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What are the criminal offences and penalties related to BEE fronting written by Gideon Gerber

What are the criminal statutory offences relating to BEE fronting and the penalties and sanctions prescribed by the B-BBEE Act ?

Further to previous blogs related to Broad-Based Black Economic Empowerment (B-BBEE) fronting, namely ‘*Three most important things you should know about B-BBEE fronting practices*’ and ‘*What signs or “Red Flags” are an indication of BEE fronting practices*’, this blog forms part of this series and will concentrate more on other criminal statutory offences relating to B-BBEE and the penalties and sanctions prescribed by the B-BBEE Act of 2003 as amended for these offences.

Statutory provisions on BEE fronting practices, misrepresentation and providing false information

In the context of B-BBEE, the criminal conduct of misrepresentation, as one of the elements of the common law offence of fraud, has been unbundled and categorised into several separate statutory offences. The B-BBEE Amendment Act of 2013 (Amendment Act), which became effective on 24 October 2014, provides for five new statutory offences, three of which relate to misrepresentation.

- Section 13O(1)(a) provides for an offence if a person knowingly misrepresents or attempts to misrepresent the B-BBEE status of an enterprise, while section 13O(1)(b) and (c) renders the disclosure of false information or misrepresentation of information to a verification professional or any organ of state or public entity an offence.
- The statutory provisions created by section 13O(1)(a)-(c) distinguish between misrepresentation or attempted misrepresentation of a person's B-BBEE status, on the one hand, and providing false information in assessing or securing a B-BBEE status to specific institutions such B-BBEE verification professionals, organs of state or public entities, on the other hand.
- Section 13O(2) of the B-BBEE Act of 2003 creates a legal duty to report any commission of or attempt to commit an offence referred to in section 13O(1)(a)-(d).

A legal duty is placed on a B-BBEE verification professional, procurement officer or other official of an organ of state or public entity to report such an offence to a law enforcement agency when they become aware of it. Failure to report such offences shall constitute an offence on the part of the B-BBEE verification professional or procurement officer.

The reporting duty imposed on certain persons

The provisions of section 13O(2) of the B-BBEE Act of 2003 place a legal duty only on verification professionals, procurement officers or other officials of organs of state and public entities, but do not apply to persons in positions of procurement outside the sphere of organs of state or public entities. **The duty to report does not refer to reporting to the B-BBEE Commission, but to an appropriate law enforcement agency.** It is important to know that the B-BBEE Commission is not deemed a law enforcement agency and is allowed in terms of the B-BBEE Act of 2003 to investigate complaints lodged by complainants or on its own initiative if of an administrative nature.

- This statutory duty to report also removes the uncertainty that existed in the past in relation to a B-BBEE verification professional's contractual obligation to a client to treat all information secured from the client as confidential. This uncertainty had led to a general low-risk approach followed by B-BBEE verification professionals of not reporting possible incidents of irregularities and fronting activities. With regard to the legal duty to report, B-BBEE verification professionals and procurement officers receive protection in this regard under section 159 of the Companies Act 71 of 2008 and the Protected Disclosures Act 26 of 2001. The Protected Disclosure Act protects employees against recourse from their employers in the event of reporting, amongst others, a criminal offence committed by their employers.
- The Companies Act protects employees and a variety of individuals and stakeholders, such as auditors, legal advisors and suppliers of goods and services to the company, who disclose any contravention of legislation. Reporting in terms of the Companies Act is subject to a qualified privilege and immunity from any civil, criminal or administrative liability, and provision is made for compensation in the event of any conduct or threat to harm whistle-blowers or deter them from exercising their rights in terms or the Companies Act.

Penalties for BEE fronting practices, misrepresentation and related offences

- Any person convicted of an offence in terms of the Amendment Act, will, for offences provided for under section 13O(1)(a)-(d), be liable to a fine or imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment. If the convicted person is not a natural person, then a fine not exceeding 10% of annual turnover shall apply.
- A person who fails to report an offence in terms of section 13O(2) of the B-BBEE Act of 2003 may, on conviction, be liable to a fine or imprisonment for a period not exceeding 12 months.
- The Amendment Act further provides that in determining a fine for offences committed under section 13O(1)(a)-(d), the court must take the value of the transaction derived from the commission of the offence into account. The Act also places an obligation on the court in which a person is convicted to report the conviction to the B-BBEE Verification Regulator (SANAS), if the person convicted is a B-BBEE verification professional, and any other cases to the Advisory Council or the convicted person's employer.
- The Amendment Act also grants jurisdiction to a magistrate's court to impose any penalty provided for in the Act.
- The Act further makes provision for **a prohibition on doing business** with organs of state or public entities for a period of 10 years following any convictions in terms of the Amendment and provides for National Treasury to keep a register of defaulters for this purpose. A court that convicts any person who is not a natural person may limit the order prohibiting business with an organ of state or public entity to those members, directors or shareholders who had contravened the B-BBEE Act of 2003.
- Section 13A of the Amendment Act also provides for an organ of state or a public entity to **cancel any contract** or authorisation granted on account of false information knowingly furnished by or on behalf of an enterprise in respect of its B-BBEE status. The cancellation by an organ of state or a public entity may be done without prejudice to any other remedies available to such organ of state or public entity.

Although the above statutory offences do not replace the possibility of prosecution under the common law, it is anticipated that the authorities will rather opt for prosecution under the statutory provisions as it is doubtful whether conviction under the common law will allow for the high penalties provided for in the Amendment Act. Some have criticised the penalties as "draconian".

What is the difference between a contract being cancelled by the state and being black-listed from doing business with the state?

BEE fronting has legal implications. One must clearly distinguish between the circumstances when a contract may be cancelled by the state and when an entity may be "black-listed" and prohibited from doing business with the state or an organ of state. It's important for to understand the difference related to BEE fronting.

- While section 13P of the Amendment Act **prohibits** an enterprise from doing business with an organ of state or a public entity following a **conviction in terms of the Act**, it is unlikely that authorities in future will seek any prosecution of miscreants and errant B-BBEE conduct in terms of the common law. A common law conviction of an offence such as fraud or a conviction in terms of any other law will, for instance, not trigger the prohibition created by section 13P. However, conviction of an offence in terms of the B-BBEE Act 2003 is not a requirement to **cancel** a contract or **authorisation** by an organ of state or public entity in terms of section 13A of the Amendment Act, but the mere provision of false information, without a conviction, may trigger a cancellation of a state contract or authorisation granted.
- With regard to the prohibition on doing any business with an organ of state (black-listing), the Preferential Procurement Regulations (PPR) provide that a contract may in fact be cancelled and an enterprise "black-listed" (both) in the event of **providing false information** or failing to disclose any subcontracting arrangements involving more than 25% of the value of a contract with an organ of state under certain circumstances. A conviction is not required in terms of the PPR to trigger both a cancellation and "black-listing". The PPR also provides for a 10% penalty based on the contract value to be levied against a transgressing enterprise if a contract has to be re-published to invite bidders to complete the remainder of the contract. Such actions by an organ of state in terms of the PPR differ from those provided for in the Amendment Act where a **conviction** in terms of the Act is required to trigger the prohibition of doing business with an organ of state, while the PPR only provides for the provider of false information to be black-listed or a contract cancelled.

The Amendment Act goes further in respect of prohibition on doing business with an organ of state and a public entity than as provided for by the PPR because the B-BBEE Act also extends the provision to the **black-listing of members, directors and shareholders** in addition to the black-listing of the legal entity.

- With regard to the cancellation of contracts by organs of state or public entities, the judgement in recent court cases (e.g. *Esorfranki Pipelines v Mopani District Municipality* (40/13) [2014] ZASCA; *Passenger Rail Agency of South Africa Swifambo (Pty) Ltd* (2015/42219) [2017] ZAGPJHC) provides for the review and setting aside of contracts which do not meet the requirements for administrative legality, such as contracts obtained irregularly or through fraud, dishonesty, collusion and fronting.

Other possible penalties outside the B-BBEE legal framework

Apart from penalties, fines, imprisonment, cancellation of contracts by organs of state and public entities and a 10-year prohibition on doing business with an organ of state or a public entity faced by the offending corporation or its members, directors or shareholders, a director of a company may also be disqualified from serving as a director if convicted under the Amendment Act.

- Section 69(8) of the Companies Act provides for the disqualification of a person from serving as a director if he or she is convicted of an offence involving fraud, misrepresentation or dishonesty or an offence involving theft, fraud, forgery or perjury and is sentenced to imprisonment without the option of a fine or a fine exceeding the prescribed amount. A conviction in terms of section 13O(1)(a)-(c) of the Amendment Act relating to misrepresentation and providing false information will **automatically disqualify** a person from **serving as a director** in terms of the Companies Act; on the other hand, the offence of knowingly engaging in a fronting practice under section 13O(1)(d) of the Amendment Act does not necessarily involve dishonesty, as dishonesty or misrepresentation is not a requirement for being convicted of engaging in a fronting practice. Therefore, not all convictions of a fronting offence will automatically disqualify a person from serving as a director in terms of the Companies Act, but only those fronting offences involving fraud, misrepresentation or dishonesty.
- The B-BBEE Codes also allow for an affidavit to be submitted by certain smaller categories of entities to prove their B-BBEE compliance status. Providing false information in an affidavit could lead to prosecution under section 13O(1)(a)-(c) of the Amendment Act which prohibits the conduct of knowingly providing false information or misrepresenting an entity’s B-BBEE status. Such conduct also constitutes an offence in terms of section 9 of the Justice of the Peace and Commissioners of Oath Act 16 of 1963, which provides that any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, commits an offence. Section 9 of the Justice of the Peace and Commissioners of Oath Act also provides for certain penalties in the event of a conviction under the section that applies for a conviction of the offence of perjury.
- Providing false information in an affidavit might lead to prosecution in terms of section 13 O(1)(a)-(c) of the Amendment Act and section 9 of the Justice of the Peace and Commissioners of Oath Act. Since such an offence involves dishonesty, it will lead to the person being disqualified from serving as a director in terms of the Companies Act.

Conclusion

Although some of the offences criminalised in terms of the Amendment Act already exist in the form of fraud or other statutory offences but with higher penalties and fines provided for in the Amendment Act, it is expected that prosecuting authorities will formulate the contravention of provisions in terms of the Amendment Act as the main charge, and charges relating to other offences with traditionally lower expectant fines and penalties as alternative charges. The provisions under section 13O of the Amendment Act do not replace the provisions of the common law for offences such as fraud or those that exist in other statutes, but were created in addition to those provisions to, amongst others, make it easier, in theory at least, to prove, and to provide for heavier fines and penalties. BEE Fronting is a serious offence.

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. Don't miss our last blog where we will discuss the requirements for criminal conviction of a BEE fronting offence.

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-Duthch Law (THRHR) August 2018*. (Easy Download here)*