

CORPORATE & COMMERCIAL AND DISPUTE RESOLUTION

ALERT

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IN THIS ISSUE

B-BBEE Commission found to lack evidence in finding of fronting

In the case of *Cargo Carriers Proprietary Limited v Broad-Based Black Economic Empowerment Commission and Others* [Case number 76000/2019] (HC), the High Court reviewed and set aside a decision of the Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in relation to a fronting complaint against the applicant, Cargo Carriers Proprietary Limited (Cargo Carriers).



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In the case of Cargo Carriers Proprietary Limited v Broad-Based Black Economic Empowerment Commission and Others [Case number 76000/2019] (HC), the High Court reviewed and set aside a decision of the Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in relation to a fronting complaint against the applicant, Cargo Carriers Proprietary Limited (Cargo Carriers).

Cargo Carriers entered into owner-driver initiative (ODI) contracts with the second to seventh respondents (complainants), who were, in terms of the ODI, owner-drivers. In terms of section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act), a B-BBEE initiative means any transaction, practice, scheme or other initiative which affects compliance with the B-BBEE Act or any other law promoting broad-based black economic empowerment. ODIs may be recognised as B-BBEE initiatives and may therefore be considered in measuring a company's B-BBEE status.

BACKGROUND

In 2011, Cargo Carriers concluded an agreement with Afrisam Proprietary Limited (Afrisam) to provide transportation services to Afrisam. On 26 November 2012, Afrisam asked Cargo Carriers to transport 30,000 tons of cement from Ulco to

Afrisam's Western Cape ready mix plants. Cargo Carriers submitted its proposal, seeking a letter of intent and indicating that, if it was required and in order to contribute towards Afrisam's equality development programme, two of the vehicles could be operated by owner-drivers.

On 4 December 2012 Afrisam accepted Cargo Carriers' transportation proposal. The augmented portion of the agreement was outsourced to Ezethu Logistics Proprietary Limited (Ezethu), a subsidiary of Cargo Carriers. In early 2013, Cargo Carriers advertised internally for new positions under the ODI. The complainants concluded service agreements with Ezethu on 23 April 2013 to provide road transportation services as independent contractors. The contract between Afrisam and Cargo Carriers was an existing one and Afrisam's letter of intent did not require owner-drivers as a condition for the conclusion of the augmented agreement.

In terms of the ODI, the complainants concluded service agreements with Ezethu, management agreements with HRG Management Services CC, which provided accounting and financial management services, and finance and insurance agreements with Mercedes Benz Financial Services Proprietary Limited (Mercedes Benz) (the agreements).

On 5 January 2015, the second respondent terminated his agreements and on 2 August 2016 laid a complaint with the B-BBEE Commission to the effect that after a month of working as an owner-driver, Cargo Carriers wanted to use funds from his business account, access to which he was denied. Further, the second respondent stated that he did not understand the empowerment deal and that the objectives were not explained to him, and he demanded compensation from Cargo Carriers for alleged outstanding monies due and for Cargo Carriers to settle any debt remaining in respect of his vehicle to Mercedes Benz, while he would retain ownership of the vehicle.

B-BBEE Commission found to lack evidence in finding of fronting

CONTINUED

Cargo Carriers was issued with a notice to investigate by the B-BBEE Commission on 16 December 2016. The preliminary investigation was based only on the initial assessment of the second respondent's complaint. The B-BBEE Commission found that the allegations by the second respondent indicated practices or conduct that were contrary to the objectives and spirit of the B-BBEE Act in that, *inter alia*, the second respondent did not have control of the business and finances and therefore was not able to participate in the core activities of the ODI, and further, that Cargo Carriers may have used the second respondent to gain a higher B-BBEE status without the second respondent receiving any economic benefit. Cargo Carriers provided responses to the B-BBEE Commission in respect of the allegations in the notice to investigate denying that there had been any fronting, and included information on the nature and B-BBEE expectations of the Afrisam contract; the contractual arrangements and process followed when entering into the agreements

with the complainants; the training given to the complainants; the reasons for the restrictions placed on the complainants' access to the business accounts; and its practice of implementing ODIs.

The B-BBEE Commission went on to make preliminary findings of fronting on 7 June 2018. Despite further documentation provided by Cargo Carriers in response to the preliminary findings, the Court found that the final findings, made on 18 April 2019, remained "a copy and paste of the preliminary findings", which Cargo Carriers sought to review.

FINDINGS OF THE B-BBEE COMMISSION TAKEN ON REVIEW

The B-BBEE Commission found that, firstly, Cargo Carriers benefitted from the ODI in augmenting its contract with Afrisam, and Ezethu benefitted from an improved B-BBEE status as a result of the ODI, to the detriment of the complainants. There was also an averment by the B-BBEE Commission that Cargo Carriers earned B-BBEE scorecard points. Further, in response to the complaint, the B-BBEE

Commission was informed that the Afrisam project was not dependent on the establishment of the ODI, and neither Cargo Carriers nor Ezethu used the complainants to attain a higher B-BBEE status. The Court found that although Ezethu's B-BBEE status marginally improved, there was simply no evidence placed before it by the B-BBEE Commission that the ODI was concluded because it was required by Afrisam, and although Ezethu did benefit in fulfilling Afrisam's requirements to secure the business, it was not due to the ODI. The Court concluded that the augmented contract between Ezethu and Afrisam benefitted Afrisam, rather than Cargo Carriers or Ezethu. Afrisam required a higher black shareholding, and asked to contract with Ezethu, due to its level 2 B-BBEE rating. Further, Ezethu benefitted as it "fulfilled Afrisam's requirements" in order to secure the business, but this was not due to the ODI. The Court reviewed and set aside the finding of the B-BBEE Commission that Cargo Carriers benefitted from the ODI in augmenting its contract with Afrisam, and that

B-BBEE Commission found to lack evidence in finding of fronting

CONTINUED

Ezethu benefitted from an improved B-BBEE status as a result of the ODI, to the detriment of the complainants, on the basis of section 6(2)(f)(ii) of PAJA in that the finding was irrational and not connected to the evidence before the B-BBEE Commission.

Secondly, the B-BBEE Commission found that the complainants were drivers and not owner-drivers because they were not trained or were inadequately trained, and Cargo Carriers was unable to provide evidence of business management training having been provided to the complainants. However, in its responses to the B-BBEE Commission and in its replying affidavit, Cargo Carriers had provided a detailed explanation of the business management training that was given to the complainants over a four-day period together with ongoing monthly on-the-job training. In contrast, there was no evidence from the B-BBEE Commission that training was not provided. The finding of the B-BBEE Commission that Cargo Carriers was unable to provide evidence of such training was found by the

Court to be unfounded, untrue and irrational on the evidence before the B-BBEE Commission and was reviewed and set aside in terms of section 6 of PAJA.

In relation to the findings of the misuse of funds by Cargo Carriers, restricted access to the business accounts, and having deprived the complainants of the economic benefits reasonably anticipated from the proceeds of the deliveries the complainants were making; the Court took into account several factors that were presented to it.

It found that the complainants committed breaches of the agreements, which included failing to attend management meetings, refusing to take loads issued for an order, failing to ensure that vehicles were available for use in order to avoid unnecessary delays, failing to arrange replacement drivers, unlawful use of petrol and toll gate cards, misappropriation of funds, failing to return to work after a one-week cycle, and withdrawing funds from the business account without permission. The Court noted that these breaches

were boldly denied by the B-BBEE Commission on the basis that it was not informed of them. The Court held that a party that has no knowledge of a fact cannot deny it but must set out that it has no knowledge of it; the B-BBEE Commission had to have knowledge of these breaches because the documents pertaining to the breaches were submitted to the B-BBEE Commission; and the B-BBEE Commission could not ignore breaches committed by the complainants when coming to a finding.

The B-BBEE Commission argued that it was not mandated to investigate contractual disputes and argued that the contractual breaches were irrelevant to the disputes before the Court. However, the Court held that an ODI by its very nature requires contractual regulation, and indicated that if a breach of the contracts by one of the parties led to the ODI's failure, such breaches cannot be brushed aside. The Court found

B-BBEE Commission found to lack evidence in finding of fronting

CONTINUED

that breaches committed by the complainants played a central role in the ODI failing (not any inherent deficiency of the ODI) and could not have been ignored.

Further, the Court held that the restriction placed on the complainants' ability to access their business accounts for a period of three years in terms of the agreements did not frustrate the achievement of the B-BBEE Act. Instead, the restriction sought to achieve the transfer of skills to the complainants to run their businesses and their business accounts with the ultimate result that the drivers would become owner-drivers. This did not deprive the complainants from participating in the core activities of the ODI and to manage their business affairs accordingly. Moreover, the complainants earned salaries even though they could not access their business accounts.

UNREASONABLE FINDINGS

The Court found that the findings of the B-BBEE Commission in relation to the mismanagement of funds, the restriction of the business accounts of the drivers and the deprived economic benefit from the ODI were unreasonable and reviewed and set aside such findings in terms of section 6(2)(h) and section 6(2)(e)(iii) of PAJA.

Finally, in relation to the finding that the conduct of Cargo Carriers was contrary to the B-BBEE Act and amounted to fronting or misrepresentation of B-BBEE status, the Court found that the B-BBEE Commission failed to raise a single jurisdictional fact to the satisfy the definition of fronting in terms of section 1 of the B-BBEE Act. The Court found that the ODI was not concluded for improved B-BBEE status or to obtain the contract with Afrisam; there was no misrepresentation committed to

the complainants; the complainants signed the management agreement which acted as the mechanism for fiscal discipline for the ODI to succeed; the complainants were able to participate and contribute to the main activity of the ODI; and the restriction on access to the bank accounts was to maintain fiscal discipline for a defined period and to ensure the transfer of financial skills. The Court concluded that the finding of fronting by the B-BBEE Commission was irrational and was reviewed and set aside in terms of section 6 of PAJA.

Ultimately, the Court reviewed and set aside all findings of the B-BBEE Commission and dismissed the complaint with costs awarded against the commission.

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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