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Requirements for a criminal conviction of a BEE fronting offence written by Gideon Gerber



What are the main statutory requirements for criminal conviction of a BEE fronting offence?

This is the final blog of our series where we focused on a range of **BEE** fronting elements. Other blogs that lead up to this final article include: '*Three most important things you should know about BEE fronting practices*'; '*What “Red Flags” are an indication of BEE fronting practices?*'; and '*Criminal offences and penalties related to Fronting Practices*'. In this blog we will focus on the main statutory requirements for being convicted for a BEE fronting offence.

The extension of the common law crime of fraud to include more ‘tailor-made’ statutory offences in section 13O of the B-BBEE Amendment Act 46 of 2013 (Amendment Act) relating to misrepresentation and fronting practices is similar to the method employed by the legislature to extend the common law offence of bribery with a narrow application, to include a wider enforceable statutory offence in terms of the Prevention and Combating of Corrupt Activities Act 12 of 2004. Unlike corruption legislation, a fronting practice in terms of the Amendment Act has not replaced the common law offence.

The formulation of a fronting practice as a criminal offence has raised concerns that it is too vague, broad and ambiguous and might not stand constitutional muster.

Statutory provisions’ definitional requirements of a BEE fronting offence

The definition of a ‘fronting practice’ in section 1 of the Amendment Act consists of two parts. The first is a **general part** and the second deals with **specific practices**, initiatives and transactions. This format of formulation to provide for general offences, on the one hand, and specific offences, on the other, is similar to the structure adopted in the formulation of prohibited corrupt activities in terms of the Prevention and Combating of Corrupt Activities Act although not as thorough. **A ‘fronting practice’ is defined as-**

- ‘a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative ...’

The second part of the definition includes four specific B-BBEE initiatives and states that these initiatives are included in the general meaning of the offence but are not limited to these four initiatives.

Four transactions are identified and included, numbered (a)-(d)(i)-(iii) under the definition of a fronting practice, and can be summarised as follows:

- (a) A B-BBEE initiative in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
- (b) The economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio provided for or specified in the legal documentation of the transaction;
- (c) The conclusion of a legal relationship with a black person for the purpose of achieving a certain *B-BBEE compliance level* without granting the relevant black person the economic benefits that are reasonably expected to be associated with the status or position held by that black person;
- (d) An agreement with another enterprise to achieve or enhance a measured entity's B-BBEE status in circumstances where-
 - (i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers of the enterprise (although not clear, it can be assumed that 'enterprise' refers to a B-BBEE enterprise);
 - (ii) the maintenance of business operations of an enterprise with whom an agreement is concluded is reasonably considered to be improbable, given the resources available to such an enterprise;
 - (iii) the terms and conditions of the agreement were not negotiated at arm's length and on a fair and reasonable basis.

Requirements for criminal liability of a fronting practice

The *means rea* (intention or negligence) requirement in respect of a fronting offence is established by the definition of '**knowing**', '**knowingly**' or '**knows**' provided for in section 1 of the Amendment Act. **The definition provides as follows:**

“‘Knowing’, ‘knowingly’ or ‘knows’, when used with respect to a person and in relation to a particular matter, means that the person either-

- (a) had actual knowledge of that matter; or
- (b) was in a position in which the person reasonably ought to have-
 - (i) had actual knowledge;
 - (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or

(iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.”

The term has a very strong emphasis on being aware and having knowledge of certain matters.

What are the criminal liability requirements for negligence?

The criminal liability requirements for **negligence** as an element of a criminal offence are as follows:

- Would a reasonable person in the same circumstances as the accused have foreseen the reasonable possibility of the occurrence of the consequence or the existence of the circumstances and the unlawfulness thereof?
- Would a reasonable person have taken steps to guard against that possibility and did the accused fail to take steps which the accused ought to reasonably have taken to guard against such possibility? With regard to a duty to guard, a person may take a slight risk on the basis of what is socially practical for the urgent and commendable action the accused is engaged in, or the prevention measures may have been difficult, inconvenient or costly to the extent that a reasonable person would not have guarded against the possibility of the unlawful event.

The provision in paragraph (a) of the ‘**knowing**’ definition in respect of the fronting offence ... ‘had actual knowledge of that matter ...’ clearly indicates the presence of **intention**. Other terms used in paragraph (b)(i)-(iii) of the ‘**knowingly**’ definition, such as ‘reasonably ought to have’, ‘taken other measures’ and ‘would reasonably be expected’ are indicative of the requirement for **negligence**.

- The culpability requirement of *means rea* for a fronting offence is therefore **either intention or negligence**. Negligence is a **lower standard** of fault than that required for the commission of a corrupt activity or fraud.

In the event of a fronting offence, the term ‘knowingly’ requires a **duty of care** to obtain information and take **reasonable steps** to be informed. Obtaining legal advice could be relied on even if the advice is later proven to be incorrect, on condition that it is not far-fetched and that a reasonable person would also have accepted such advice. Failure to obtain advice in circumstances in which it is difficult, inconvenient or costly to do so may also be an acceptable defence.

Summary of criminal liability for a BEE fronting offence

The terms requiring the conduct of a fronting office to be prohibited are very wide and refer to '**directly**' and '**indirectly**' or '**other act or conduct**'. Some transactions and arrangements may even fall outside the definition of a B-BBEE initiative and are not related to obtaining or achievement of any B-BBEE benefit.

- The legislature setting a minimum *means rea* requirement of negligence instead of intention is popular in modern formulation of offences. Negligence is also interpreted by the courts to be the requirement in the absence of clear statutory provisions regarding the requirement of culpability.
- This lower form of *means rea* is normally required when the legislature wants to penalise reckless, careless or negligent behaviour.
- Cases where offenders could easily escape liability by merely raising a defence of being "unaware" to exclude intention could also prompt the legislature rather to require a lower form of fault.
- The legislature, in formulating a fronting offence, has set the bar lower insofar as the fault requirement is concerned and this would make prosecution easier than would be the case with the common law offence of fraud.
- Furthermore, no misrepresentation or an element of dishonesty is required to commit a fronting practice, as would be the case with fraud, and no prejudice or potential prejudice will have to be proven by the state as committing the offence of fronting is deemed to disadvantage people in general, namely the intended beneficiaries of the B-BBEE legislation as ruled in the judgement of *Esorfranki Pipelines v Mopani Municipality* (40/13) [2014] ZASCA.

The legislature places a higher onus and duty of care on persons involved in the B-BBEE programme to take reasonable steps to be informed and obtain the necessary knowledge. Ignorance and lack of knowledge of a fact or the law would only be a defence if obtaining knowledge is unreasonable.

SERR Synergy assists businesses to implement viable B-BBEE initiatives and ensure alignment of initiatives with the legal requirements of the B-BBEE Codes and to avoid any possible risks associated with fronting or any other unethical business practices that may cause possible reputational damage to an enterprise.

About the author: *Gideon Gerber* is a director of SERR Synergy (Pty) Ltd, an admitted High Court attorney with the qualifications B.Juris (Unisa), B.Proc (Unisa) and LLM (Pret.) with a Master's dissertation titled: ***An Appraisal of the Offence of "BEE fronting" in the context of Broad-Based Black Economic Empowerment (B-BBEE) in South Africa.*** He has more than 30 years' experience in Business Structuring & Compliance, Training, Skills Development and Business Compliance in South Africa, the UK and Namibia. He is a regular speaker at various B-BBEE seminars and also writes articles for the Business Day and Landbouweekblad that concerns BEE Matters. He also published an article titled '*Criminal liability requirements of the new Broad-Based Black Economic Empowerment (B-BBEE) statutory offence*' in the Journal of Contemporary Roman-Dutch Law (THRHR) August 2018.

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