the misconduct and implemented remedial recommendations set by the B-BBEE Commission. Stellar Events (Pty) Ltd unduly benefitted from contracts awarded by Transnet National Ports Authority (TNPA), and the South African Social Security Agency (SASSA) based on the company's invalid B-BBEE certificates and misrepresented B-BBEE status.

Conversely, Stella Events Pty (Ltd) failed to respond to the B-BBEE Commission's findings and/or implement the remedial recommendations set therein. There are a number of entities that choose to ignore correspondence and recommendations of the B-BBEE Commission, and as such, the B-BBEE Commission has commenced the process to identify such entities to pursue action against them in court, but further to cancel their contracts or dealings with the state. The directors that move from one entity to another in an attempt to evade liability will be pursued and declared delinquent so that they are barred from holding any such fiduciary positions for a specified period in the future. There will be no perpetrator that goes without proper consequence management.



## ***Vicky Adey Consulting Withdraws From Government Panels And Surrenders For Cancellation Its Cidb Grading For Misrepresentation of B-BBEE Status***

Following the findings of misrepresentation of B-BBEE status made by the B-BBEE Commission, Vicky Adey Consulting CC has agreed to immediately withdraw from each panel of contractors / service providers of any organ of state or public entity, including the Independent Development Trust, Coega Development Corporation and Department of Education Gauteng Province, which were awarded on the basis of false and misrepresented information, as well as voluntarily surrendering to the Construction Industry Development Board its CIDB grading for cancellation. Vicky Adey Consulting CC and its members Olufunsho Adebayo Ademoye and Phumudzo Nancy Muthelo cooperated with the investigation and apologised for the conduct, which in their view was not intended, and implemented the remedial recommendations.

Vicky Adey Consulting CC is a close corporation registered in South Africa, with its members being Mr

Olufunsho Adebayo Ademoye, a Nigerian born African male, and Phumudzo Nancy Muthelo, a South African born African female, with 40% and 60% members' interest respectively. The investigation was impelled by a video that circulated widely on social media in South Africa in which Mr Olufunsho Adebayo Ademoye was interviewed on the Nigeria Morning TV show wherein he made statements that were misleading and distorting on the application of B-BBEE as a policy in South Africa and how B-BBEE has benefitted him as a foreign national who is also married to a South African woman.

The nature of the statements made indicated that Olufunsho Adebayo Ademoye possibly engaged in misrepresentation of B-BBEE status and fronting practice through his business Vicky Adey Consulting CC. This was particularly of concern as Mr Olufunsho Adebayo Ademoye does not qualify for any benefits under the B-BBEE Act as he does not meet the

definition of 'black people' under the B-BBEE Act as a Nigerian born African male. This meant that any benefit he claimed to have received during the said interview would have been based on false or misrepresented B-BBEE credentials.

The investigation revealed that Vicky Adey Consulting CC and its members Olufunsho Adebayo Ademoye and Phumudzo Nancy Muthelo indeed misrepresented the B-BBEE status of the business by claiming that it is 100% black owned when it is not, as Mr Olufunsho Adebayo Ademoye does not qualify for any benefit under the B-BBEE Act.

Further, it was found that Vicky Adey Consulting CC was able to secure opportunities on the panel of contractors / service providers in the Gauteng Provincial Department of Education, Coega Development Corporation and the Independent Development Trust, as well as the CIDB grading using the said misrepresented B-BBEE status. It was confirmed, however, that the corporation had not been awarded any contracts/work yet from these panels.

Ms Moipone Kgaboesele, Head of Investigations & Enforcement at the B-BBEE Commission warned both the private and public sector to refrain from including foreign nationals as beneficiaries of any B-BBEE element because the law is clear as to who should benefit. Section 1 of the B-BBEE Act limits benefits to black people, which includes Africans, Coloureds and Indians that are South African citizens by birth or decent, or by naturalisation prior to 27 April 1994.

The B-BBEE Act specifically defines black people to exclude any non-black South African citizens, foreign nationals and those black people that acquired citizenship by naturalisation after 27 April 1994. "Hence it is critical to trace the existence of black people up to the actual natural black person to determine compliance with the B-BBEE Act. It is the responsibility of every corporation to ensure that the claims it makes about B-BBEE are in line with the requirements of the B-BBEE Act and organs of state must do proper due diligence to ensure B-BBEE compliance prior to appointing service providers or awarding any authorisations", she added.

"Although we received written confirmation of withdrawal from respondents, we will follow up with these relevant organs of state to ensure that the withdrawals have indeed been effected. Had it not been for this investigation, Vicky Adey Consulting CC would have continued to benefit using this falsified and misrepresented status, but we are encouraged by the fact that they cooperated fully with the investigation and demonstrated upfront willingness to correct this conduct. The corporation can continue to do business but with the correct B-BBEE credentials", emphasised Ms Kgaboesele.

The B-BBEE Commission offers free advice on B-BBEE matters and thus there should be no reason for non-compliance. As such, this case should serve as an example of illegal conduct that will not be tolerated, noting that if uncovered in any corporation going forward, it will be immediately referred for prosecution through the criminal justice system as permitted under the B-BBEE Act. Perpetrators may be jailed for up to 10 years and the corporation itself may be fined up to 10% of the annual turnover if convicted. The summary of the findings and recommendations and the apology are available on the link:

<https://www.bbeecommission.co.za/b-bbee-commission-vicky-adey-consulting-cc-others/>







## ***Gauteng high court dismisses application to set aside B-BBEE Commission's investigation report on CRRC E- Loco supply (Pty) Ltd.***

The Broad Based Economic Empowerment (B-BBEE) Commission welcomed the decision handed down by the Gauteng High Court on 05 July 2021 dismissing with costs the application launched by CRRC E Loco Supply (Pty) Ltd to set aside the decision of the B-BBEE Commission and interdict the publishing and implementation of the findings and recommendations. This was triggered by a fronting complaint lodged by Lietsiso Mohapeloa and Juliet Mxhakaza, who were director of Matsete Basadi Consortium (Pty) Ltd, against CRRC E Loco Supply (Pty) Ltd, a joint venture incorporated for B-BBEE compliance in the Transnet locomotives contract. The matter was heard on 28 and 30 October 2020.

In this case the B-BBEE Commission vigorously defended the attack on its mandate by CRRC E LOCO Supply (Pty) Ltd, a joint venture between CSR Zhuzhou Electrical Locomotives Company Limited, a Chinese entity with 70%, and Matsete Basadi Consortium (Pty) Ltd (MBC), a B-BBEE partner with 30% shareholding, and the

High Court found that the B-BBEE Commission acted procedurally and that its findings were rational on allegations that MBC as a B-BBEE partner were denied participation, economic benefits and access to information, with the shareholders' agreement characterised as Court characterised the shareholders' agreement between CRRC E LOCO Supply (Pty) Ltd and MBC as "...just a ruse designed to disguise a window dressing type of a relationship as an empowerment deal."

This ruling cements the authority of the B-BBEE Commission to fearlessly defend the objectives of the economic transformation agenda, in particular expose and uproot the fronting practices that have continued to undermine these objectives. Further, it now paves the way for seamless referral of these type of matters to criminal law enforcement agencies and other regulatory bodies for consideration.

In summary, the High Court had to determine the following as summarised:

*Whether powers of the B-BBEE Commission in investigating the complaints of the Lietsiso Mohapelo and Juliet Mxhakaza and issuing its Final Report dated 1g November 2018, constitute administrative action as contemplated in the Promotion of Administrative Justice Act, 3 of 2000*

Court found that the B-BBEE Commission's investigative powers as provided for in section 13J of the Act do not constitute administrative action as contemplated in PAJA and the exercise of those powers must therefore be reviewed in terms of the principle of legality.

*Whether the relationship between CRRC E Loco Supply (Pty) Ltd and Matsele Basadi Consortium (Pty) Ltd concerning the implementation of the shareholders' agreement between these parties, constituted a fronting practice as contemplated in the Broad-based Black Economic Empowerment Act, 53 of 2003.*

The court further found that there was indeed a practice of fronting through the implementation of the shareholders' agreement as set out in the B-BBEE Act. No requisite skills and experience to manufacture and assemble locomotives was acquired by MBC and its members and no economic interest was derived flowing from the contracts awarded.

*Whether the Final Report took into account irrelevant considerations and ignored relevant considerations.*

Court ruled that "There is no provision in the Act which stops it to investigate a complaint merely because a former Director of an enterprise under investigation or, because the said Director was advancing his own personal interests", as it was stated in the application. Whether the findings in the Final Report were materially influenced by errors of law or fact.

Court concluded that there was no error of judgement arising from the information of the investigation.

*Whether the findings and/or recommendations in the Final Report are not rationally connected to the*

*information that was before the B-BBEE Commission when the B-BBEE Commission considered the complaints and were unreasonable.*

Court agreed with the B-BBEE Commission that it was premature for CRRC E Loco Supply (Pty) Ltd to raise an objection of procedural unfairness when investigations were ongoing and not referred to other regulatory authorities. The court also stated that it was "disingenuous of the Applicant to claim that it should have been informed that it may face an investigation and remedial action for possible tax evasion".

*Whether the findings and/or recommendations of the Final Report are based upon administrative action that is procedurally unfair.*

In its conclusion the court dismissed the application and ordered the applicant to pay costs of the two legal counsels involved in the court matter. This is the first fronting ruling on a matter investigated by the B-BBEE Commission, which sets precedent for future cases. CRRC E Loco Supply (Pty) Ltd approached the court for leave to appeal the ruling and the B-BBEE Commission awaits the judgment in this regard. The B-BBEE Commission is prepared to defend the matter to safeguard the objectives of the B-BBEE Act.





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# *Dialogue*



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## ***Taking Accountability for Women Empowerment***

On 25 August 2021 the B-BBEE Commission held a Webinar on Women's Economic Empowerment in the place of its annual Women Empowerment Conference as a continuation of structuring debates on issues pertaining to women and B-BBEE. The annual event is aimed at commemorating Women's Month and to continue raising awareness of the need to accelerate the economic empowerment of women in South Africa.

The year 2021 marks the 65 Year anniversary of the 1956 Women's March which is commemorated annually, to pay tribute to the efforts of women who took part in the protests against draconian laws of the apartheid government. The year 2021 also marked 27 Year anniversary of the promulgation of the South African Constitution as well as the 18 Years of the promulgation of B-BBEE legislation in South Africa. Apart from the existing B-BBEE Act whose aspiration is sourced from the Constitution of South Africa, the same Constitution makes provision for empowerment of South African women through elements of the Commission for Gender Equality Act.

The webinar provided a platform for participants and speakers to reflect on the issues that relate to women economic empowerment policies which have been in existence for the past 27 years of South Africa's democratic dispensation. This follows the narrative that suggests that South Africa has policies that were developed to combat and address all the inequalities of the past, which however, still persist and unabated.

The speakers included Ms. Zodwa Ntuli (Commissioner: B-BBEE Commission), Ms. Thembakazi Dondashe (Senior Manager: Strategy Development and Performance – B-BBEE Commission), Ms. Polo Leteka (Association of Black Securities and Investment Professionals), Dr. Ntabiseng Moleko (Deputy Chairperson of the Commission for Gender Equality), Ms Namhla Mniki (DDG and Senior Specialist in the Presidency) and Ms Phelisa Nkomo (Independent Development Economist).



## ***Opening of the Webinar (Ms. Zodwa Ntuli Commissioner: B-BBEE Commission)***

The webinar was opened by Ms. Zodwa Ntuli who pointed out the importance of placing women's economic empowerment within the context of human rights that are enshrined in the Constitution of the country as well as international conventions. In doing so, Ms. Ntuli mentioned that human rights are practiced globally with the intention to protect, respect and fulfil those rights through the state. The B-BBEE Act seeks to therefore empower black people to acquire ownership in the productive assets of existing businesses, to create their businesses, to develop and enhance skills through training of black people, and ensuring that black owned businesses thrive and compete in the market through enterprise and supplier development.

Ms. Ntuli stated that all public and private entities are required to spend 80% on entities that are B-BBEE compliant and in the fragmentation of that percentage, 12% must be spent on entities that are at least 30% black women owned. Preferential procurement was introduced with the aim of ensuring that black people have access to markets and opportunities to run sustainable businesses and currently both public and private sector entities are not doing well in providing those opportunities. In this regard, Ms Ntuli indicated that the B-BBEE Commission will pursue the implementation of the proposal by the President of South Africa which dictates that Procurement Spend for public sector should be set aside for women to a level of 40%, this, she says, is capable of being realised within the current legislative framework.

Under Enterprise and Supplier Development, private entities should spend 3% of NPAT and for government it is 0.3% of the allocated budget on an annual basis on black owned entities and in this instance black women owned entities should be given priority to close the inequality gap, focus being to develop entities that are on the supply chain. Focus will also be on entities that are not listed on the existing database of the measured entities through Enterprise Development. As opposed to supplier development, enterprise development looks at identifying qualifying entities in the market for the purpose of development.

The 3% that entities must spend must be guided by the need of beneficiaries that measured entities should contribute towards in a sustainable manner.

Ms. Ntuli made a reflection on the progress made in relation to women empowerment since the inception of the B-BBEE Commission in 2016. She stated that in 2016, both private and public sector entities contributed significantly towards the funding of black owned entities, however, there has been a slight decrease in recent years. Under the Ownership element of B-BBEE, there was an increase in 2019 and 2020 with about 30% black ownership overall. She expressed the need to grow new black women owned businesses in addition to acquisitions in existing enterprises, and thus, ESD presents a huge opportunity for South Africa, if consistently and properly implemented.

Ms. Ntuli stated that in making such a reflection, there are challenges that persist in the implementation of the B-BBEE Act, and as such “fronting” presents a major challenge as it undermines the economic empowerment agenda. Black people continue to be paraded as owners whereas they are not and women appear to be the target in this instance, and this is mostly done through sophisticated structures that create a façade of black economic empowerment. It is important that such practices are brought to light for improving development and empowerment of black people.



***Ms. Zodwa Ntuli  
(Commissioner: B-BBEE Commission)***

**Ms. Thembakazi Dondashe (Senior Manager:  
Organisational Performance and Strategy at  
the B-BBEE Commission)**



Ms. Dondashe, presented data on the state of black women ownership as per the National Status and Trends Analysis on B-BBEE report which was produced by the B-BBEE Commission. In terms of data on black women across sectors, under Generic code, 47% of the reported entities have a black ownership which is less than 10%, followed by black women ownership of the 31% of entities that reported falls between and 30%.

The overall data collected as well as the JSE listed companies on black ownership indicate that in 2017 there was 27% black ownership and 9% black women ownership. In 2018 there was a decline in terms of black ownership which was at 25% and a slight increase in black women ownership from 9% to 10%. In 2018 and 2019, there was also another improvement of 4% in black ownership to 29% and 2% increase in terms of black women ownership to 12%. Then in 2020 black ownership increased by 2% to 31% and black women ownership increased from 12% to 15%. Overall there is a slight increase in terms of black women owning stakes, but a lot more still needs to be done to increase the numbers.

She concluded by saying that the observations in terms of directorship in JSE listed companies continue to be dominated by white and foreign nationals and this is a continuous trend from 2016.

Thus where initiatives are implemented, very few women are beneficiaries and such is not in with the economically active population figures.

The pace must be accelerated if women are to be properly included in the mainstream economy.

**Ms. Polo Leteka (Association of Black  
Securities and Investment Professionals)**

Ms Leteka spoke about challenges associated with male domination in the financial services sector. She made a reflection on the data on gender representation by making audiences aware that even though women were more educated than men in South Africa, statistics on employment show that a low number of women are being absorbed in the workplace. Other reports she cited indicate that when women are often placed in junior positions when they join the mainstream economy.

Ms Leteka further stated that societal patriarchy has seeped its way into the corporate world which ultimately affected women in that men behave in corporate as they behave at home and in society men are treated as if they are superior to women. Ms. Leteka mentioned various systemic barriers that hinder the advancement of women the workplace and this include racial and gender discrimination. She went on to explain that in the financial services sector; there seems to be recruitment of women in accordance with Employment Equity and the B-BBEE Act, however, retaining such individuals has proven to be impossible and this is due to the organizational cultures that are entrenched within the sector.

Ms. Leteka indicated that there is a need to enhance the legislative framework through by introducing impact assessments, a combination of the qualitative and quantitative aspects of transformation to yield positive results that are sustainable and be deliberate about driving diversity within companies in order to ensure a proper supportive environment for women. Further, companies must introduce policies around human resources to ensure that men and women are compensated equitably within the work environment. She further stated that government must put stringent measures to ensure proper implementation of its policies.



***Dr. Ntabiseng Moleko (Deputy Chairperson  
of the Commission for Gender Equality)***

Dr Moleko began her presentation by providing information on the mandate of the Commission for Gender Equality (CGE) and explained that there is sufficient legislation in place such as the B-BBEE Act, Employment Equity Act and the Convention on the Elimination of Discrimination against Women. Even though that is the case, these policies and laws are not addressing the issue of the performance of women's rights to ensure there is non-discrimination and equal representation across the board.

Speaking about unemployment, Dr Moleko stated that women are the hardest hit by unemployment compared to men because the country is on a trajectory that is not realising changes or gains; coupled with the inability to address gender disparity and inequality in South Africa. On procurement, the 40% target of the Preferential Procurement Policy will be ineffective if there are no policy prescripts and mandatory requirements. Many government departments do not have gender indicators and therefore cannot monitor gender equality in terms of women empowerment.

Dr Moleko recommended punitive sanctions that are adequate and the strengthening of monitoring the implementation of the recommendations of such sanctions. With regards to the economic empowerment programmes, Dr Moleko stated that there has to be a reconfiguration of programmes to look at new projects and greenfield investments that are earmarked for women. This includes creating new sectors by the locals and ensuring that finances are geared towards those sectors and also prioritise access for women in the informal sector of the economy as well as women in rural areas. On the aspect of employment equity, she stated that collaboration amongst various Commissions to deal on non-performers in the area of transformation in order to ensure that there are adequate and appropriate sanctions that are in line with the mandates of those Commissions.

***Ms Namhla Mniki (DDG and Senior  
Specialist in the Presidency)***

Ms Mniki made a presentation on the solutions to achieve economic justice for women's economic empowerment. She cited four categories of solutions for the realisation of women empowerment. She expressed the fact that there is a need to expand decent work and conducive work environments for women and to also ensure that such environments are safe as well.

Secondly, there must be an increase in productive resources to ensure that women increasingly have access to ownership and control of productive resources. Thirdly, inclusive economy must also be prioritised with the inclusion of policies, legal frameworks, approaches and planning systems that are gender responsive, and hence gender responsive budgeting is important. Lastly, the "Care Economy" should ultimately result in transformation across various sectors.

***Ms Phelisa Nkomo (Independent  
Development Economist)***

Ms Nkomo made a presentation on the solutions for increased accountability on women's economic empowerment. The key issue she brought to the forum was around accountability mechanisms that needed to be instituted. She also emphasised that women economic empowerment is a prerequisite to sustainable economic development. She stated the need to strengthen mechanisms for measuring women's economic empowerment that goes beyond standard measures of legal instruments and gender equality issues by bringing in multiple stakeholders to solve the problems.

One of the mechanisms she mentioned as a possible solution was the legal instruments that are used to make a continuous assessment in as far as commitment is concerned for the realisation of accountability on women's economic empowerment. She stated that the measurement of women economic empowerment in most instances focuses on an outcome rather than the process. Ms Nkomo was clear on the need to focus on grass-root economy to create more opportunities.



From the webinar, it became clear that although South Africa has accountability systems in place, there is a lack of coordination and cooperation which continues to result in pockets of transformation and silo approach to economic empowerment of women. Further, the institutions set up for the purpose of monitoring implementation and act against violations are mainly under-resourced with limited budgets and independence to monitor and drive economic transformation. Regulatory bodies must work together to make economic empowerment a reality for the women of South Africa.

***The Effort of the Woman  
of 1956 should not be in  
vain!***





## ***Young people are ready for participation in the mainstream Economy through B-BBEE***

The B-BBEE Commission hosted its first Youth Month Dialogue which coincided with the Youth Month programmes of government to commemorate June 16 Students Uprisings of 1976. This year marked the 45 Anniversary of the June 16 Students Uprising, 27 years of the institution of democracy in South Africa, and 18 years of the adoption of B-BBEE legislation and policy. With regards to the latter, it was also important to reflect on the possible outcomes of B-BBEE legislation and policy but more importantly, to also establish the current challenges that create a barrier to employment as well as economic inclusion of the youth of South Africa. The debates during the dialogue paid attention to the two factors, i.e. the rising unemployment as well as the means to increase economic inclusion of the youth.

The dialogue coincided with the release of statistics on unemployment which pointed that the unemployment rate

amongst youth was higher than the norm, at 74%. In light of the above, the national youth programme as well as its focus and theme became relevant to the mandate of the B-BBEE Commission. The pillars of B-BBEE were used as an anchor for the debates that took place on the day of the dialogue. Content was generated from these 5 elements of B-BBEE: Ownership, Management control, Skills Development, Enterprise Development, and Socio-Economic Development. The B-BBEE Commission invited a number of speakers who are leaders of youth formations and associations that have an interest in the implementation of B-BBEE legislation. These included, Black Management Forum (Young Professionals), Black Forum South Africa, and Black Business Council (Youth Chapter).

## ***Black Management Forum***

Classi Kgopa (National Chairperson: BMF Young Professionals) represented the BMF in the dialogue. The presentation of BMF was centered around the elements of ownership and management control. Within the pillar of ownership, Mr. Kgopa presenter highlighted some of the problems and challenges which points out that a portion on Black Ownership of JSE listed entities leaves a lot to be desired with an average of 50% of listed entities that reported with Black Ownership of less than 25%, an average of 46% of entities with more than 25% but less than 100% Black Ownership and with only 2% of entities that reported with 100% Black Ownership. The other major concern which was highlighted by BMF was that only 9.2% of South African youth are involved in entrepreneurial activities, these individuals are likely to be male than female. In light of this, barriers to ownership of enterprises are linked to the fact that there are no avenues or enabling environments created for influence (by youth) in the strategic direction of the business through shareholding (by young black people). The BMF made a call for a youth friendly financing models, and expansion of entrepreneur incubation programmes, countrywide.

With regards to the element of management control, the BMF raised a concern that there was no noticeable progression of youth in the boards of JSE listed entities MF pointed out that 61.61% of board membership of JSE listed companies remained White people and foreign nationals, 38% for Black Males (21.63%) and Black Females (16.76%) respectively. The anomaly in the existing statistics is that the statistics do not quantify the number of youth that are in senior management or serve on boards of listed entities and organs of state. In relation to the aspect of management control the BMF made a call for the BBBEE Commission to engage stakeholders to ensure that the stats on JSE listed entities and state owned enterprises make reference to youth representation in executive and boards. The BMFYFP also proposes a (30) thirty percent quota on boards establishment or appointments to be made for qualifying youth people under the age of 35 in the JSE listed companies. BMFYFP was adamant that advocating for youth inequality and transformation should be made priority and the youth initiatives can be championed through State Owned Enterprises as a bare minimum.

## ***Black Forum South Africa***

Adv. Kgagudi Morota (CEO of BFSA) made a presentation on Skills Development. He began the presentation by explaining the history and the mandate of the BFSA since its inception. Adv. Morota explained the current model of skills development in the country with reference to the overall aims in growing the country. BFSA emphasised the fact that all initiatives that are created for skills development should lead to job creation or job absorption in the long term. Adv. Morota emphasised the fact that there needs to be a way in why TVET Colleges are given priority to occupations that are technical in nature. This means that the training provided by TVET Colleges should create skills that are needed for careers for the future. The presented also explained the skills policy framework and questioned whether the policy framework leads to job creation.

BFSA suggested solutions to enhance skills development. One of the solutions was that there was a need to ensure that existing skills should be used effectively in order to growth the economy. He made an example of the creative sector as one of those sectors that have a potential on increasing jobs through existing skills.

## ***Black Business Council (BBC) Youth Chapter***

Thobela Maponya (Chairperson: BBC Youth Chapter) made a presentation on Enterprise and Supplier Development. He began his presentation by explaining the mandate of the BBC. He explained that the BBC is an independent membership-based organization representing professional, business associations and chambers with the purpose to advocate for transformation of the South African economy through aggregation and amplifying of member opinion, thought-leadership and policy change to achieve meaningful inclusive economic growth. Mr. Maponya explained three barriers to Enterprise and Supply Development, which include ambiguity in policy on socio-economic transformation, lack of enforcement on non-compliance with B-BBEE and lack of accountability to the effective implementation of B-BBEE.



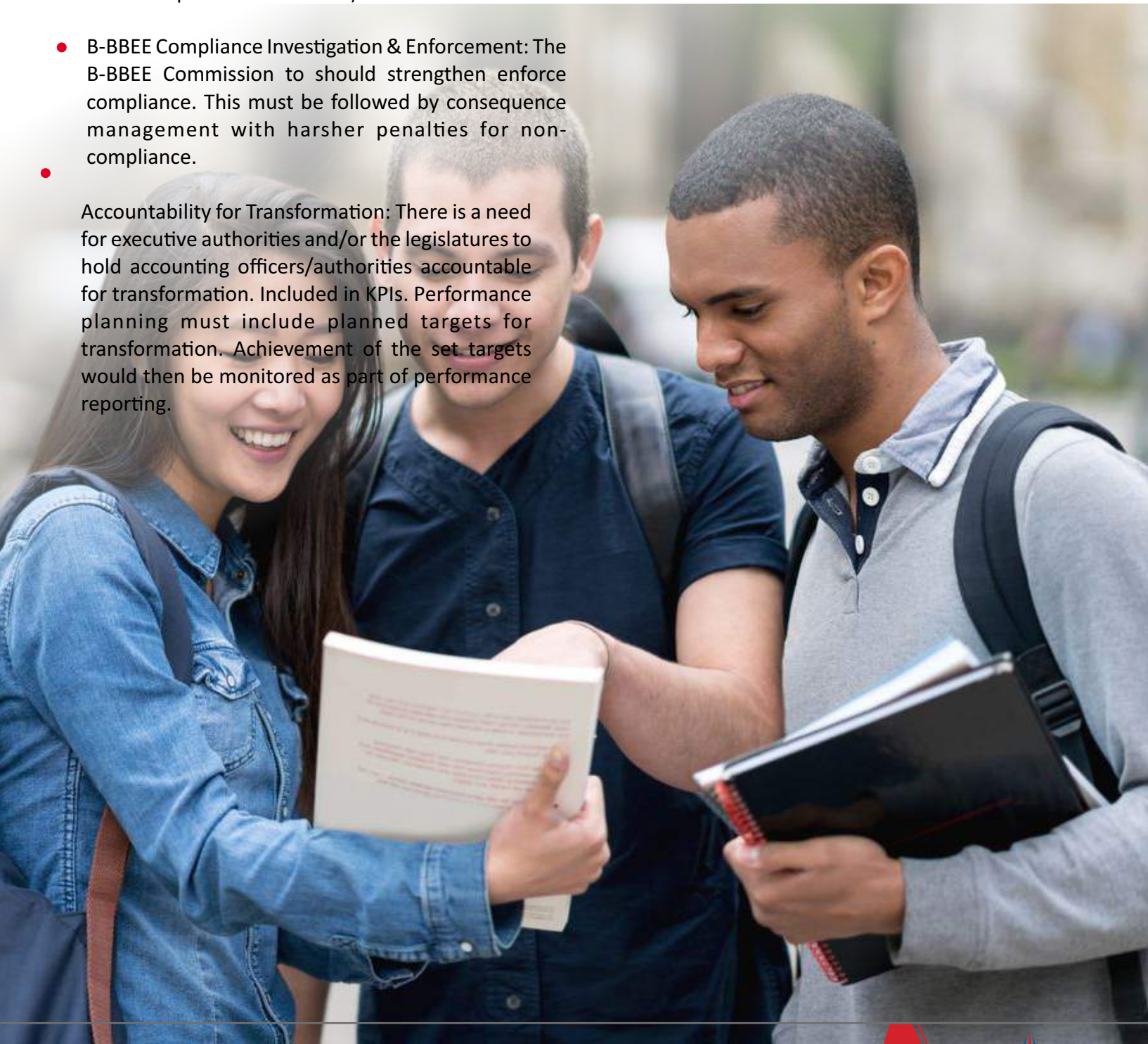
**The BBC suggested the following solutions to the problems identified:**

- Procurement and Socio-Economic Transformation Policy Ambiguity: Establish one aligned reference legislative policy document to regulate procurement of goods & services, with key priorities on Preferential Procurement for Designated Groups. **(Promulgation of the Draft Public Procurement Bill)**. Mainstream Economic Inclusion through dedicated Pre-qualification criteria linked to Annual Procurement Plans in alignment with **NYP2030 & IYDS Entrepreneurship interventions**: Women-Only, Youth-Only, Persons with Disabilities Only (remove race as requalification criteria)

- B-BBEE Compliance Investigation & Enforcement: The B-BBEE Commission to should strengthen enforce compliance. This must be followed by consequence management with harsher penalties for non-compliance.

Accountability for Transformation: There is a need for executive authorities and/or the legislatures to hold accounting officers/authorities accountable for transformation. Included in KPIs. Performance planning must include planned targets for transformation. Achievement of the set targets would then be monitored as part of performance reporting.

The dialogue highlighted gaps in the economic empowerment of young people, most of which remain unemployed and without adequate skills and funding to start their own businesses. There is a need for legislative framework to provide for consequences for lack of transformation, which must be properly enforced by the B-BBEE Commission. The participants appealed for proper enterprise and supplier development interventions that are of quality to create new businesses that are black owned. The session demonstrated that young people are ready to contribute to the economy and policies and initiatives must align to their needs. This way, more job opportunities can be created and sustained.



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