

Bothersome BEE

By Martin Nicol

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Broad-Based Black Economic Empowerment transactions benefitting the poor have been delayed for more than two years. Is this due to government failure – or is there method in the madness? Martin Nicol discusses an apparent lapse in governance that has undermined initiatives that benefit poor black communities – and comes up with a theory.

New Agenda has never much liked 'Black Economic Empowerment'. Of course, along with everyone, it has stood strongly behind the need for black advancement. But *New Agenda's* bias has been towards the effective redistribution of wealth.¹ Our pillars of reference have been the Freedom Charter of 1955 "The People Shall Share in the Country's Wealth!"² and the Constitution, with its intention to recognise the injustices of our past and "advance persons or categories of persons, disadvantaged by unfair discrimination".

BEE has been criticised as a failed

policy – with very limited redistribution, and no impact on growth. Prof Ben Turok wrote in 2016,

...BEE has created a new business class. Opportunists and tenderpreneurs have abused government procurement processes to feed fat pockets.... It seems that the top layers of government have signalled that cronyism and looting are okay, especially if it can be given a veneer of legitimacy in the form of 'black empowerment'.³

New Agenda summarised 2014 research published by the United Nations University's World Institute for Development Economics Research (WIDER) that found:

Black economic empowerment measures (BEE) have had little redistributive impact, and their emphasis on transferring ownership and control to the political elite has largely excluded low-skilled labour, the unemployed and those in the informal sector. BEE seems to be the outcome

of a pact between the ANC government and previously white-owned firms that were concerned about securing their property rights and influencing economic policy.

"[The WIDER paper noted that] 56 ANC officials and politicians can be found on the boards of directors of JSE-listed firms. The persistence of rent-seeking [has] disappointed the prospects of the unemployed and the hopes of those who would like to see rents transferred into higher-productivity and higher-investment growth enhancing actions.⁴

As an economic policy, then, *New Agenda* has not seen BEE as the right tool for reducing inequality or promoting growth.

THE EARLY YEARS: BEE UNDERMINES LOCAL MANUFACTURING AND INVITES ABUSE

In the way it has been applied by government, BEE has acted as a brake on investment. It has added uncertainty to the investment environment, through complex, unclear and frequently >>

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The reaction of the Broad-Based Black Economic Empowerment Commission ... will deprive the most deserving empowerment beneficiaries of their long-standing, official BEE status.

changing rules. Foreign oil companies reversed their plans to apply for exploration rights in South Africa because of years of policy uncertainty on BEE and state ownership requirements. For many years, the BEE rules favoured black companies that imported their products over local manufacturers who were not as empowered. Here BEE cut manufacturing jobs and increased unemployment. BEE accelerated de-industrialisation, in complete contradiction to national industrial policy.

Richard Maponya, a leading black entrepreneur before 1994, said that BEE was necessary – but it had negative unforeseen consequences: “BEE was created to empower the majority of our people, unfortunately it was abused and misused so that it empowered the few who were connected.” Maponya also said that even preferential procurement, a central pillar of BEE, has only helped “the very few who are connected. It has not helped the majority” (Madi, 2016: 154).

The illegal abuses of BEE are legion. Some companies pretend to be black companies when they are not – defeating the purpose of the



BEE concept. Tenderpreneurs win government tenders on the basis of their BEE credentials, although they have no experience or expertise and have to outsource the actual work to less-BEE compliant companies. This also defeats the intention of BEE while increasing the costs for the public sector purchasers (McLachlan, 2010).

On 30 October 2020, the Broad-Based Black Economic Empowerment commissioner, Zodwa Ntuli, told Parliament that the biggest problem faced by the Commission is “fronting” (Ntuli, 2020).⁵ Fronting (which is a crime in terms of the BEE laws)⁶ often takes the form of ‘window-dressing’ where a business lists low-level black workers, such as secretaries, gardeners or security staff, as company directors or shareholders so that the company can appear to be more compliant with BEE transformation goals and qualify for government tenders. The workers are often unaware of this deception. Businesses want to score more BEE points so they can qualify to participate in a government tender.

The mechanics of BEE are complicated. At first it was a gesture of reconciliation (and co-option!) as the big company players of the apartheid years handed out shares, directorships and business opportunities to carefully selected black people. Soon BEE became

sensible business practice. From the late 1990s, different sectors adopted voluntary ‘Charters’ to promote black advancement. Government stepped in with a binding legal framework for BEE in 2003. This was managed by the Department of Trade and Industry (DTI), which developed a bewildering array of regulations in Codes 000 to 500.⁷

A parallel policy process managed by the National Treasury linked the BEE points of a company to its qualification to tender for government business. If a company was a perfect BEE candidate (with what is now called a No 1 verified BEE rating) it could win a public tender, even if it charged a higher price than other, less-empowered bidders. Over time, tendering companies could win extra points for their BEE prowess if their own suppliers were BEE compliant, say with a 26% black shareholding, a majority of black executives and a bursary scheme for black students. Even if companies doing business with government were not themselves BEE compliant, it made a difference if their clients were. In effect, all companies have been incentivised to get with the BEE programme – or to pretend that they are.

Commissioner Ntuli told Parliament that the Commission had received 687 cases between 2016 and September 2020 (Ntuli, 2020; Liedtke, 2020), “where



companies approach black people to reach the mandated 26% threshold, however, this is done on paper and these individuals rarely participate meaningfully in decision-making” (PMG, 2020). Fronting includes instances “where companies claim to have black ownership but fail to provide legal documentation supporting this. In other cases, businesses create the impression of abiding by B-BBEE codes, however, black partners are deprived of voting rights and do not participate meaningfully in decision making” (PMG, 2020).

One of the most notorious examples of this was provided by Angelo Agrizzi, the former Chief Operating Officer of Bosasa, a catering services company, who explained in his 2020 book, and to the Zondo Commission, how Gavin Watson, the effective owner of the company “became the master of BEE fronting in South Africa. While a company’s shareholding and directorship may have appeared to be representative of the country’s previously disempowered, disenfranchised and disadvantaged demographic, in reality, the shareholders often owned nothing, and the directors were appointed for everything *but* their business prowess. Veiled in contorted, elaborate (and encumbered) share structures, together with handsome salaries and other benefits, there was very little true empowerment.”

Gavin Watson made extensive use of trusts to obscure beneficial ownership. Agrizzi reveals:

...The intricate structure of the myriad of different trusts that made up Global Holdings (the main holding company of all the other companies in the Bosasa Group) was so complicated and so detailed that nobody was really able to understand

it, let alone unwind it. Carol (Mkele’s) shareholding was split across all these trusts ... Although Carol had a 22% share in the consortium ... because of her burgeoning loan account and encumbered shares, she couldn’t just ... cash in her shares and leave....

In terms of the company’s shareholding, when it was time to update Bosasa’s annual BEE certificate, all this lily-white-over-the-age-of-fifty-owned company had to do to claim the right amount of points was to appoint a corrupt verifications agent and pay them R20 000 for every level they wanted the company raised by. One has to wonder who checks on the people on the ground who issue these verification certificates. I am almost certain that up to 75% of white-owned companies are doing exactly what Bosasa did to raise their BEE ratings and it appears that it’s easier for government to look the other way than to do any digging of their own.

LEGISLATIVE AMENDMENT AND EFFORTS TO CRACK DOWN ON ABUSE

The reaction of the Broad-Based Black Economic Empowerment Commission to this abuse of trusts has been both strange, and extreme. Strange because the Commission has adopted a set of filters for approving the BEE status of certain trusts that have no basis in law, regulations or government policy on BEE. Extreme – because the new stance will deprive the most deserving empowerment beneficiaries of their long-standing, official BEE status. This means less

broad-based participation in BEE and the threat to cut off BEE benefits from charitable trusts that benefit black children, black women and poor black communities.

The B-BBEE Commission was formed as an entity within the DTI after June 2016, following a major legislative amendment. The Commission is headed by a commissioner – who was appointed by the Minister in early 2019 – and its job is to oversee the implementation of the B-BBEE laws.

In an effort to address the problems of fronting, the commissioner decided that empowerment had to involve “real black ownership”. This meant that there had to be identifiable black beneficiaries (with ID numbers) and that the beneficiaries should be able to exercise real rights of ownership, such as receiving dividends directly and voting their shares in company meetings. These rules would make it very much easier for the Commission to verify whether or not a B-BBEE transaction was transformative in fact and compliant with the law. The problem is that this approach leaves out a lot of truly transformative empowerment arrangements that were purposefully designed not to benefit black *individuals* as such, but to give black communities and black organisations a share in the economy.

For example, a B-BBEE transaction would channel dividends from shares to a bursary fund for black students, through an NGO that arranged the transaction and was the legal owner of the shares – usually via a trust. Or an NGO would use its B-BBEE share dividends to fund education projects in poor, black communities. In neither of these cases could the beneficiaries be identified individually in advance. In neither case could the B-BBEE beneficiaries participate in company management or vote shares in meetings. But in both cases, the transactions provided benefits to black communities who were previously excluded from ➤

economic participation because of racist laws and poverty. And they did this by reducing inequality and poverty. This sort of B-BBEE does not give perpetual benefits to one black individual – it provides particular benefits to a broad base of black beneficiaries. This sort of empowerment has been welcomed and supported by government in the past – and it should continue into the future.

The scale of the broad-based schemes is hard to measure, because their reporting is not consolidated. Anecdotes about these investments and their impact in terms of employment, dividends and effective black empowerment could fill volumes.

New Agenda recognises that there are different varieties of B-BBEE. We could not oppose the advantages given by government to black entrepreneurs who tender (legitimately!) for government business. This sort of B-BBEE does indeed further the national transformation agenda in many respects. But should it be the only variety of empowerment promoted by government, just because it can be structured to comply with the preferences of the Commission for “simple” empowerment?

This analysis is difficult to present because it is complicated, a lot of it is secret (the Commission hides its policies and actions behind the screen of confidentiality [Cohen, 2020]) and ultimately it appears completely inexplicable. Why would the ANC government want to take BEE benefits away from poor black communities, workers and NGOs? Why would it penalise innovators who have managed to structure share transactions with businesses that benefit the broader black community?

THE MEANING OF BLACK OWNERSHIP

The DTI has wrestled with the meaning of ‘black ownership’ for many years – ever since the consultations with stakeholders on the major

changes in the law that accompanied the Broad-Based Black Economic Empowerment Amendment Act No 46 of 2013. The first sign of trouble came in May 2015 – before the Commission was formed. Suddenly, the DTI issued a “clarification notice”.⁸

“It came as a bolt from the blue,” said Tony Balshaw at Mazars (Le Roux, 2015). Without consultation, the DTI announced that the number of BEE ownership points that could be earned by black participants in Broad-Based Ownership Schemes (BBOS) and Employee Share Ownership Plans (ESOPs) had been reduced to only 3 points out of the available 25 points. These schemes would count for much less than individual share ownership. This was a fundamental change to the Revised BEE Codes that had just come into effect.⁹

Analysts said that the significant cut in the B-BBEE ownership points that could be claimed by many companies removed any significant benefit of including employees, communities or foundations in black ownership structures. Some of the largest, established BBOS with either union members, or black community projects as shareholders, would receive limited black ownership recognition (Le Roux, 2015a; Transcend Corporate Advisors, 2015).

Three days later, on 8 May, the DTI issued a media statement to clarify the clarification notice: the lower ownership points would only apply to transactions after 1 May 2015. Adams and Adams, another law firm, commented that, “it can be safely assumed that the recognition of ownership rights based on B-BBEE Schemes, as we know it, is probably a thing of the past and one will have to carefully consider the implications when implementing empowerment transactions going forward” (2015). Then, four days after that, the DTI completely withdrew the clarification on ownership in a new notice in the

Government Gazette, signed by then Minister Rob Davies.¹⁰

Davies, spoke to the Portfolio Committee on Trade and Industry in Parliament on 19 May 2015. He acknowledged the DTI had made a mistake in sending out a message that collective “schemes were not encouraged, when in fact the opposite was the case”. However, he said that DTI had confronted a number of “dodgy” ESOPs. He also referred to consultations on the revised codes which had led to the identification of “mischief” in terms of a number of these collective schemes. This had been the motivation for putting a cap on the number of points that could be earned. But the notice had now been withdrawn and it was “back to the status quo”. A task team had been appointed to look at the “mischief” and how it would be fixed in a smarter way. He emphasised that the DTI wanted to strengthen those parts of the B-BBEE Codes which would allow black people to become real and effective participants in the productive economy in the country. B-BBEE was a tool to bring black people into important roles and positions in a productive economy.¹¹

The historical record shows that the DTI officials have long standing problems with granting ownership points to “any of the following Black natural people in the measured entity:

- 2.2.3.1 Black Designated groups;
- 2.2.3.2 Black participants in Employee Share Ownership Programme;
- 2.2.3.3 Black people in Broad-Based Ownership;
- 2.2.3.4 Black participants in Co-operatives.”¹²

The record also shows that there is a strong faction within the DTI that seeks to favour individual black ownership in B-BBEE transactions. They think government transformation policy should be focused on creating black capitalists. If share transactions that benefit the poor and the disadvantaged no longer earn investors points to boost their empowerment

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The new approach leaves out a lot of truly transformative empowerment arrangements that were purposefully designed not to benefit black individuals, but to give black communities and black organisations a share in the economy.

rating, they will have to be redirected to black individuals. There are plainly people in the DTI who believe this is a good thing.¹³ They lost their first, clumsy battle in 2015 – but they came back in 2019. And this time they had full ministerial support.

2019: ‘SCENT’ OF A SLEDGEHAMMER

The assault against Broad-Based Black Economic Empowerment came from what should have been the least expected quarter – the B-BBEE Commission itself. It started in April 2019, with a letter to the majority of broad-based trusts to inform them that the newly-minted Commission did not regard them as black-owned, but as illegal black ownership fronts (as defined in the legislation). They had “to rectify their ownership structure and undergo reverification of their BEE status or face investigation for fronting.”¹⁴ (We have not seen the letter, we were told it is ‘confidential’ – but the

press has.)

This letter posed a major threat to the very existence of the many broad-based trusts whose participation in investments was based on being recognised as a vehicle of empowerment at an ownership level. It was also preposterous. How could government believe that an entity such as the Mineworkers Investment Company (MIC) or the Mineworkers Investment Trust (MIT) is fronting?

Mary Bomela, the CEO of the MIC, which is owned by the MIT, said “The MIT represents a broad base of black beneficiaries from the National Union of Mineworkers, their dependents, and the communities they come from or in which they live. These are all black individuals, and predominantly black, rural women given the focus of some of the programmes being funded by the MIT such as the Mineworkers Development Agency. The MIT also has a long track record of supporting this beneficiary base many years before the Codes were published.”¹⁵

Many of the trusts immediately appealed to Minister Ebrahim Patel to gazette a clarification that broad-based ownership schemes are legitimate black owners. These included the Kagiso Charitable Trust, the MIT, HCI, the WDB Trust, Ditikeni Trust and Wiphold Trusts.¹⁶ This should not have been a problem, but a year and a half later, Sidwell Medupe, the departmental spokesperson, said that issuing the clarification notice that the schemes had requested was still under consideration.¹⁷ The 2019 letter – which is neither based in law or official government policy – has had a chilling effect on the ability of broad-based schemes to develop their investment portfolios for almost two years.

Bomela said in November 2020: “The current lack of policy certainty is placing in jeopardy the investments held by the trusts and their continued ability to reduce poverty, improve skills and create black entrepreneurs ... Growth

and expansion initiatives valued at millions of Rands – which would not only stimulate black ownership of the economy, but also its overall recovery – have had to be put on ice. Transactions which would stimulate the growth of these trusts and the economy as a whole are stalled because of the uncertainty and the scent of ‘investigations’.”

Louisa Mojela, co-founder and group CEO of pioneer women’s empowerment vehicle Women Investment Portfolio Holdings (Wiphold), told the *Sunday Times*: “Instead of more BBBEE there is going to be less.” She said that “uncertainty over the interpretation of the codes by the commission has created an untenable environment for Wiphold because investors are wary of entering into empowerment transactions if there is doubt about the black ownership status of their BEE partner. The more confusing the policy the more of a disincentive it is for potential business partners wanting to invest in BBBEE trusts ... Wiphold and other pioneer empowerment vehicles have been pleading with the department of trade and industry to publish a clarification notice, but to no avail.”¹⁸

The ability and power of the minister to intervene is beyond question. The B-BBEE Act specifically states that the Commission is “an entity within the administration of the Department” (Section 13B (1)) and that “The Minister may issue directives of a general nature, which are consistent with this Act, to the Commission concerning the performance of its functions and the Commission must comply with any such directive” (Section 13B (4)).

2021: A TWO-FACED DEPARTMENT DELAYS AND DECEIVES

So why has the minister failed to act? The BBOS have sent “many letters” and have “made repeated calls on DTIC19 to clarify the situation” (Bomela, 2020). The most recent was on 9 February (Paton, 2021a and b). But they >>

get the run-around from government. Wiphold commented: “You talk to the commissioner and she says one thing. You talk to the minister and the minister says another thing ... You have a commissioner who seems to be fighting and wanting to come up with her own interpretation of this policy. Then you talk to the department and they seem to be understanding and supportive of our broad-based ownership.”

Mojela reflected on a meeting with Patel in 2019, in which the commissioner was also present: “[H]e expressed support for our view and acknowledged the commendable work that our trusts have carried out for the betterment of South African communities.” Spokesperson Sidwell Medupe said in November 2020 that DTIC “affirms that we recognise the use of broad-based ownership scheme structures for BBEE ownership” (Paton, 2020). The unequivocal statement made by Director-General Lionel October to Parliament in 2015 said:

... the ownership card remained unchanged and full points would be awarded for narrow-based and broad-based and the *status quo* prevailed. DTI fully retracted the [May 2015 clarification] notice and it had been publicly explained.... The proposal of the hybrid model and the capping [ownership points for BBOS] came up during the consultation process. The Minister [first] indicated that it could work for future transactions, but the implication was that many companies doing full broad-based empowerment would have been excluded from getting full points in perpetuity. The Minister then withdrew the proposal after understanding the full implications. This needed

to be put to rest because the Department was focusing on its communication strategy to explain that absolute legal certainty had been established (PMG, 2015b).

There has been no change in the law or regulations since 2015 – so how can it be that the Commission can ‘interpret’ the same law to mean something entirely different? Why has the DTIC allowed the Commission to undermine its previous assurance of “absolute legal certainty”? Significant business opportunities have been lost and lasting damage has been done. A formal clarification from the DTIC was requested for two years, without result.

Business Day published an editorial in November 2020 headed: “Broad-based BEE commissioner has gone rogue: The broad-based BEE commissioner is abusing her power and only minister Ebrahim Patel can stop her.” This is an extreme statement about both a public official and a government minister. The MacBook dictionary says that the phrase “go rogue” – often used to describe elephants – means to “behave erratically or dangerously, especially by disregarding the rules or the usual way of doing something”. To say the commissioner has “gone rogue” is to condemn both the commissioner and the minister (who has failed to call her to account).

This is too easy an explanation – blaming it all on an out-of-control commissioner and a minister who fails to give leadership and direction. There are material reasons why government wants to move to a new, tighter form of empowerment, that needs less emphasis on the ‘broad base’.

The BBOS have found Minister Ebrahim Patel and his department to be two-faced in their interactions. The BBOS need to understand that there are advantages for the minister – and the department (all its factions) – in moving towards a model of BEE that is based

on state support for individual black capitalists and their firms. Performance targets are easier to achieve when BEE points can be scored by fewer companies. Reporting on compliance is easier for the department when criteria are narrower.

But the main reason is to make BEE a more efficient engine for building the black middle class in the private sector, rather than through public sector employment (the main vehicle to date). This is vital for the ANC, as budget difficulties are compelling government to limit both employment and salary levels in the civil service.

Cynical observers will also see a potential here for what Karl von Holdt has termed “managed corruption” (2019: 21). With narrow criteria for BEE and better enforcement, concessions at the margin are easier to valorise. Kickbacks to individuals or party can be extorted more easily when it is clear what the rules are – and what adjustments need to be made (by both regulator and applicant) to move a compliance rating from level 2 to level 1. They are angling to make the B-BBEE Commission the gatekeeper for government contracts.

GATEKEEPER FOR GOVERNMENT CONTRACTS

The Commission has a way to go before it can come to the fore as a credible gatekeeper, but it is barely two years old. The assault on BBOS is a case of picking the low-hanging fruit first. BBOS represent levels of flexibility in the law that regulatory rent-seekers need to set aside. The compromise most likely is that past transactions will be exempted and allowed to retain their points, while new transactions will be bound by the stricter B-BBEE rules. This is exactly what was attempted in 2015 – in the 8 May press statement²⁰ – but was abandoned in the face of pressure. The pressure from the BBOS worked in 2015 within days. In 2019, more intense lobbying and pressure has yielded no results in more than two years.



The BBOS would be well advised to reduce their expectations and change their tactics – to plead that their existing investments should be accorded recognition for full ownership points – and make new plans for their future. The government has other plans for BEE going forward.

The Commission reports every year on compliance with BEE legislation – and things are not going at all well. The majority of “measured entities” are still not compliant with the law in their reporting.

- The 2019 Commission report on the national status and trends on Broad-Based Economic Empowerment showed a decrease in the number of compliance reports that had to be submitted by JSE-listed entities, from 43% in 2018 to 42%.
- State-Owned Enterprises all have to comply with B-BBEE legislation – but most do not. In 2019, only 43 organs of state (15% of the total) complied.
- A journalist from *Business Day* said that the findings of the report suggest that efforts through BEE – meant to address the injustices of apartheid and colonialism – are failing (Phakathi, 2020).

Private sector compliance is totally voluntary – unless the company is listed on the JSE or does business with the state.²¹ And here there are major incentives for ensuring you get a good BEE rating – by hook or by crook (Cohen, 2020). So the Commission is confronted with many instances where companies claim BEE status irregularly. This is often by using complicated company ownership structures – which may include trusts (where beneficiaries can be hidden without breaking any laws).

The refuge of the Commission is to tighten and restrict criteria for recognising BEE ownership. The 2015 attempt to reduce ownership points

for BBOS and ESOPS was described by then Minister Rob Davies as using “a rather large sledgehammer to hit a fly” (PMG, 2015a). In 2019, the Commission used a fly-swatter – and this has been successful, so far. They did not illegally and unprocedurally seek to change the law;²² they simply ‘interpreted’ the law. The Commission’s letter and the delays and fudging by the DTIC and the minister since then have caused great harm to the BBOS and undermined their standing (Seoka, 2020).²³

Turning BEE into an effective tool – regulated by the B-BBEE Commission – is increasingly important for government, so that the billions spent on public procurement are effectively used for transformation, and to boost the participation of black people in jobs and leadership positions in the economy that remains dominated by whites. But this should not be at the expense of cutting broad-based empowerment schemes off at the knees. Ending BBOS is not inevitable. It does not have to happen.

Things can take a different course if some people make better choices. They have every reason to do so. The DTIC should issue the clarification notice requested by the broad based investment schemes, and without further delay.

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- ENDNOTES
- 1 The late Prof Ben Turok, founding editor of *New Agenda* and previous Director of IFAA, said in 2019: "While welfare is necessary, we need a primary focus of spending on development.... [P]overty and unemployment can only be overcome by deliberate interventions by the state to draw people into economic activity. Investment itself, however, will not lead to redistribution. We have to develop redistributive fiscal mechanisms which ensure that not only the wealthy benefit from such investment ...". (Open letter to President Ramaphosa with 16 co-signatories). 'The need for public debate on macroeconomic policy'. *Daily Maverick* 16 July. Available at < <https://www.dailymaverick.co.za/article/2019-07-16-the-need-for-public-debate-on-macroeconomic-policy/> > (Accessed 30-Dec-20)
 - 2 <https://anc1912.org.za/freedom-charter>
 - 3 *The Economist* wrote on 14 November 2020: "Corrupt procurement deals are ubiquitous in South Africa. So much so that the country coined the term 'tenderpreneur' to describe politically connected winners of public contracts."
 - 4 Smith, M. South Africa's growth traps: a summary of Borat, Cassim & Hirsch (2014) *New Agenda* 61 page 23. c.f. United Nations University World Institute for Development Economics Research (UNU-WIDER) Working Paper 155/2014.
 - 5 Commissioner Ntuli said that, "Over 80% of the complaints received by the Commission relate to fronting." PMG (2020).
 - 6 There is a huge legal literature on this. "Fronting" was first defined legally in guidelines issued in 2005. But it has been an issue since the very start of democracy in South Africa. An intricate definition of fronting is now in Section 1 of the B-BBEE Act No 53 of 2003 – as amended in 2013. Fronting can lead to fines, an administrative penalty of 10% of turnover and the possibility of jail time for directors (Crotty, 2020).
 - 7 <http://bbbeecommission.co.za/wp-content/uploads/2016/09/Consolidated-B-BBEE-Act-2013.pdf> >
 - 8 Notice 396 of 2015 *Government Gazette* 38764 of 5th May 2015.
 - 9 The Amended Broad-Based Black Economic Empowerment (B-BBEE) Codes of Good Practice took effect on 1 May 2015 (Revised Codes). Webber Wentzel (2015) commented that by referring to this notice as a "clarification" (rather than as an "amendment"), the DTI had sought to avoid the provisions of the B-BBEE Act.
 - 10 "Revised Notice of Clarification" *Government Gazette* 38799 Notice 444 of 2015. 15 May 2015. "(the notice that contained paragraph 1(d) relating to Broad-based Scheme and Employee Share Schemes ("ESOPS")) is withdrawn. Cited in CTF (2015).
 - 11 Paragraph assembled from PMG (2015a). Also see the statements by the DTI in PMG (2015b).
 - 12 Citation of the original paragraph 1(d)
 - 13 Messrs Tambani (then the DTI head of BEE in 2015) and October (Director General), who were responsible for paragraph 1(d), conceded that the issue of downgrading the ownership points had not been raised by DTI in the long "final consultations" on the amended codes. Both said there was a need for the codes to promote "active participation" (Paton, 2015).
 - 14 *BusinessTech* quoting Sanjay Kassen of ENSAfrica, a law firm.
 - 15 Mary Bomela: "BBOS and the BBEE Commission: Proposed Q&A for interviews, 17 November 2020".
 - 16 Paton (2020) and Paton (2019) quoting Consultant Ajay Lalu, whose firm, Black Lite, advises companies on BEE transactions.
 - 17 Sidwell Medupe – statement made on 23 November 2020 (Paton, 2020). Medupe is Media Liaison Officer for the DTIC and the departments spokesperson who issues media releases on behalf of the B-BBEE Commission.
 - 18 Quoted in Barron (2020).
 - 19 DTIC is the Department of Trade, Industry and Competition, the 2019 successor department to the DTI.
 - 20 "...this provision will not have retrospective effect and that B-BBEE deals concluded prior to 1 May 2015 will not be affected." Quoted in Adams and Adams, 2015.
 - 21 Section 13G of the B-BBEE Act makes it compulsory for all JSE listed entities, organs of state, public entities and SETAs to submit compliance reports on B-BBEE to the B-BBEE Commission on an annual basis.
 - 22 In 2015, law firm Webber Wentzel said that in its view the controversial clause 1(d) "constitutes a fundamental amendment to the Revised Codes" and contravened "the provisions of the B-BBEE Act (as the empowering legislation) which requires that any amendments to the B-BBEE Codes must first be published in draft form and be open to the public for comment for 60 days" (Webber Wentzel 2015).
 - 23 In making this major change in B-BBEE in this way, the DTIC has by-passed both Parliament and public consultation. **NA**