



**OFFICE OF THE CHIEF JUSTICE
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 13210/19

CAXTON AND CPT PUBLISHERS AND PRINTERS	1 st Applicant
CTP LIMITED	2 nd Applicant
v	
NOVUS HOLDINGS LIMITED	1 st Respondent
EXPRESS VERIFICATION SERVICES PROPRIETARY LIMITED	2 nd Respondent
THE COMMISSIONER, BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION	3 rd Respondent
JSE LIMITED	4 th Respondent
SOUTH AFRICAN NATIONAL ACCREDITATION SYSTEM	5 th Respondent

JUDGMENT DELIVERED ON THIS 31st DAY OF MARCH 2022

FORTUIN J:

A. INTRODUCTION

[1] This matter concerns the validity of a broad-based black economic empowerment (**B-BBEE**) certificate, issued to the First Respondent (**“Novus”**) by the Second Respondent (**“EVS”**) in 2019 (**“the EVS Certificate”**) which certified Novus as a level 1 contributor from 16 May 2019 (**“the 2019 certificate”**)

[2] The First and Second Applicants (**“Caxton”**), and the First Respondent (**“Novus”**), are competitors in the printing industry. Novus is a large, listed company.

[3] After a competitive bidding process wherein both the Applicants (collectively referred to as **“Caxton”**), and the First Respondent (**“Novus”**) participated, the contract was awarded to Novus as Novus held a higher Broad-Based Black Economic Empowerment (**“B-BEE”**) rating than Caxton. Caxton was notified of its unsuccessful bid on 25 June 2019.

[4] The Second Respondent is a B-BEE verification agency that issued various certificates to Novus certifying Novus’ B-BEE rating as a level 3 contributor on 20 December 2018 (**“the 2018 certificate”**) and as a level 1 contributor on 16 May 2019. Caxton, on the other hand, throughout remained a level 4 contributor. The Second Applicant (**“EVS”**) issued the impugned certificate on 16 May 2019 (**“the impugned 2019**

EVS Certificate”). EVS is an independent expert, which specialises in applying the formulae dictated in the B-BBEE Act to measure or “verify” a company’s contribution to BEE.

[5] Following the unsuccessful bid, Caxton proceeded to lodge a complaint with the Third Respondent (“**the Commission**”) to investigate whether the 2019 certificate was lawfully issued, specifically raising two issues. Firstly, whether the 2019 certificate was issued after EVS’s suspension, and secondly to investigate the alleged jump in Novus percentage black ownership.

[6] In addition, it launched an application on 2 August 2019 for an interim interdict to prevent Novus from relying upon the 2019 certificate pending the outcome of the Commission’s investigation of the complaint.

[7] In the original application before this Court, launched in August 2019, Caxton sought urgent interim relief. The original relief sought was to prevent Novus from placing reliance on the impugned 2019 EVS Certificate (which at that stage was still effective), as well as a previous superseded certificate issued to Novus on 20 December 2018.

[8] Caxton suggested that this relief would cause Novus no prejudice, in that Novus

could approach a different ratings agency to obtain a fresh certificate, should it so wish. Novus took up this invitation and accordingly, it appointed aBEErate Verification Agency (Pty) Limited (“**aBEErate**”) to undertake a fresh process, which resulted in a new certificate which was issued to Novus on 12 December 2019 (“**the 2019 aBEErate Certificate**”). At the same time the impugned 2019 EVS Certificate was withdrawn.

[9] Hereafter, Caxton sought leave to amend its notice of motion in this court to entirely replace its original relief. On 26 February 2020, leave to amend was granted by agreement between the parties.

[10] The amended relief, which Caxton now envisages, is for final relief, challenging the historical validity of the (superseded) impugned 2019 EVS Certificate. This is clearly relief that is backward looking.

[11] In addition, Caxton seeks further, consequential relief. Firstly, it seeks access to the documents underpinning the new 2019 aBEErate certificate and secondly it seeks an order that Novus be treated as having no B-BBEE certificate whatsoever during the period May to December 2019. Moreover, it seeks an order that Novus be compelled to publicise this news to “all persons with whom it conducted business” in the period.

[12] After the close of pleadings, it sought to compel the production of further information, and filed further affidavits.

[13] The B-BBEE Commission, established under the B-BBEE Act is currently investigating the lawfulness of the impugned 2019 EVS Certificate.

[14] The Commission abided by the application for interim relief, and, it is common cause that the Commission is still in the process of investigating the complaint.

B. COMMON CAUSE BACKGROUND FACTS

[15] Novus and Caxton are competitors in the printing industry. Their BEE ratings are an important consideration for clients in the public and private sectors. These BEE ratings are based on the measurement of five metrics, being:

(a) Black ownership;

(b) Effective management control by Black people;

(c) Skills development initiatives designed to develop the competencies of Black people;

- (d) Enterprise and supplier development, which measures procurement practices;
and
- (e) Socio-economic development initiatives.

[16] A B-BBEE certificate is only valid if it is issued by an accredited verification agency. On 17 May 2020, the South African National Accreditation System (“SANAS”) suspended EVS’s accreditation.

C. APPLICANT’S VERSION

[17] It is the applicant’s version that the EVS certificate is unlawful and invalid for two reasons. Firstly, because EVS issued the certificate at a time when its accreditation had been suspended and secondly because EVS did not conduct its verification of Novus in accordance with the provisions of the B-BBEE Act 53 of 2003 (“**the Act**”), the Codes of Good Practice on B-BBEE (“**the Codes**”) and the verification manual, 2008 (“**the verification manual**”). It is the applicant’s contention that, as a result, the EVS certificate is substantively invalid, as it is based on incorrect information and it employs incorrect methodology.

[18] On the applicant's version, from that date, until its suspension was lifted on 17 September 2019, EVS was not empowered to issue B-BBEE certificates.

[19] The EVS certificate was dated 16 May 2019. However, EVS only issued the certificate in final form on 7 June 2019 – when its accreditation had been suspended. It is the applicant's contention that EVS could not issue a valid B-BBEE certificate while its accreditation was suspended and as a result, the EVS certificate is invalid.

[20] Moreover, because EVS itself admits that the certificate was only sent in final form on 7 June 2019, the certificate is invalid.

[21] It is further the applicant's submission that, once it is accepted that the EVS certificate was issued at a time when its accreditation was suspended, there is no need to delve into the substance of the EVS certificate.

[22] Further, that, even if EVS had issued the certificate while it was properly accredited the problems with the substance of the certificate are such that it would still be invalid. This, it submits, is based on the following: EVS did not conduct its verification of Novus

in accordance with the provisions of the Act, Codes, and verification manual and accordingly, for this reason too, the EVS certificate is unlawful and invalid.

[23] It is submitted, on behalf of the applicant, that this remains a real and live issue as can be gleaned from the following events. During the period May – December 2019 (before EVS withdrew the certificate), Novus relied on the EVS certificate, and represented to existing and potential clients that it had been verified as a level one B-BBEE contributor. This meant that Novus offered those clients 135% procurement spend recognition. Novus either knew, or ought reasonably to have known, that the EVS certificate was invalid. Nevertheless, it continued to rely on it anyway. This amounts to an offence under section 130 of the Act.

[24] It is the applicant's case that, even though EVS has now withdrawn the certificate and Novus has obtained a new one (which reflects a lower B-BBEE status), Novus continues to rely on the EVS certificate as "*proof*" of its supposed prior level one B-BBEE status, in order to boost its reputation. It is the applicant's submission that it appears that Novus does not intend to inform the market that the certificate has been withdrawn, even though EVS has requested Novus to advise all parties with whom it has traded based on the EVS certificate that the certificate has been withdrawn.

[25] The applicant contends that Novus, going forward, cannot validly rely on, or benefit from a certificate that is unlawful. Therefore, in the event that the EVS certificate is declared unlawful, they pray for an order prohibiting Novus from continuing to rely on that certificate.

[26] It is the applicant's case that Novus has profited from its unlawful reliance on the invalid EVS certificate to the prejudice of its competitors, including Caxton.

[27] Applicant submitted that, irrespective of the harm to Caxton, Novus's conduct also undermines the objectives of the Act.

D. RESPONDENTS' VERSION

(a) First Respondent

[28] The court was asked by the first respondent to take into account that, before 2017, it was part of the Media24 group and took its rating from the group. Since then it had six "stand alone" B-BBEE Certificates from three different independent verification agencies, of which EVS is one.

[29] Moreover is it the first Respondents version that Caxton focuses on only one of the applicable metrics (being Black ownership) in one of Novus's Certificates (being the impugned 2019 EVS Certificate). In addition, the First Respondent disputes the allegation by Caxton that one of the alleged errors in the calculation of Black ownership in the impugned 2019 EVS Certificate was "carried forward" from an earlier Certificate of December 2018.

[30] It is the First Respondent's case that Caxton cannot suggest any defects in any of Novus's B-BBEE Certificates relating to any of the other metrics. Moreover, that, apart from the impugned certificate, Novus's levels of Black ownership have been consistently high.

(b) Second Respondent

[31] It is the second respondent's submission that their participation in these proceedings is directed at assisting the Court to resolve the dispute between the parties, including the provision of the information at its disposal for this purpose. It maintains its position as an independent verification agency, and has provided a detailed account of its verification processes, as well as the circumstances giving rise to the issue of the 2019 certificate.

[32] EVS has made clear that there exists no basis for any inferences of bad faith, nor

is there any evidence to support Caxton's suggestion that EVS colluded with Novus in order to "inflate" Novus' B-BEE score. To the extent that EVS erred in the provision of its verification services, these errors do not amount to evidence of *mala fides*. To the contrary, they submit that its approach, to this litigation, including its acceptance of errors that have been drawn to its attention, are clear indicators of its *bona fides* at all times relevant to these proceedings.

E. THE LEGAL FRAMEWORK

[33] The B-BBEE Act "*seeks to address the legacy of apartheid and promote the economic participation of previously disadvantaged people in the South African economy*".¹

[34] Apparent from its preamble, the B-BBEE Act was enacted to *inter alia* promote the achievement of the constitutional right to equality, increase broad-based and effective participation of Black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution.

¹ *Beadica 231 CC and Others V Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at para 222.

[35] The objectives of the B-BBEE Act are to facilitate broad-based Black Economic Empowerment by *inter alia* promoting economic transformation in order to enable meaningful participation of Black people in the economy, and achieving a substantial change in the racial composition of ownership and management structures, and in the skilled occupations of existing and new enterprises.

[36] Section 13B of the B-BBEE Act established the B-BBEE Commission which, in terms of section 13F (1) of the B-BBEE Act, has the following functions:

“ ...

(c) to receive complaints relating to broad-based Black economic empowerment in accordance with the provisions of this Act;

(d) to investigate, either of its own initiative or in response to complaints received, any matter concerning broad-based Black economic empowerment; ...”

[37] Section 13F of the B-BBEE Act gives the B-BBEE Commission the power to investigate any matter arising from the application of the B-BBEE Act, including any B-BBEE initiative or category of B-BBEE initiatives. The consequences or remedies that could follow are set out in section 13J (3) to (7) of the B-BBEE Act, and include that:

(a) The Commission may make a finding as to whether any B-BBEE initiative involves fronting;

- (b) The Commission may institute proceedings in a court to restrain any breach of the B-BBEE Act, including any fronting practice, or to obtain appropriate remedial relief;
- (c) The Commission must refer the matter to the National Prosecuting Authority or an appropriate division of the South African Police Service where the matter may involve the commission of a criminal offence in terms of the B-BBEE Act;
- (d) The Commission may, if it has investigated a matter and justifiable reasons exist, refer to the South African Revenue Service any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service; or refer to any regulatory authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority; and
- (e) The Commission may publish any finding or recommendation it has made in respect of any investigation, which it has conducted in such manner as it may deem, fit. A decision of the Commission may not be put into effect before, amongst others things, judicial review proceedings of the decision have been completed or have not been instituted within the period allowed for.

[38] The manner in which an entity's B-BBEE status is to be calculated is governed by the Act, read with the Codes of Good Practice on B-BBEE ("the Codes").

[39] The B-BBEE Codes are issued in terms of section 9 of the B-BBEE Act in order to promote the objectives of the B-BBEE Act.

[40] A "Verification Certificate" is defined in paragraph 1 of Statement 005 of the B-BBEE Codes ("**Statement 005**"). In terms of the definition, a Verification Certificate is a B-BBEE certificate issued in compliance with the B-BBEE Codes of Good Practice and all Sector Codes issued in terms of Section 9 (1) of the B-BBEE Act.

[41] According to paragraph 7.2 of Statement 005, a Verification Certificate issued must record the weighting points attained by the measured entity for each element and the overall B-BBEE Status of an Enterprise and other relevant information regarding the identity of the Measured Enterprise, determined in accordance with the Codes of Good Practice, Sector Codes issued in terms of Section 9 (1) of the B-BBEE Act and the Verification Manual; must record an approved identification reference in the format required by the Approved Regulatory Body or Accreditation Body, and is valid for a period of 12 months from the date of issue.

THE PARALLEL PROCEEDINGS PENDING BEFORE THE COMMISSION

[42] It is common cause that there is an ongoing investigation by the Commission into the issues that form the subject matter of this application. This is alleged by the applicant in its founding affidavit.

[43] A reading of the papers demonstrates that Caxton's justification for seeking interim relief during August 2019 was that it could not await the finalisation of the Commission's investigation. The relief initially sought by Caxton would therefore operate pending a decision by the Commission on the same subject matter that formed the basis for the interim relief sought. As such, the initial relief was based on an acceptance by Caxton that the issues before this Court overlap substantially with those under investigation by the Commission.

[44] However, Caxton's subsequent amendment of its notice of motion rendered the relief sought final in nature. This is evident from a plain reading of the terms of the amended notice of motion. Caxton therefore seeks final relief arising from precisely the same issues currently under investigation by a specialised body, empowered to do so by the Broad-Based Black Economic Empowerment Act 53 of 2003 ("**the Act**").

[45] The result is that there are different proceedings being run in different fora at the

same time, dealing with substantially the same subject matter. The core question in both matters is whether the calculation by EVS of Novus' ownership score, as reflected in the 2019 certificate, was correct.

[46] Caxton argues that the relief sought is not premature since this Court is not required to wait for the outcome of the B-BBEE Commission's process in order to make its own order and that in so doing, the Court would not usurp the power of the B-BBEE Commission.

[47] However, the B-BBEE Act recognises that appeal or review proceedings may be instituted after the B-BBEE Commission has concluded its investigation. There can thus be no suggestion that this Court's jurisdiction is ousted in any manner, but would merely align with the correct sequencing of matters.

[48] A complainant would still have the right to approach this Court, after the B-BBEE Commission has made a finding, to review any such finding. The possibility of such review proceedings is explicitly recognised in section 13J(7)(b)(i) of the B-BBEE Act. In addition, section 13J (4) empowers the B-BBEE Commission itself to approach the Court regarding a breach of the Act and to obtain appropriate remedial relief.

[49] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**² the Constitutional Court held that (albeit in a different context)

“[t]he Court should take care not to usurp the functions of administrative agencies”.

This accords with the notice of defence for administrative bodies, in respect of which the Court adopted the definition (by Prof Hoexter) that it represented a –

“(A) judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate.”

[50] In **Koyabe v Minister for Home Affairs**³ the Constitutional Court held that,

“... approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function.”

[51] The Supreme Court of Appeal has cautioned against such a scenario. It suffices to state that it should be obvious that to permit parallel proceedings to commence and

² 2004 (4) SA 490 (CC) at para 45.

³ 2010 (4) SA 327 (CC).

run in different fora at the same time, and in respect of essentially the same dispute, is undesirable.

[52] In doing so the Supreme Court of Appeal relied on a previous decision of the Appellate Division in **Universiteit van Stellenbosch v JA Louw (Edms) Bpk 1983 (4) SA 321 (A)**, citing **Taunton-Collins v Cromie and another**⁴ in which the Court quoted Lord Denning as follows:

“It seems to me most undesirable that there should be two proceedings in two separate tribunals – one before the official referee, the other before an arbitrator – to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay.”

[53] There can be no doubt that the Commission is best placed to determine the issues in dispute between the parties. The Commission is established in terms of section 13B of the Act. Its functions, listed in section 13F, include the following:

“To oversee, supervise and promote adherence with the Act in the interest of the public;

To receive complaints relating to broad-based black economic empowerment in accordance with the provisions of the Act; and

⁴ [1064] (2) All ER 332 (CA) at 333.

To investigate, whether if its own initiative or in response to complaints received, any matter concerning broad-based black economic empowerment.”

[54] In pursuit of these functions, the Commission has a wide discretion to determine the nature and format of its investigation and in doing so may issue a summons calling upon any person to appear before it or to produce any document relevant to the matter under investigation.

[55] The Commission has access to all of the relevant information required to conduct a robust analysis of the lawfulness of the 2019 certificate. It will, to the extent it deems necessary, be able to rely on oral evidence in resolving the disputes of fact between the parties. This Court, on the other hand, has been asked to determine the same issues through motion proceedings, relying on evidence produced on affidavit.

[56] This Court’s discretion to hear the matter at this stage is encouraged by section 21(1)(c) of the Superior Courts Act 10 of 2013, which provides that the High Court has the power “... *in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination*”.

F. RELIEF SOUGHT

(a) Certificate Issued Unlawfully

[57] Caxton argues that the EVS Certificate dated 16 May 2019 was issued unlawfully and is invalid because it was only issued in final form on 7 June 2019 – at which time EVS had been suspended.

[58] In its answering affidavit in the original application, EVS explained that on 16 May 2019 it sent its preliminary report to Novus, being the date of its verification decision.

[59] It further explained that the decision of 16 May 2019 was final, save to the extent that Novus might provide any feedback on the substance of the report or lodge an appeal against EVS' findings. Novus did not take either of these steps and accordingly, EVS's verification decision of 16 May 2019, on their version, became final. EVS sent the EVS Certificate issued on 16 May 2019 to Novus on 7 June 2019.

[60] EVS' contentions are supported by a Digital Forensic Expert report, which makes it clear that the preliminary report sent to Novus on 16 May 2019 – which report records the same ownership score as that recorded in the EVS Certificate – was indeed created on 16 May 2019.

[61] The EVS Certificate sent to Novus on 7 June 2019 (in which the ownership score remained unchanged) was indeed sent on that date.

(b) Past Reliance on the EVS Certificate

[62] The applicants seek an order declaring that the reliance Novus placed on the EVS certificate up to 11 December 2019 (when EVS withdrew the certificate) was unlawful as, on the applicant's version, Novus was aware, or at the very least ought reasonably to have been aware, that the EVS certificate had been issued unlawfully.

[63] In relying on a B-BBEE certificate that Novus knew, or ought reasonably to have known to be invalid, it is submitted by the applicant that Novus misrepresented its B-BBEE status. Novus represented that it had been verified as having level one status, when in fact no valid verification certificate existed. It is the applicant's submission that this conduct is contrary to section 130(1)(a) of the Act. On the applicant's version, any reliance on the EVS certificate by Novus was therefore unlawful.

[64] This, they submit, is particularly so because the applicants have, and continue to suffer prejudice because of Novus's unlawful reliance on the certificate.

(c) Present Reliance on the EVS Certificate

[65] Novus is currently relying on its level one rating. According to the applicant, this is unlawful as this certificate and accordingly the rating in terms thereof, is invalid.

(d) Duty to Inform Third Parties

[66] The applicants seek an order directing Novus to inform all persons with whom it conducted business based on the EVS certificate, between 16 May 2019 and 12 December 2019 that the EVS certificate was issued unlawfully and has been withdrawn. This relief should be considered by the commission.

G. DISCUSSION

[67] I am not persuaded by the applicant's submissions. It is not disputed that EVS's decision of 16 May 2019 was final, save to the extent that Novus might challenge it. Novus did not do so. Outside of a challenge from Novus, EVS could not change its decision. EVS was, in essence, *functus officio*.

[68] Caxton's response to this difficulty is simply to highlight that the Act does not oust the jurisdiction of the Court to determine this dispute, but rather provides an alternative avenue for complainants to obtain redress. It is their submission that a complainant can

therefore choose to approach the Commission or to rely on the courts for relief.

H. CONCLUSION

[69] That a complainant may choose between two fora with concurrent jurisdiction does not detract from the disadvantages that would arise from both fora exercising their jurisdiction at the same time. Not least of these is the possibility that this Court and the Commission may well come to different conclusions on certain key issues. This is likely, given the differences in the nature of evidence that is before this Court, and the evidence that has been and will be placed before the Commission. There is therefore a real possibility that an engagement by this Court on the substance of a matter that is currently being investigated by the Commission could lead to substantial uncertainty as to the status of the 2019 certificate.

[70] In *casu*, Caxton provides no basis for this court to hear this matter and to issue final relief in anticipation of its own complaint, on the same subject matter, before the B-BBEE Commission. In my view, Caxton should formulate its case for final relief based on a challenge or enforcement of the B-BBEE Commission's findings, once it is handed down. It is not appropriate for this Court to hear the matter at this time. Its case could be either an appeal or a review of the Commission's findings, or an action to enforce the outcome of the B-BBEE Commission's findings.

[71] I will now deal briefly with the merits of the application and touch on the issues raised by the Applicant in as far as it relates to the issues not before the commission. I will accordingly not deal with the issues that are currently before the commission.

[72] In my view, it is evident that, no matter the outcome of these proceedings, Novus had, and continues to enjoy a competitive advantage over Caxton in relation to its B-BEE rating. This is so because Caxton has not sought to challenge the EVS certificate issued on 20 December 2018, which certified Novus as a Level 3 contributor until the expiry date of 30 May 2019; and Novus obtained a new certificate from aBEErate on 12 December 2019, certifying Novus as a Level 2 contributor, and which increased Novus' rating on all levels stated in the 2018 certificate, save for socio-economic development which remained the same.

[73] Caxton throughout remained a level 4 contributor.

[74] It is submitted by the applicant that the EVS certificate is unlawful and invalid and therefore any past or present reliance Novus has placed on the EVS certificate is unlawful. As a result, the applicant requests that third parties, with whom Novus has contracted, on the strength of that unlawful certificate, must be informed of this, so that they can take the appropriate steps.

[75] For the reasons discussed above, I do not agree that an order to that effect should be made by this court.

I. ORDER

[76] In the result, the application is dismissed with costs, including the costs of two counsel.

FORTUIN, J

Date of hearing: 11 October 2021

Date of judgment: 31 March 2022

Counsel for applicants: Adv S Budlender SC

Adv I Cloete

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