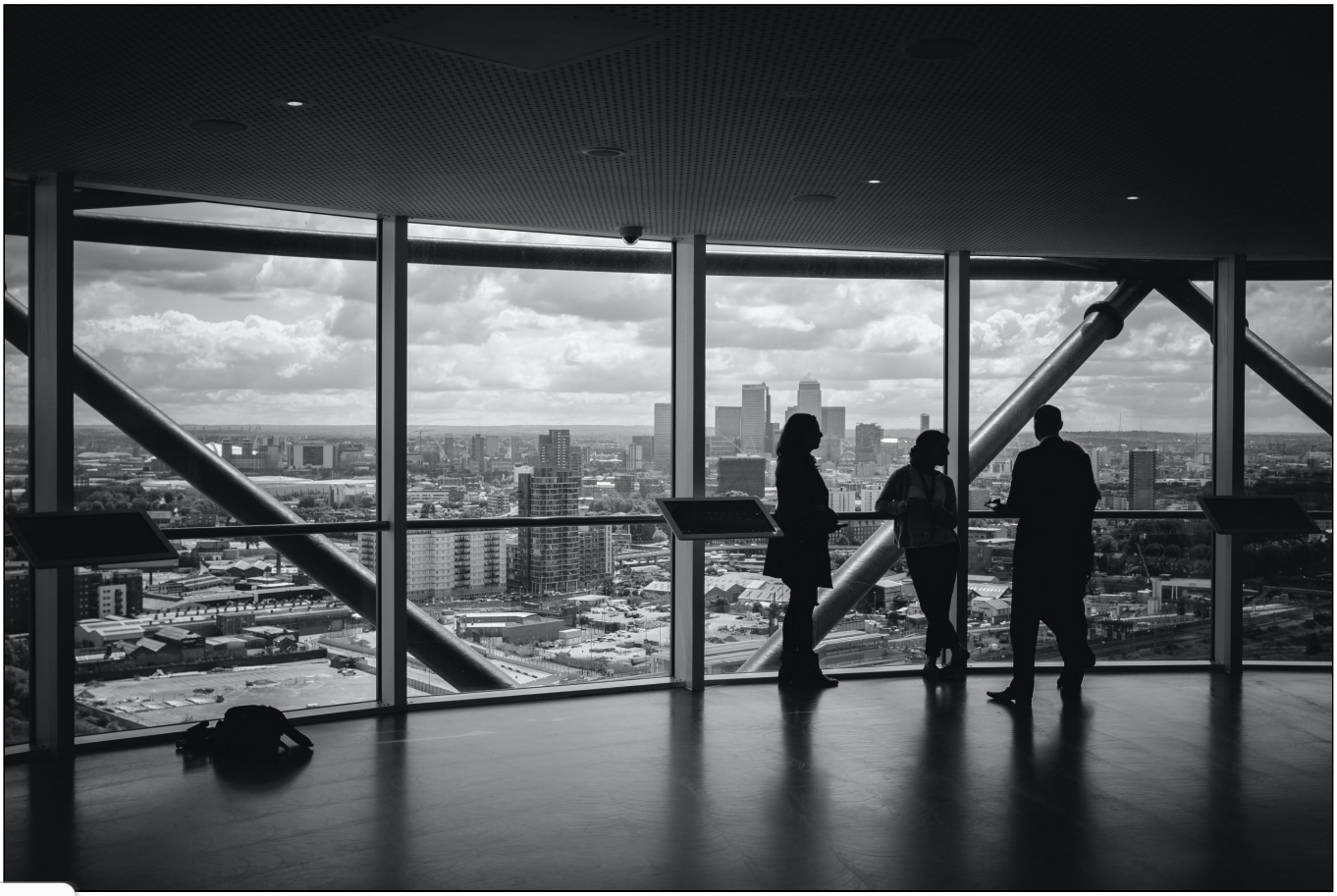
A critical analysis of the BBBEE Commission in adjudicating fronting cases



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Cargo Carriers Proprietary Limited v The Broad Based Black Economic Empowerment Commission and Others [case number 76000/2019] and Sasol Oil Limited v The Broad Based Black Economic Empowerment Commission and Others [case number 21415/2020]: Analysing the role of the BBBEE Commission in adjudicating fronting cases.

Introduction

In the recent matters between Cargo Carriers Proprietary Limited v BBBEE Commission and Others [case number 76000/2019] ("Cargo Carriers case") and Sasol Oil Limited v The Broad Based Black Economic Empowerment Commission and Others [case number 21415/2020] ("Sasol Oil Case"), the Broad Based Black Economic Empowerment Commission ("the Commission"), being the statutory body receiving complaints relating to BBBEE matters, once again found itself under legal scrutiny.

In both these cases, the High Court found that the Commission's finding of fronting lacked evidence, was flawed, irrational and not connected to the evidence before the Commission. In the Cargo Carriers case, Cargo Carriers sought a review and setting aside of the final finding of the Commission as well as substitution of its decision with a decision dismissing the second to seventh respondents' complaints against Cargo Carriers. The second to seventh respondents were owner drivers in terms of Cargo Carriers Owner-driver initiative ("ODI"), which is a BBBEE initiative implemented in terms of section 1 of the BBBEE Act ("the Act").

The gist of the Commission's decision in the Cargo Carriers case was that the complainants were denied the economic benefits they had reasonably expected to receive, and that the terms of the owner-driver scheme contradicted with the objectives of BBBEE. In the Sasol Oil case, on the other hand, the Court was asked to adjudicate on whether the findings of the Commission in a fronting complaint against Sasol Oil Limited ("Sasol Oil") should be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000. The crux of the Commission's findings in the

This note seeks to analyse the role of the Commission in adjudicating fronting cases. In particular, the note scrutinises the powers of the Commission with regards to finding a practice is a "fronting practice" in terms of section 13J(3) of the Act.

Cargo Carriers case

Facts:

On 1 August 2011, Cargo Carriers concluded an agreement with Afrisam Proprietary Limited ("Afrisam") to provide transportation services to Afrisam. On 26 November 2012 Afrisam approached Cargo Carriers to transport an estimate of 30 000 tons of cement from Ulco to Afrisam's Western Cape Ready Mix Plants. Cargo Carriers submitted its proposal for the Western Cape seeking a letter of intent and setting out that if Afrisam required it, Cargo Carriers could have two vehicles operated by Owner Drivers to contribute towards the Afrisam equality development program. On 4 December 2012 Afrisam sent a letter of intent, not requesting any Owner-Driver vehicles. Neither in the contract with Afrisam, nor in the proposal to augment, was an ODI a requirement for Cargo Carriers to fulfil before the contract could be implemented. The augmented portion of that agreement was then outsourced to Ezethu Logistics Proprietary Limited ("Ezethu"), a subsidiary of Cargo Carriers.

In early 2013, Cargo Carriers internally advertised for new positions under the ODI. On 23 April 2013, the Complainants concluded the service agreement, management agreement and finance agreement with Ezethu.

On 2 August 2016, two years after the second respondent had terminated his ODI contracts, he lodged a complaint with the Commission. His complaint was that he was employed by Cargo Carriers as an owner-driver, however, the problem started within a month of his employment wherein he was denied access to his business account. He was informed that he had no access until he covered 48 months. He did not understand the empowerment deal and the objectives of the deal were not explained to him. He was surprised that he received a letter from Mercedes Benz indicating that he owed monies. He asked for compensation from Cargo Carriers for unspecified outstanding monies due, and in addition that Cargo Carriers settle any remaining debt with Mercedes Benz, but with him retaining ownership of the truck.

The Commission's preliminary assessment/ investigation

The commission made a preliminary assessment based on complainant and found

Cargo Carriers that the second respondent seemingly did not derive any financial benefit from this initiative, leaving him in debt with Mercedes Benz. He was inhibited from participating in the core activities of the ODI as he had no control of the business and finances. Cargo Carriers may have used the second respondent to gain a higher BBBEE status without an economic benefit flowing to the second respondent. On 16 December 2016, Cargo Carriers was issued with a notice to investigate by the Commission.

In a letter responding to the notice to investigate, Cargo Carriers provided comprehensive information and supporting documents denying that there was any fronting.

On 16 January 2017, the Commission delegated its investigative powers to Ubuntu Business Advisory and Consulting (Pty) Ltd ("UBAC"). UBAC informed Cargo Carriers that the third to seventh respondents had now joined the complaint of the second respondent.

On 7 June 2018, the Commission published its preliminary findings, that Cargo Carriers benefited from the ODI by extending its contract with Afrisam whilst Ezethu benefited from an improved BBBEE status as a result of the owner driver scheme. That Cargo Carriers failed to provide proof of management training to the complainants. That Cargo Carriers attempted to distance itself from the complainant's relationship with Ezethu and that the conduct of Cargo Carriers was contrary to the objectives of the Act and may amount to fronting practice or misrepresentation of BBBEE status or violation of the Act, which are criminal offences.

The Commission afforded Cargo Carriers 30 days to respond to these preliminary findings before it issued its final findings. Cargo Carriers responded to these findings with further evidence, however, that exercise was futile as it did not yield a different result. The final findings were essentially a copy and paste of the preliminary findings.

Courts finding on review

The Court applied the trite principles of Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd 1984 (3) SA 623 (A) when deciding whether this ODI was

accordingly held that the finding is to be reviewed in terms of section 6(2)(f)(ii) of PAJA in that this finding was not rationally connected to the information before the Commission.

The finding that Cargo Carriers indicated that they provided management training to the complainants however Cargo Carriers was unable to provide evidence of such evidence is unfounded, untrue and irrational on the evidence before the Commission and must be reviewed and set aside in terms of s6 of PAJA.

The serious breaches committed by the complainants played a central role in the failure of the ODI and could not have been ignored. The Commission need not have civil jurisdiction to take cognisance of this relevant factor.

On the allegation of fronting the Court found that, the facts of this matter unequivocally render a finding of fronting irrational. Not a single jurisdictional fact for fronting was established by the Commission. The ODI was not concluded for improved BBBEE status or to obtain the contract with Afrisam.

Sasol Oil Case

Facts

Sasol Oil is one of the subsidiaries of Sasol Ltd which is a listed public company. In 2006 Sasol Oil Ltd sold 25% of the shares of Sasol Oil to ("Tshwarisano") the second respondent, a black controlled company, in a black economic empowerment transaction. Awevest Investment Ltd ("Awevest"), the third respondent, is the investment company of two groups of African Women represented by Queen Elizabeth Sangion ("Sangion"). Awevest is the sole shareholder in Golden Falls Trading 567 Pty Ltd ("Golden Falls") which is one of the shareholders of Tshwarisano. Golden Falls is a SPV specially created to hold 5.58% of the shares in Tshwarisano. When Golden Falls failed to raise the purchase price of the shares of R19.3 M, a group of funders agreed to finance the acquisition of the shares through the subscription of redeemable preference shares in Golden Falls. The funders, subscribed for the preference share at a price of R19.5m in terms of a preference share subscription agreement ("Pref share agreement")

In December of 2015, Ms Sangion laid a complaint to Sasol Limited that the pref share agreement unfairly favoured the funders and thereby undermined the BBBEE purpose

In October 2017, the Commission issued a notice to Sasol Oil that it was investigating a complaint by Ms Sangion laid in terms of the Act. The complaint was that Sasol Oil was somehow, responsible for the unfair terms of the pref share agreement. The Commission interpreted the complaint as an accusation that Sasol Oil had knowingly engaged in "fronting" in that it claimed a BBBEE rating on the basis that Golden Falls' shares in Tshwarisano were held by a black company while in truth the white funders were the true beneficiaries of the shares.

Despite comprehensive submissions made by Sasol Oil to the Commission, the Commission found that the black ownership claimed through Tshwarisano, Goldem Falls and Awevest is flawed and a mockery to what BBBEE stands for. Sasol Oil sought a review on the alleged erroneous and unlawful adverse findings made by the Commission.

Court's finding on review

Section 13B of the Act establishes the Commission as a statutory body to receive complaints relating to BBBEE and to investigate complaints received, either of its own initiative or in response to a complaint received. Those complaints must be in the prescribed form and substantiated by evidence justifying an investigation. The process to be followed upon receiving a complaint is set out in the Regulations. In particular, Regulation 15(7), which provides that "Any investigation concluded by the Commission shall be in accordance with its procedures that are in accordance with the Act and conform to all the rules relating to fair administration of justice processes applicable to investigations".

It is evident from the above cases that the Commission did not apply and comply with the set regulations. It failed to apply the natural rules of justice, in that even when the applicants made their comprehensive submissions to the allegations and provided all the evidence, the Commission was adamant to disregard all the evidence before it.

In terms of section13B(3)(b) and (c) of the Act, the Commission "must be impartial and perform its functions without fear, favour or prejudice" and must exercise its powers in accordance with the values and principles mentioned in section195 of the Constitution.

Conclusion

Offences relating to BBBEE fronting are not to be taken lightly by corporates because there are serious penalties and sanctions, like criminality prescribed by the Act. These recent judgments however will encourage corporates to seek relief where it is apparent that the Commission failed to apply the rule of law in adjudicating their cases.

See also:

- Presidential BBBEE Advisory Council up and running
- Fronting under the BBBEE Act
- Government tenders and the "invalid" regulations

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