



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

2022-01-28

DATE

A handwritten signature in black ink, appearing to be 'C. M. M.', written over a horizontal line.

SIGNATURE

Case Number: 76000/2019

In the matter between:

CARGO CARRIERS PROPRIETARY LIMITED

Applicant

and

BROAD-BASED BLACK ECONOMIC

EMPOWERMENT COMMISSION

First Respondent

SIMON SANKU MADUNA

Second Respondent

PIET VUYSILE MJIKA

Third Respondent

PAUL LITSOANE

Fourth Respondent

MOSES MOLIFI TEFFO

Fifth Respondent

MKHONGWANE JOHN MATONA

Sixth Respondent

RAMAGAGA PAUL MONWADIBE

Seventh Respondent

JUDGMENT

POTTERILL J

[1] Cargo Carriers Proprietary [Cargo Carriers] sought the review and setting aside of the final finding of the Broad-Based Black Economic Empowerment Commission [the B-BBEE Commission] made on 18 April 2019, as well as substitution of the decision with a decision dismissing the Second to Seventh Respondents complaints against Cargo Carriers. These respondents were in terms of Cargo Carriers Owner-Driver Initiative [the ODI] owner-drivers. They are collectively, without any disrespect intended, referred to as the complainants. No relief was sought against the complainants.

[2] The B-BBEE Commission is a statutory body established in terms of s13B of the Broad-based Black Economic Empowerment Amendment Act No 46 of 2013 [the B-BBEE Act]. The objectives of the B-BBEE Act are broadly to promote economic transformation enabling meaningful participation of black people in the economy. It seeks to achieve a substantial change in the racial composition of ownership and management structures, and in the skilled occupations of existing and new enterprises. It strives to promote access to finance for black start-ups, small-, medium- and micro enterprises and

cooperatives and black entrepreneurs enhancing their access to financial and non-financial support. It seeks to increase workers to own and manage existing and new enterprises by increasing their access to economic activities, infrastructures and skills training.

- [3] In terms of s13F of the B-BBEE Act the functions of the B-BBEE Commission are inter alia to oversee, supervise and promote the adherence with the B-BBEE Act in the interest of the public. In relation to this matter they are the body receiving complaints relating to B-BBEE matters and have the duty to investigate a complaint received. It determines the format and the procedure to be followed when conducting an investigation. The B-BBEE Commission makes findings as to whether any B-BBEE initiative involved a fronting practice and may publish any finding or recommendation of any investigation in a manner it deems fit.
- [4] The process to be followed upon receiving a complaint is set out in the regulations. In terms of regulation 15 an initial assessment must be made to determine whether the complaint warrants an investigation. The B-BBEE Commission received a complaint from only the second respondent on 2 August 2016, two years after he had terminated his ODI contracts. The tenure of the complaint was that he was employed by Cargo Carriers and had applied for an owner-driver's vacancy for the Western Cape Bulk Operations. To that end he had concluded a Service Agreement, Management Agreement and Finance Agreement. He worked as such for one month when the problem started with Cargo Carriers wanting to use his funds from his business account and 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 was not explained the objectives of the deal. He was thus 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 the complainant retaining ownership of the truck.

- [5] The Commission made a preliminary assessment based only on the complaint and found that 'the allegations made by the complainant indicated practices or conduct that was contrary to the objectives and spirit of the B-BBEE Act.' The Commission further found that since the complaint related to an 'Owner-Driver scheme which may be important to investigate immediately to discount fronting.' This was compounded by the fact Cargo Carried had denied the complainants direct access and management of their bank accounts which directly or indirectly diminished, frustrated or undermined the attainment of the objectives of the B-BBEE Act.
- [6] The preliminary investigation/assessment informed 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 B-BBEE status without an economic benefit flowing to the second respondent. The matter may also raise 'possible unidentified unconscionable conduct'. Cargo Carriers was thus on 16 December 2016 issued a notice to investigate by the Commission. This was accompanied by a letter to the director of Cargo Carriers at the time, Mr M Bolton [Mr Bolton] detailing the complaint as above, as well as the preliminary assessment requesting specific documentation by 9 January 2017.
- [7] In a letter responding to this notice to investigate the B-BBEE Commission was informed that the complainant had the wrong party as the complainants had a contractual relationship with the entity Ezethu; Cargo Carriers being a 56 % shareholder in Ezethu Logistics (Pty) Limited [Ezethu], thus a distinct and separate legal entity to Cargo Carriers. It was explained that when the ODI was

concluded the complainants were not employed by Cargo Carriers. Pursuant to the complainants responding to the advertised posts they were exposed to psychometric testing and thorough training. A suite of agreements was concluded after a 4-day training session. The service agreement provided that they would be a contractor for Ezethu providing road transportation services. A cooling-off period was provided to consult with their families.

- [8] It was further explained that in terms of the Management Agreement the complainant had agreed that he would not have authority to withdraw funds from, or any other authority over, his business account. This was agreed to ensure that the income was optimally preserved for his benefit and to install financial discipline. The complainants were entitled to draw from the reserve in the business account after certain debts and expenses were paid. The revenue paid to the complainants went to cover their operational expenditure, their financial and regulatory obligations and overhead costs. The complainants received an interest free loan from Ezethu of R50 000 to assist with the financing of the working capital.
- [9] All the agreements and the implications thereof were explained to the complainants. There were numerous meetings between the complainants and Ezethu's representatives. The second respondent on 5 January 2015 exercised his right to terminate the agreement in terms of the agreement. Cargo Carriers at no time had any control over the manner in which the complainants chose to participate in the initiative.
- [10] Cargo Carriers denied that there was any fronting. Cargo Carriers concluded an agreement with Afrisam with effective date of 1 August 2011 signed on 2 April 2014. On 26 November 2012 Afrisam requested Cargo Carriers to transport an estimate of 30 000 tons of cement from Ulco to Afrisam's Western Cape Ready Mix Plants. On 4 December 2012 Afrisam accepted Cargo Carriers' transportation proposal. In early 2013 Cargo Carriers internally advertised for new positions under the ODI. On 23 April 2013 the complainants concluded the service agreements with Ezethu. The Commission was informed

that Ezethu was not in any way dependent upon the establishment of this ODI to run the Afrisam project and neither Cargo Carriers or Ezethu used the second respondent to attain a higher B-BBEE status. Ezuthu's B-BBEE status did marginally improve.

- [11] Cargo Carriers also denied any unconscionable conduct; the drivers were trained and informed and the ODI initiatives were a long standing practice that had started in August 2003; this ODI with these complainants, was not to benefit Ezethu.
- [12] 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. There is then a toing and froing of correspondence between Cargo Carriers and UBAC seeking meetings and documents. There is also an attempted settlement of the matter, but the board of directors decided that there was no rationale to pay any amounts to the complainants and the settlement did not come to fruition.
- [13] On 28 September 2017, 20 days after the notice to investigate received from the B-BBEE Commission, Mr Bolton received a summons issued by UBAC wherein the complaint is brought against him personally. The content of the summons has the same narrative as the notice to investigate. Thereupon there was correspondence between the UBAC and Cargo Carriers pertaining to documents being requested and extensions sought within which to deliver the documents sought.
- [14] On 7 June 2018 the B-BBEE Commission published its preliminary findings which I find prudent to quote:

- ‘5.1 *that Cargo Carriers Limited benefited from the ODI by extending its contract with Afrisam whilst Ezethu Logistics (Pty) Ltd benefited from an improved BEE status as a result of the owner driver scheme to the detriment of the Complainants, however they were both complicit in a scheme together with HRG Management, to manage the owner driver’s business in a manner that would take away their decision-making powers and access to funds, to the extent that the Complainants were no more than ordinary drivers in the business;*
- 5.2 *that Cargo Carriers Limited indicated that they provided business management training to the Complainants however the Respondents were unable to provide evidence of such training. In the absence of the Respondents assisting the owner driver to earn sufficient funds to pay off the residual amount at the end of the 48-month contract with Mercedes Benz Financial Services South Africa (Pty) Ltd, the Complainants would not have been able to take possession of the trucks and would have been in the same position as that of the ordinary drivers after engaging in a Black Empowerment Initiative, which was allegedly supposed to empower the Complainants’*
- 5.3 *that Mr. Bolton attempted to distance Cargo Carriers Limited from the Complainants relationship with Ezethu Logistics (Pty) Ltd and the conclusion of the contract with Mercedes Benz Financial Service South Africa (Pty) Ltd whilst the Cargo Carriers Limited was instrumental in securing the contract with Afrisam and assisting the Complainants in obtaining finances from Mercedes Benz Financial Services South Africa (Pty) Ltd;*

- 5.4 *that Mr. Sprenger's letter to Mercedes Benz Financial Services South Africa (Pty) Ltd indicates that the Respondents considered themselves to be in control of the Complainants vehicles and were supposedly supportive of the Complainants and were very much a part of the empowerment initiative, however the Respondent chose not to intervene when the Complainants complained about the misuse of their fund;*
- 5.5 *that the Respondents insisted that the Complainants utilise services of Mr. Hennie Gouws to manage their business despite receiving several complaints about the manner in which Mr. Hennie Gouws deprived the Complainants the right of access to the business accounts.*
- 5.6 *that Cargo Carriers Limited deprived the Complainants the economic benefits they reasonably anticipated from the proceeds of the deliveries they were making as truck drivers and being part of the Owner Driver initiative. The Complainants were denied the ability to exercise the rights flowing from such arrangement in a manner that hindered transformation imperatives; and*
- 5.7 *that the conduct of the respondents were contrary to the objectives of the B-BBEE Act and may amount to fronting practice or misrepresentation of B-BBEE status violation of the B-BBEE Act, which are criminal offences.'*

[15] The recommendations of the B-BBEE Commission were that Cargo Carriers must pay reasonable compensation with the calculation thereof to be approved by the B-BBEE Commission. The Cargo Carriers and Ezethu directors should undergo training on corporate governance. Cargo Carriers should attend a

session on the Act through an accredited Agency. Cargo Carriers was also to afford the complainants to attend similar training to empower the complainants to exercise the rights and obligations flowing from their rights as Owner Drivers.

[16] The B-BBEE Commission afforded Cargo Carriers 30 days to respond to these preliminary findings before it issued its final findings. Cargo Carriers responded to these findings, but requested clarity on what decision-making powers were taken away from the complainants. It, *inter alia*, denied that Cargo Carriers or Ezethu used the complainants to attain a higher B-BBEE status. To illustrate this the BEE certificates issued before the ODI and after the ODI were attached to their response. Mr Gous in an affidavit attached the dates, venues and training agendas of the complainants between May 2013 and December 2014. It informed the Commission that the Afrisam Agreement was not at all dependant on this ODI. Cargo Carriers set out that there was economic benefit to the complainants because the revenue paid to them covered *inter alia* operational expenses and overhead costs. Shortfalls that may have occurred was due to lack of compliance by the complainants and business risks.

[17] A final finding was published on 18 April 2019. It is common cause that the final findings were a copy and paste of the preliminary findings and I accordingly do not repeat the final findings. No sanction against Cargo Carriers was implemented.

What is an ODI?

[18] The ODI is not a foreign concept to Cargo Carriers or the B-BBEE Commission. An ODI's whole purpose is to attain the goals of the B-BBEE Act; to promote meaningful participation of previously disadvantaged people by attaining ownership of small businesses thereby enhancing economic participation. The ODI enhances access to financial support to, for instance, conclude an agreement with Mercedes Benz to have access to a truck. It is also common cause that Cargo Carriers had implemented ODI's since 2013. ODI's are

recognised as a B-BBEE initiative and are considered in measuring a company's B-BBEE status.

Did Cargo Carriers benefit from the ODI in augmenting its contract with Afrisam to the detriment of the complainants?

[19] Both the findings in paragraphs 5.1 and 5.7 of the B-BBEE Commission's final findings relate to Cargo Carriers and Ezethu benefitting; Ezethu from an improved B-BBEE-status and Cargo Carriers by extending its contract with Afrisam. These benefits were to the detriment of the complainants. This Court accepts that a company can spin an intricate web of contracts to facilitate fronting and frustrate the purpose of the B-BBEE Act, thus requiring a Court to pierce the corporate veil. This investigation would include the timing of contracts, concluded by whom and to what purpose and the same investigation must certainly be employed by the B-BBEE Commission. The court has to apply the trite principles of *Plascon-Evans*¹ when deciding whether this ODI was concluded entirely to the benefit of the companies and consequent detriment to the complainants.

[20] I find it necessary to, at this stage, restate the trite principle that a court will not *mero motu* trawl through annexures to an affidavit without specific references being incorporated in the affidavit. It is not open to a respondent to merely annex to his affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.² Where reliance is placed on facts it must be pertinently set out or referenced. The affidavits of the B-BBEE Commission were seriously lacking in setting out on what facts and findings of their agent, UBAC, they were

¹ *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A); *Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA); *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375D-F

² *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 321F-G; *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) at 306D-E

relying on in coming to its findings. The UBAC report and annexures exceeds 1100 pages and the court is merely informed that the B-BBEE Commission relied on all the findings thereon. Counsel for the B-BBEE Commission was informed that if a finding in the UBAC-report was not specifically referenced under oath the court was not undertaking a search for foundational evidence and findings in the UBAC report. In motion proceedings the affidavits constitute the pleadings and evidence.

- [21] It is common cause that on 1 August 2011 Cargo Carriers concluded an agreement with Afrisam to provide transportation services to Afrisam. On 4 December 2012 the augmented portion of that agreement was outsourced to Ezethu. Afrisam approached Cargo Carriers to transport cement in the Western Cape. On 26 November 2012 Cargo Carriers submitted its proposal for the Western Cape seeking a letter of intent and setting out in paragraph 7 that if Afrisam required it Cargo Carriers could have two of the vehicles operated by Owner Drivers 'to contribute towards the Afrisam Equality Development program'. On 4 December 2012 Afrisam sent out its Letter of Intent, not requesting any Owner-Driver vehicles. Neither in the contract with Afrisam, or the proposal to augment, was an Owner-Driver Initiative a requirement for Cargo Carriers, or Ezethu to fulfil, before the contract could to be implemented. There is simply no evidence put up by the B-BBEE Commission that this ODI concluded, on 23 April 2013, was required by Afrisam. There are no facts put up supporting the assertion that Cargo Carriers' only intent with this ODI was to extend its contract with Afrisam. In fact, the result of the augmented contract between Ezethu and Afrisam, benefitted Afrisam, not Cargo Carriers or Ezethu because Afrisam needed and required a higher black shareholding, which Ezethu had, the ODI did not fulfil this need of Afrisam. This is set out as follows by Mr John Sprenger [the ODI manager] in an email dated 3 March 2014 'Afrisam required their contract to be with Ezethu Logistics because of their 30 % black shareholding (i.e. Cargo Carriers 7.19 black shareholding did not meet the Afrisam requirements.' Ezethu did benefit as it fulfilled Afrisam's requirements to secure the business, but not because of the ODI.

[22] In summary: Cargo Carriers had an existing contract with Afrisam, Cargo Carriers was approached by Afrisam, the letter of intent did not require Owner-Drivers, and the ODI was concluded after the Western Cape contract was concluded. Cargo Carriers by means of Ezethu did augment its contract with Afrisam and benefitted in a business sense, but not to circumvent the B-BBEE Act or to the detriment of the complainants. The only real winner in terms of the Act was Afrisam that obtained more than 100 % procurement points by insisting to contract with Ezethu due to its level 2 rating. The finding that Cargo Carriers benefitted is irrational and not connected to the evidence before the Commission. This finding is to be reviewed and set aside in terms of s6(2)(f)(ii) of the Promotion of Administrative Justice Act [PAJA] in that this finding was not rationally connected to the information before the Commission.

Was the ODI concluded to improve Ezethu's BBE status to the detriment of the complainants?

[23] The B-BBEE Commission found that Ezethu benefitted from an improved B-BBEE status to the detriment of the complainants. There was also an averment that Cargo Carriers achieved 'B-BBEE scorecard points'. This averment in the answering affidavit is unfounded. In the answering affidavit there is not a single fact set out to sustain this bald statement. Cargo Carriers to the contrary played open cards with the court and submitted that Ezethu's BBE status had marginally improved, but was not materially affected due to the Owner-Drivers appointment. It attached the BEE scorecards of Ezethu before the ODI and thereafter, reflecting same. It was not denied that the marginal improvement was also due to the appointment of more female black managers. The court is bound to accept the version of Cargo Carriers.

[24] But, in any event, it must be stressed that Afrisam sought to contract with Ezethu, as it was at that time, and did not require an ODI to be created. The ODI was thus not implemented to gain a contract. As ODI's are recognised as

a B-BBEE initiative and are considered in measuring a company's B-BBEE status implementing an ODI is not fronting, unless the ODI did not succeed in its purpose; to enable black former employees to own a small business that is economically viable.

Was the ODI structured to enable the owner-drivers to become the owners of a business?

Training

- [25] The B-BBEE Commission found that the complainants were only drivers and not owner-drivers because they were not trained or, inadequately trained. The B-BBEE Commission found that Cargo Carriers Limited indicated that they provided business management training to the Complainants but Cargo Carriers was unable to provide evidence of such training.
- [26] Cargo Carriers submitted that the complainants were subjected to psychometric testing. The psychologist, Ms Oberholzer of Nova Human Capital Solutions measured the mental alertness, verbal understanding, numerical reasoning, dependability and safety instrument and personalities of the complainants. This exercise was clearly to the benefit of Cargo Carriers and the complainants to determine whether the complainants had inter alia the capacity to understand, communicate and have numerical reasoning to become an owner of a small business. It was necessary to ensure that the ODI was not doomed from the start with the complainants set up for failure due to a lack of necessary personal attributes. I did not understand Cargo Carriers to assert that this was training, it was a necessary assessment.
- [27] Cargo Carriers submitted that the complainants were thoroughly trained and set out the following facts in support thereof:

'The breakdown of the four-day training session was:

79.1 *An initial two days was spent at Cargo Carriers Head Office on 22 and 23 April 2013. In these two days:*

79.1.1 *Mr Sprenger in his capacity as Owner Driver Manager gave a presentation of the ODI.*

79.1.2 *Mr Gous in his capacity as the Management Company Representative of the Owner Drivers gave a presentation of the services he would be able to provide.*

79.1.3 *A detailed explanation was given jointly by Mr Sprenger and Mr Gous of the budget parameters and accounting requirements and how the complainants would be remunerated.*

79.1.4 *The Service Agreements and Management Agreements were explained to the complainants in detail.*

79.1.5 *After explaining and discussing each topic, Mr Gous assisted the complainants to open their Business Bank Accounts and register as Provisional Taxpayers and VAT Vendors.*

79.1.6 *Mercedes Benz Financial Services explained the Vehicle Purchase Agreement and Full Maintenance Agreement to the complainants and the complainants signed the Agreements with the assistance of Mr Gous.*

79.1.7 *The Insurance Service Provider (i.e. comprehensive insurance for their Vehicles) explained the Insurance Agreements to the complainants and the complainants signed the Agreements, with the assistance of Mr Gous.*

79.1.8 *The Financial Services Provider (i.e. Credit Life Insurance for their Vehicles and Medical Aid) explained the Credit Life and Medical Aid Products to the complainants and the complainants signed the Agreements, with the assistance of Mr. Gous.*

79.1.9 A final joint presentation was given to the complainants by Mr Sprenger and Mr Gous where the following topics were covered: The aim of the ODI; The budget parameters; The importance of the Accounting results and meeting with Mr Gous regularly to be mentored and to be given feedback. All general queries were discussed and explained.

79.2 The Third day session was held at Sasol Branch on 24 April 2013. On this day:

79.2.1 The complainants met with Mercedes Benz representatives, Mr Sprenger and Mr Gous. The new MB 2644LS/33 Actros 3 vehicles were handed over to the complainants.

79.2.2 Driver training was given to the complainants, as these were new state of the art vehicles. The Full Maintenance Agreement requirements were explained to the complainants and all queries were addressed.

79.3 The Fourth day was spent at the Bloemfontein Branch on 25 April 2013. On this day:

79.3.1 The complainants met with Nico Gerber (the Divisional Director)(“Mr Gerber”) and his Operational Team in the presence of Mr Sprenger and Mr Gous.

79.3.2 The Operational and Work Instructions of the Branch were discussed in detail and all queries explained. Each complainant was required to sign off the Work Instructions presented to them.

79.3.3 The complainants were introduced to the Branch staff that they had to interact with: Administration, Workshop and

Operational. In the presence of Mr Gerber and his staff the budget/operational parameters were explained to the complainants and agreed to by the complainants.

79.3.4 The complainants were given every opportunity to highlight any concerns they might have had prior to starting to operate on 26 April 2013.'

[28] Mr Sprenger and Gerber gave on-going training, as did Mr Gous. The appointment of Mr Gous was in line with clause 3.11 of the Management Agreement to provide ongoing training to facilitate the development of skills and knowledge required for successful development of the business. The method employed was personal on the job training. Attached to his affidavit was a schedule setting out the monthly ongoing training. Mr Gous stated that despite his best attempts he received very little interest or the necessary attention from the complainants. He reported it to the Managers of the ODI. His problems, and the reason for this, is best described by himself as follows:

'It is important to note that the attitude of the ODs in general (apart from one exception) have always been negative towards not only the account meetings but also to me explaining the methods used, accounting standards to be maintained and strict financial management of their affairs. This made training of a very complicated matter subject extremely difficult, to a point where I indicated to John Sprenger my reluctance to carry on doing the work and trying to explain and train the ODs. A replacement management company will have the same issues to content with and I cannot foresee a solution to the problem if the status quo is maintained. By relaxing the strict financial control, though, WILL lead to non-payment issues and a supplier relationship breakdown with the resultant unsuccessful empowerment scheme. I make this statement based on the experience after most ODs withdrew their funds from the business bank accounts and thereby making it impossible to maintain my service delivery as per the management agreement.'

- [29] In the answering affidavit the four-day training course is boldly denied by the B-BBEE Commission. In argument it was submitted that there was no proof that the complainants underwent adequate training and that the four-day training in business management never took place. The on-the-job training was ineffective and did not remedy the inadequate training.
- [30] The court must ask itself whether the training, which indeed took place, empowered the complainants to understand the concept of the ODI, their responsibilities and the benefit to them. These complainants were not people of the street, they were drivers. They knew what transportation of loads entailed, they knew working schedules around transporting loads and knew that there were to be days off necessitating other drivers to take over. They knew that punctuality with loads was necessary. They presumably did not have budgeting and financing experience. At first blush a four-day course might seem inadequate to empower the drivers on those two topics, but they were not left to their own devices. They pertinently concluded a Management Agreement, with an independent party, to hold their hand pertaining to these issues. There was on- the-job-training, with proof thereof attached to the replying affidavit of Caro Carriers, in contrast to not a trace of evidence from the B-BBEE Commission that there was no training provided. The finding that Cargo Carriers 'indicated that they provided business management training to the Complainants however the Respondents were unable to provide evidence of such training', is unfounded, untrue and irrational on the evidence before the Commission and must be reviewed and set aside in terms of s6 of PAJA.

Did the Management agreement constitute an inherent deficiency in the ODI contrary to the objectives of the B-BBEE Act?

- [31] The B-BBEE Commission found that the complainants were prevented from exercising any autonomy in selecting a financier or management company for the ODI. The crux of the matter and main complaint of the complainants was they were not allowed access to their business accounts whatsoever without consent from HRG, the Management Company represented by Mr Gous. They

were informed that after 48 months they would have full access. The complainants did not understand that they owed Mercedes for the trucks because Cargo Carriers had all the financial authority. It was argued that the complainants were prevented from exercising true independence and autonomy in respect of the financial affairs of the business while being subjected to high financial risk. The finding was, and I repeat for context, that *'Cargo Carriers Limited deprived the complainants the economic benefits they reasonably anticipated from the proceeds of the deliveries they were making as truck drivers and being part of the owner-driver initiative. The complainants were denied the ability to exercise the rights flowing from such arrangement in a manner that hindered transformation imperatives and HRG Management managed the owner driver's business in a manner that took away their decision-making powers and access to funds. Cargo Carriers insisted that the Complainants utilise serves of Mr. Hennie Gous to manage their business despite receiving several complaints about the manner in which he deprived the complainants the right of access to the business accounts.'*

[32] I intervene here to set out the breaches of the agreements committed by the complainants. In a letter dated 12 July 2013 the complainants were informed that they were withdrawing funds from their business accounts in contravention of clause 3.14.24 of the Management Agreement. The complainants were using EDC cards for the purposes other than to purchase fuel or pay toll fees and did not make an effort to load a minimum of 33 tons at the Afrisam Ulco Plant. On 5 August 2013 a further letter was dispensed to the complainants setting out in detail the procedures to be followed pertaining to loads and that they had a responsibility to arrange and manage drivers to avoid delays. The complainants failed to attend the management meetings.

[33] Early 2014 six of the complainants wrote a letter setting out that Cargo Carriers and Ezethu were benefitting from fronting them, with no empowerment, their salaries were a disgrace and they wanted a new accountant of their choice as Mr Gous was too much on management's side. Mr Sprenger wrote to the

complainants again setting out the terms and conditions of the ODI as concluded and requested any suggestions for improvements to the ODI. None was received. On 1 March 2014 Mr Sprenger held a meeting with six of the complainants *inter alia* addressing the concerns raised by the Afrisam Owner-Drivers, an analysis of the loads done by the 6 Afrisam Owner-Drivers and the relief drivers for the 9 months ending 31 January 2014. The budget for the year ending 28 February 2015 was also on the agenda. Also on 1 March 2014 the complainants were informed that their refusal to take loads when issued with an order was a problem as there was no relief drivers available to execute the orders.

- [34] On 5 June 2014 the complainants were informed that communication regarding vehicle movement and availability was not being communicated to the controller in time which had caused conflict between Afrisam and Ezethu. The complainants were reminded that they were responsible to avail their vehicles and that replacement drivers must be ready to take over to avoid unnecessary delays.
- [35] On 23 June 2014 the fifth respondent was upon his non return from leave, by letter informed, that Ezethu had reserved its right to cancel the Services Agreement. On 9 September 2014 the second respondent was in writing warned regarding his failure to share the relief driver and his own absence. The fourth respondent was charged with unlawful use of the EDC card and misappropriation of funds. A further R8 200 was withdrawn from his business account without permission resulting in insufficient funds available to pay business expenditure. On 16 December 2014 Ezethu terminated the Service Agreement between Ezethu and the fourth respondent. The third respondent also failed to return from his one week off-cycle to undertake a load to Afrisam and was informed that it constituted breach of the Service Agreement. The second respondent terminated his contract on 5 January 2015. Two years later he lodged the complaint with the Commission.

- [36] These breaches are boldly denied by the B-BBEE Commission on the basis that they were not informed of the breaches, thus the breaches were unknown to it, and therefor denied. A party that has no knowledge of a fact cannot deny such fact, but must set out that it has no knowledge of such fact. Aside from that, the B-BBEE Commission had to have knowledge of these breaches because the documents pertaining to the breaches were submitted to the Commission. The B-BBEE Commission argued that in any event, it is not mandated to investigate contractual disputes and argued the contractual breaches are irrelevant to the disputes before court. But, even it was relevant, then a finding of fronting was still apposite.
- [37] Cargo Carriers denied that the ODI had any inherent deficiencies but submitted that this ODI failed as a result of the material contractual breaches by the complainants. The complainants displayed a lack of discipline and refused to take heed of advices given to them during the training programme. At the risk of repetition, the complainants had signed service agreements with Ezethu to provide road transportation services as independent contractors. They also signed Management agreements with HRG Management Services CC [HRG] who provided various accounting and financial management services. HRG was to impart financial management and business compliance skills. The complainants also signed Financing and Insurance agreements with Mercedes Benz Financial Services (Pty) Limited [Mercedes-Benz]. They also signed an agreement with ABSA Bank Limited to open a bank account. The complainants failed to arrange replacement drivers, refused to take contractually required loads and failed to attend management meetings. They unlawfully used the EDC cards and withdrew funds from their business accounts contrary to the terms of the management agreements. The conduct of the complainants affected their earning capacity and the service rendered to Afrisam.
- [38] The B-BBEE Commission cannot ignore breaches committed by the complainants when coming to a finding. An ODI can only exist with at least two parties contracting. An ODI by its very nature requires contractual regulation.

For the ODI to be successful both parties must fulfil their contractual obligations. If the breach of the contracts by one of the parties led to ODI's failure, it cannot be brushed aside.

[39] The starting point is whether the ODI was inherently deficient because of the Management agreement; did the Management Agreement concluded as part of the ODI offend the objectives of the B-BBEE Act? The Management Agreement was concluded for three years [36 months]. Mr Gous was the face of the management agreement. The Management agreement provided that Mr Gous would *inter alia* provide the complainants with legal assistance, secretarial assistance, training, reports for records and complete financial accounting service. He would receive and manage all income and expenditure. He would receive the income and pay all the debts and expenses starting with the truck instalment, insurance premiums, maintenance and repairs costs of vehicle, fuel purchases etc. He would ensure that there would be an adequate contingent reserve equivalent to operational costs of two months. The complainants had no authority to withdraw funds from the business account or deal with the account in any way.

[40] It is difficult to reconcile the argument that there was inadequate training on financial management with the argument that the complainants instantly should have had access to their business accounts. A driver cannot overnight become an owner-driver, but the ODI must give a driver the capacity to over a period become an owner-driver. If not, the ODI had failed in achieving its goal and could frustrate the objects of the B-BBEE Act. Precisely due to the basic training a Management agreement is a good tool to ensure that the complainants are not afloat in the business world. If Cargo Carriers had not assisted the complainants they would not have obtained finance for a truck, let alone at a financier of their choice. The financed truck is the vehicle to the business, but comes at a high monthly premium. Ensuring that all the business expenses are paid ensures the pathway to a successful business and the driver becomes a successful owner-driver. On the facts the complainants were disgruntled that

they could not access their business accounts, blamed Mr Gous for this and consequently did not heed or attend his meetings. They proceeded to be absent from work, failed to deliver loads and organise relief drivers. There was an abuse of the card to be utilised only for petrol and toll gates. Ezethu and Mr Gous attempted to assist the complainants, but this assistance was rebuked. Ezethu employed three relief drivers to assist, but to no avail. This attitude of the complainants led to the ODI failing and not an inherent deficiency of the ODI.

[41] Cargo Carriers set out that it implemented ODI's, structured as is this ODI, in Swaziland with the '*Coca-Cola contract*', '*the RSSC Alcohol Contract*' and the '*RSSC Cane Contract*' and in South Africa the '*BME Rossing mine contract*' and the '*Lafarge contract*'. Those ODI's lasted *their* full duration and the owner-drivers either sold the trucks and received value for it, or the owner-drivers developed their own logistics company with some of them now sub-contracting for Cargo Carriers. In response to these averments the B-BBEE Commission denied the '*remaining allegations made in these paragraphs, and in particular, deny the relevance thereof to this application. Despite Cargo Carriers' self-proclaimed success of their previous and subsequent ODIs in these paragraphs, I note that in arriving at the decision against Cargo Carriers, the Commission did consider that some of the ODI's implemented by Cargo Carriers, were allegedly being successfully implemented.*' The Commission goes further that if the ODI's were on the same terms as the ODI before court then those ODI's should also be subjected to scrutiny in the interest of the public.

[42] The B-BBEE Commission is aware that similar ODI's implemented by Cargo Carriers were successful rendering the argument that the ODI's had an inherent deficiency as untenable; drivers had transformed to owner-drivers. The fact that the autonomy over the business account was restricted for three years did not frustrate the achievement of the objectives of the B-BBEE Act. It sought to achieve the transfer of skills to run a business and its business account with the

ultimate result that the driver became an owner-driver. The owner-driver is not inhibited from substantially participating in the core activities of the ODI; the complainants were the main focus of the core activity. The complainants earned salaries but could not dip into the business account for a period and under strict conditions. This did not deprive them of participating in the core activity that they had to manage. The owner-driver would receive the economic benefits and become the owner of a business.

- [43] The findings of the B-BBEE Commission in paragraphs 7.1.1.4; 7.1.1.5 and 7.1.1.6 were unreasonable and must be reviewed and set aside in terms of s6(2)(h) of PAJA. These findings also need to be set aside in terms of s6(2)(e)(iii) of PAJA as the B-BBEE Commission ignored relevant considerations when coming to its findings. The serious breaches committed by the complainants played a central role in the failure of the ODI and could not have been ignored. The B-BBEE Commission need not have civil jurisdiction to take cognisance of this relevant factor.

Fronting

- [44] The facts of this matter together with this courts findings unequivocally render a finding of fronting irrational and such finding is to be reviewed and set aside in terms of s6 of PAJA. The Commission in argument submitted that the implementation of this ODI satisfied the criteria of fronting practice under subsection (a) and (d) of the fronting practice definition in section 1 of the B-BBEE Act.

'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-BBEEE initiative – [

- (a) *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) ...
- (c) ...

- (d) *involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which –*
 - (i) *there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;*
 - (ii) *the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;*
 - (iii) *the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.'*

[45] Not a single jurisdictional fact for fronting was established by the Commission. The ODI was not concluded for improved B-BBEE status or to obtain the contract with Afrisam. There was no misrepresentation to the complainants; they signed the contracts with the Management Contract acting as the mechanism for fiscal discipline for the ODI to succeed. I had already found that the complainants could participate in the main activity, they were the owner-drivers and were only limited in accessing their business accounts for a period for fiscal discipline and transfer of financial skills. I accordingly find it unnecessary to expand on fronting.

[46] All the findings of the B-BBEE Commission are to be reviewed and set aside and I accordingly make the following order:

- 46.1 The decision is reviewed and set aside;
- 46.2 The decision is substituted with a decision dismissing the complaint;
- 46.3 The Commission is ordered to pay the costs of the application, such costs to include those consequent upon the employment of two counsel.

A handwritten signature in black ink, consisting of several overlapping loops and a horizontal line at the top, positioned above a solid horizontal line.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NUMBER: 76000/2019

HEARD ON: 8 October 2021

FOR THE APPLICANT: ADV. J. BABAMIA SC

ADV. H. MUTENGA

INSTRUCTED BY: Werksmans Attorneys

FOR THE FIRST RESPONDENT: ADV. R. BEDHESI SC

ADV. L. BEDHESI

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 28 January 2022