

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 20479/21

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

.....

In the matter between:

**PERI FORMWORK SCAFFOLDING
ENGINEERING (PTY) LTD
REG NO:2009/005054/07**

APPLICANT

and

**BROAD-BASED BLACK ECONOMIC
EMPOWERMENT COMMISSIONER
BROAD- BASED BLACK ECONOMIC
EMPOWERMENT COMMISSION**

FIRST RESPONDENT

**FASCO HOLDINGS (PTY) LTD
REG NO:2007/027689/07**

SECOND RESPONDENT

THIRD RESPONDENT

GEO HOLDINGS (PTY) LTD

FOURTH RESPONDENT

REG NO:2009/004909/7

FASCO EMPOWERMENT INVESTMENTS

FIFTH RESPONDENT

(PTY)LTD REG NO: 2009/005961/07

THE TRUSTEES OF THE FASCO

SIXTH RESPONDENT

EMPOWERMENT TRUST

IT NO: 1106/2011

JUDGMENT

MOTHA, J:

Introduction

[1] For fear of reprisal, most people prefer to call a spade a gardening tool. Hence, and sadly, thirty (30) years into democracy courts are still seized with matters of *Ubandlululo*, *kgethollo*, *diskriminasie* and fronting. The irony was not lost on this court when, in a matter dealing with the Broad-Based Black Economic Empowerment Act and fronting¹, seven litigants, the legal firm, Office of State Attorney and four counsel failed to perceive the importance of the presence of, at the very least, a single (one) African² counsel, ok as a junior!

[2] In view of the persistent, obstinate and deep racial divisions still prevalent in South Africa and right to choose one's own legal representatives, one would excuse the applicant, but it is disconcerting and inexcusable for organs of state, largely populated by black professionals who were empowered to occupy positions of power in the Office of State Attorney and Commission (as vanguards of black economic empowerment), to display such a staggering lack of appreciation of the imperative to have on brief African counsel, especially, in a matter involving the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended, which states in its Preamble:

¹ "Fronting practice defined under legal framework.

² African is defined as black, Indian and coloured in the B-BBEE

“WHEREAS under apartheid race was used to control access to South Africa’s productive resources and access to skills;

WHEREAS South Africa’s economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills;

AND WHEREAS, unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans irrespective of race;

AND IN ORDER TO-

- 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; and
- establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation protect the common market and promote equal opportunity and equal access to government services,

BE IT ENACTED...”

[3] Tellingly, section 2 of the Act mentions its primary objectives as:

“(a) promoting economic transformation in order to enable meaningful participation of black people in the economy;

(b) achieving a substantial change in the racial composition of ownership and management structures and in the skilled occupations of existing and new enterprises;

(c) ...

(d) increasing the extent to which black women owned and manage existing and new enterprises and increase their access to economic activities infrastructure and skill training...”³

³ Section 2 of Broad-Based Black Economic Empowerment Act 53 of 2003.

[4] This failure is not only a betrayal of these stated aspirations, but also incongruent with the dictates of section 9(2)⁴ of Chapter 2 of the Constitution. Consequently, this court found itself at the crossroads, like most South African courts sometimes do, of either shutting its eyes to this patent and palpable iniquity or do something at its great expense. I chose the latter. Addressing this issue, the court asked for short heads of argument from the parties. What ensued was tantamount to stirring up a hornet's nest. I will deal with this later in this judgment.

[5] Surely, in B-BBEE matters involving the State or organs of State, and more so with senior counsel on brief, it is in the interest of justice for presiding officers to insist on the involvement of, at a bare minimum, one African counsel before the matter is heard. To this court, it is axiomatic that, in such matters, the inputs, insight and perspective of African counsel are indispensable to arrive at a just decision; otherwise, a court's judgment would be impoverished and monochromatic. In these matters, the presence of an African counsel is not a favour, but an imperative for justice must not only be done but must also to be seen to be done. Furthermore, the adage nihil de nobis, sine nobis immediately springs to mind.

[6] In the matter of *PFE International and Others v Industrial Department Corporation of South Africa Ltd*,⁵ the court held that:

"Since the rules are made for the courts to facilitate the adjudication of cases, the superior courts enjoy the power to regulate their processes, taking into account the interest of justice. It is this power that makes every superior court the master of its own process. It enables a superior court to lay down a process to be followed in particular cases, even if that process deviates from what its rules prescribe. Consistent with that power, this Court may in the interest of justice depart from its own rules."⁶

⁴ "(2) equally includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken."

⁵ 2012 ZACC 21; 2013(1) SA (CC)

⁶ Supra para 30

[7] This power is envisaged in s 173 of the Constitution. Mindful of the parties' rights in terms of s 34 of the Constitution, it is this court's considered view that an enquiry into the absence of African counsel, in B-BBEE matters, fits snugly under the rubric of the capacious remit of procedure, hence, the reference to s 173 of the Constitution. As stated in the *National Union of Metalworkers of SA and Others v Fry's Metal (Pty) Ltd*⁷ this power is "the inherent regulatory power the Constitution confers is broad and unqualified."

[8] Examining s 173 of the Constitution, the court in *Mukaddam v Pioneer Foods (Pty) Ltd and Others* enunciated:

"Section 173 makes plain that each of the superior courts has an inherent power to protect and regulate its own process and to develop the common law on matters of procedure, consistently with the interest of justice. The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the normally followed. When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted."⁸

[9] At the risk of being labelled, an all-white team making submissions on fronting by a white owned company is not in the interest of justice because it is bound to miss nuances involved in cases of black people's struggle for empowerment and against racism; *a fortiori*, result in the miscarriage of justice. By parity of reasoning, the same is true of an all-male team making submissions on gender equity matters in the absence of a female counsel's submissions, where the State or an organ of State is involved. Lest I be misunderstood, I must hasten to add that I'm not advocating for an all-black team, but to achieve justice, in B-BBEE matters, courts need to be true to the motto: ! ke e: /xarra //ke⁹.

⁷ 2005 ZASCA 392005(5)SA433SCA) at 40

⁸ Para 42 of *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013(50SA89 (CC)

⁹ Khoisan language meaning diverse people unite.

[10] This is not tantamount to dictating to the State or parties whom to have on brief, as asseverated by counsel, far from it. The litmus test is the interest of justice. In pursuit of justice, our courts do sometimes insist on the presence of specific legal representatives. Albeit dealing with the institution of a class action, the court in *Trustee for Children's Resource Centre Trust v Pioneer Food*¹⁰ set the requirements which must be met in an application for certification. One of them was: "...does the representative have access to lawyers who have the capacity to run the litigation properly?"¹¹ It follows that a court, in its quest for justice, would demand of a litigant who is eager to exercise his/her s 34 Constitutional right to follow defined procedures (rules) to enable the court to adjudicate the dispute. At times circumstances arise which are not provided for in the rules, as currently is the case, and for justice to be done, the court must take the bull by the horns and insist on the presence of African counsel in B-BBEE matters, "after all, in terms of s 173 each superior court is the master of its process."

[11] Indeed, this power does not apply to substantive rights but rather to adjectival or procedural rights, and, as cautioned in *S v Molaudzi*,¹² it must be used sparingly, and without assuming jurisdiction a court does not have. Even so, when it is in the interest of justice, as in *casu* and all B-BBEE matters involving the State, it must be used "to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise it is the authority to prevent any possible abuse of process and to allow a court to act effectively within its jurisdiction."¹³

[12] To proceed and hear B-BBEE matters in the absence of an African counsel, like this court did, is inimical to the spirit, purport and objects of the Bill of Rights, and makes a mockery of the Preamble and "Founding Provisions of the Constitution", which states:

¹⁰2013 (2) SA 213 [2012] ZASCA 182

¹¹ Supra para 48

¹² 2015(2) SACR 341 (CC) 2015 ZACC 20 para 34

¹³ South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others 2007(2) BCLR167 2(CC) para 90

“The Republic of South Africa is one sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

(b) non-racialism and non-sexism...”.

[13] Furthermore, it renders words uttered during the nascent stage of our democracy, in cases such as *Minister of Finance & Other v Van Heerden*,¹⁴ to ring hollow. Moseneke J, as he then was, said:

“The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.

For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially just society. In explicit terms, the Constitution commits our society to “improve the quality of life of all citizens and free the potential of each person”.¹⁵

[14] Notwithstanding the applaudable progress, thirty years later these words still reverberate loudly. It behoves this court to state that section 7(2) of the Constitution does not stutter in enjoining the State to respect, promote and fulfil the rights in the Bill of Rights.

¹⁴ [2004] ZACC 3, 2004 (6) SA 121 (CC) [2004]12 BLLR 181 (CC) PARA 22

¹⁵ Supra 22 [2004] (6) SA 121 (CC) 2004(11) BCLR 1125 (CC)

[15] During the hearing of this matter, I formed a distinct impression that had an African counsel been part of either legal team, the court would have been given different inputs and submissions, and, possibly, the matter would have proceeded differently. From the engagements, it soon became clear to me that, through no fault of counsel, the court was exposed to a monochromatic perspective. An input of an African counsel would have helped to answer questions which still linger in my mind. Nevertheless, the horse has bolted, since I heard the matter. I now proceed to give my judgment.

[16] In *casu*, the applicant seeks to review and set aside the first and second respondents' findings, relying on the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which gives effect to s 33¹⁶ of the Constitution; alternatively, on s 1(c) of the Constitution under the nomenclature: the principle of legality. These impugned findings were made on 17 December 2020, under the case number 6/1/2019. They relate to an alleged fronting practice and conduct which purportedly undermined the objectives of the B-BBEE Act, and which allegedly resulted in the misrepresentation of Peri Formwork's B-BBEE status¹⁷.

The parties

[17] The applicant is Peri Formwork Scaffolding Engineering, a company with limited liability and incorporated in accordance with the company laws of the Republic of South Africa. It is part of a group of companies called the Peri Group, which is in the business of selling, hiring of formwork and formwork equipment solution.

[18] The first respondent is the Commissioner of the Broad-Based Black Economic Empowerment Commission appointed as such by the Minister of Trade, Industry and Competition, in accordance with the provisions of s 13C of the Broad-Based Black Economic Empowerment Act 53 of 2003 (as amended by the Broad-Based Black Economic Empowerment Amendment Act, No 46 of 2013)

¹⁶ "Just administration action (1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) everyone whose rights have been adversely affected by administrative action has the right to be given written reasons." See page 700 of Cora Hoexter Glenn Penfold Administrative Law in South Africa, third edition.

¹⁷ Founding Affidavit para 7.1

[19] The second respondent is the Broad-Based Black Economic Empowerment Commission established in terms of s 13B of the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended.

[20] The third respondent is Fasco Holdings (Pty) Ltd a company with limited liability and incorporated in accordance with the company laws of the Republic of South Africa. It is part of the Peri Group and wholly owns the applicant. It does not oppose the application.

[21] The fourth respondent is Geo Holdings (Pty) Ltd a company with limited liability incorporated in accordance with the company laws of the Republic of South Africa and is part of the Peri Group of companies. It does not oppose the application.

[22] The fifth respondent is Frasco Empowerment Investments (Pty) Ltd, a company with limited liability incorporated in accordance with the company laws of the Republic of South Africa. It is also part of the Peri Group. It does not oppose the application.

[23] The sixth respondent are Trustees of the Fasco Empowerment Trust in their capacity as trustees of the trust established per the provisions of the Trust Property Control Act and registered with the Master of the High Court. They do not oppose the application.

[24] To avoid any confusion, it is worth pointing out that only the first and second respondents opposed this application. Therefore, respondents in this matter refer to them.

Salient factual background

[25] The applicant was established in 2009. Together with the third, fourth and fifth respondents, it is part of the Peri Group. They are in the business of selling, hiring of formwork, formwork equipment solution, scaffolding systems, designing, consulting, construction supplies to building, general construction and civil engineering industries.¹⁸

[26] In the founding affidavit, the applicant states: "...the Peri Group embraced Governments B-BBEE initiatives to address the inequalities and imbalances of the past and in the mainstream of the economy. Peri Formwork carefully considered its choice of B-BBEE partner, and after thorough research and investigation, deliberately decided to empower its own employees in a broad-based manner, rather than to allow the enrichment of already wealthy individuals."¹⁹For this purpose, the Fasco Empowerment Trust was established.

[27] Against this background, the *fons et origo* of this matter is the dismissal of the nine applicant's employees, namely: David Appeal Khoza, Kgopotso Mahlaka, Johnson Mabokela, Given Madau, Frans Tsokela, Lucas Mogane, Phineas Mapela, Kulile Mficane and David Molemane.

[28] On 18 April 2017 to 22 August 2017, they went on strike demanding R500.00 adjustments, R5.00 increase and 20% B-BBEE shareholding of the Employee Trust, wherein they were made beneficiaries. On 31 October 2017, the applicant dismissed them for misconduct.

[29] Aggrieved by their dismissal and represented by Mr. David Appeal Khoza, they approached the B-BBEE Commission for redress "in a form of shares of the employee trust (FASCO Empowerment Trust) [to] be distributed to the former employees..."²⁰.

¹⁸ Founding affidavit para 4.1

¹⁹ Supra 5.2

²⁰ Annexure G (investigation report)

[30] Upon the assessment of their complaint, the B-BBEE Commission concluded that the complainant did not allege any violation of the B-BBEE. However, in the examination of Fasco Empowerment Trust, the Commission, at paragraph 4, said: "... the analysis of the Fasco Empowerment Trust Deed appears to contain clauses which are contrary to the objectives of the B-BBEE Act, and may amount to fronting practice or misrepresentation of the B-BBEE status, and the B-BBEE Commission has concluded that there is merit to warrant an investigation in respect of this matter in terms of sections 13(F)(1)(d) and 13J(1) of the B-BBEE Act read with Regulation 15 of the B-BBEE Regulations."

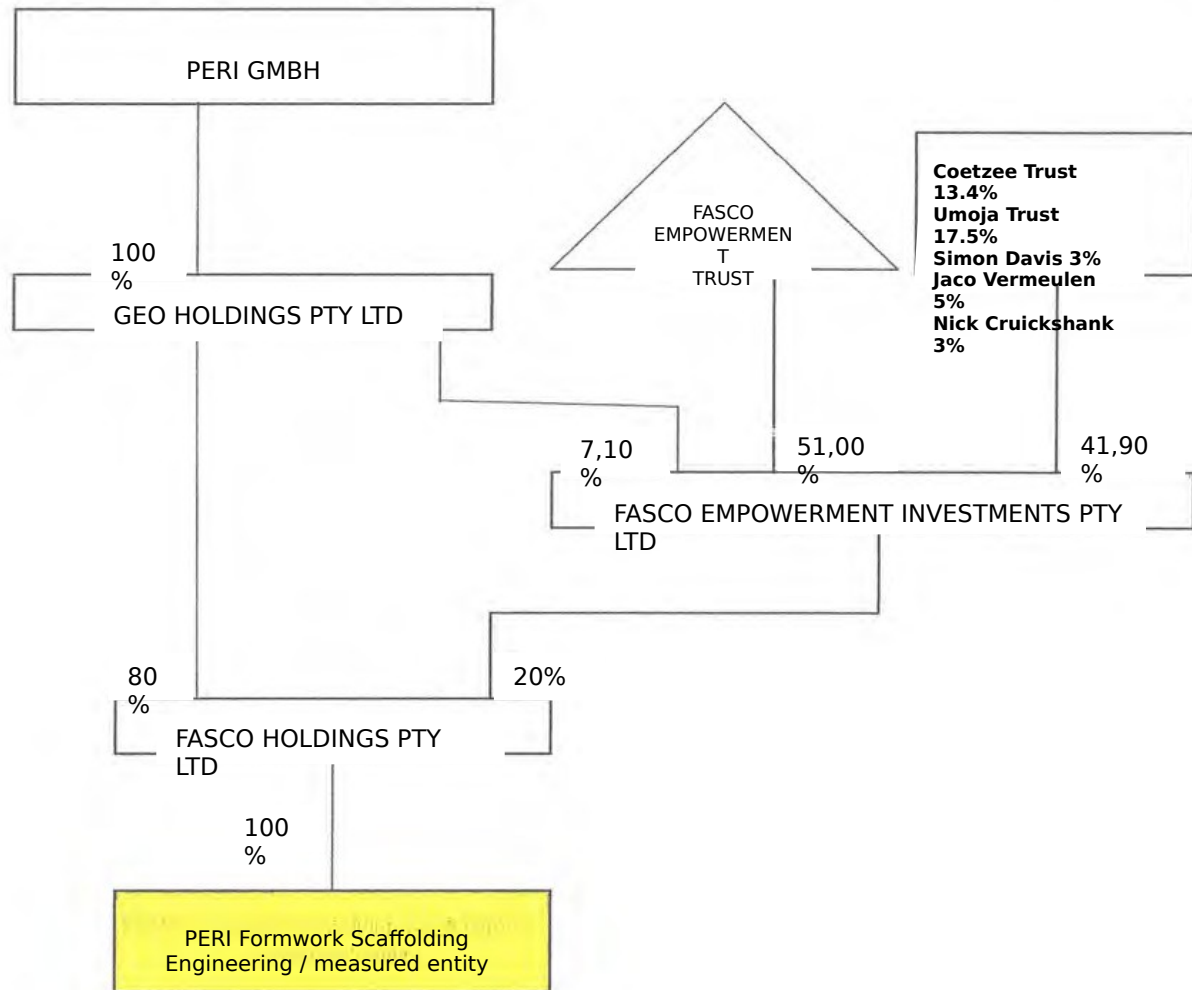
[31] The clause in question is at paragraph 8 of the Amended Trust Deed, which at paragraph 8.8 reads:

"Notwithstanding anything to the contrary in this clause 8, in determining the Black People who qualify as Capital Beneficiary as at any Capital Beneficiary Determination Date or the Termination Date (as the case may be), the Trustees shall not take account of or include any Black Person who:

8.8.1 has ceased to be an employee of any member of the Geo Holdings Group for any reason whatsoever (including but not limited to, death, dismissal, retrenchment, retirement and resignation) as at the Capital Beneficiary Determination Date or the Termination Date (as the case may be);"

[32] At this juncture, it is prudent to pause and pore over the applicant's organogram. For the *raison d'être* of this review application hinges on the first and second respondents' lack of understanding of the applicant's ownership structure

Organogram



[33] In brief, “The applicant is wholly owned subsidiary of Fasco Holdings (Pty) Ltd. The shares in Fasco Holdings (Pty) Ltd are in turn owned by Geo Holdings (Pty) Ltd (80% shareholding) and Fasco Empowerment Investment (Pty) Ltd (20% shareholding). The shares in Fasco Empowerment Investment (Pty) Ltd are owed by Geo Holdings (Pty) Ltd (7.10% shareholding), Fasco Empowerment trust (“BEE Trust”) (51% shareholding) and five individual shareholders who collectively hold a 41.90%

shareholding.”²¹

[34] The nine applicant’s former employees genuinely believed that they owned shares in the applicant but were genuinely incorrect. For in their minds, their shareholding in the applicant needed to be addressed. This was incorrect because they were part of a class of beneficiaries in a discretionary trust. The trust did not own any shares in the applicant. In a discretionary trust, trustees have “the discretionary power to nominate the income and/or capital beneficiaries of the trust from a certain group. The trustee is usually also given discretionary capacity to determine the ratio in which awards will be made to the beneficiaries.”²² The beneficiaries have no rights to the funds held in the Trust and have no legal claims over the trust’s funds. Being wholly-owned by the Fasco Holdings, the applicant pays all the dividends declared to its holding company not the Trust. Little wonder counsel for the first and second respondents mounted no opposition on merits, as will be seen later.

[35] Labouring under the same misconception that the dismissed workers were indirect shareholders, the Commission wrote: “it appears that your entity treated the beneficiaries purely as employees and not owners of an interest in the entity through ESOP and therefore did not consider appraisal of their interest when they were dismissed.”²³

[36] Doubling down on this assertion of ownership in the answering affidavit, the respondents wrote:

“In terms of the Interim Report, it was found that the Applicant was engaged in fronting practice(s), and it was recommended that serious measures be taken against the applicant for fronting for the following reasons:

²¹ Applicant’s Heads of Argument para 2.1 to 2.3

²² Jamneck et al *The law of Succession in South Africa* (Oxford University Press, Cape Town 2009) page 173.

²³ Letter F8 para 5

Loss of employment cannot automatically lead to loss of ownership...”²⁴

[37] The applicant cautioned against the misapplication of Trust Law. Unfortunately, it fell on deaf ears. Hence, we are here.

Issues

[38] At the commencement of the proceedings, counsel for the first and second respondents requested an audience to address the court. Whilst not seeking a separation of issues, he submitted that the only justiciable issue serving before this court was whether the Commission made preliminary or final findings. Thus, they would stand or fall on this narrow and circumscribed submission. He submitted that the Commission made preliminary findings, *ipso facto*, the matter was neither ripe nor ready for ventilation. In addition, he submitted that, if their submissions failed to carry the day, they would offer no resistance to the applicant's application to have the Commission's findings reviewed and set aside in terms of PAJA.

[39] On the contrary, counsel for the applicant submitted that the findings were neither preliminary nor part of an interim report, because they were made in terms of s 13J (3) of the B-BBEE Act, which makes no provision for preliminary findings. For that reason, the court was at large to deal with the review application, he submitted.

[40] To shore up his submission, counsel referred to the answering affidavit which adumbrated the main issues as the following:

“4.1. Whether the non-issue of Form 10 was procedurally unfair to the Applicant and therefore invalidates the process and decision of the First and Second Respondents *visa-a-vis* the Applicant;

²⁴ Answering affidavit at para 3.13 and 3.13.1

4. 2. Whether the decision of the First and Second Respondents was substantially fair; and

4.3. Whether the Explanatory Memorandum by Minister Patel has the status of legislation and the interpretation of the Act and Regulations therein are therefore binding on the Respondents.”²⁵

[41] Furthermore, he argued that the first and second respondents did not state that the findings were preliminary views, hence, the answering affidavit proceeded to defend the findings. It was rather farcical to now say it was a preliminary view when they never said it, he maintained. As contemplated in s 13J(7)(b) of the B-BBEE, the applicant was bringing a PAJA review and seeks a declaratory order that the content of the amended Fasco Empowerment Trust is compliant with the objectives of the B-BBEE Act.²⁶

The legal framework

[42] Occupying the pride of place under this rubric are the definitions of black people and fronting practice in terms of section 1 of the Act, as amended. The following meanings are ascribed to them:

“black people is a generic term which means Africans, Coloureds and Indians-

(a) who are citizens of the Republic of South Africa by birth or descent or

(b) who became citizens of the Republic of South Africa by naturalization-

i) before 27 April 1994; or

(ii) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date;...

‘Fronting practice’ means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrated that 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-BBEE initiative-

²⁵ Answering affidavit para 4

²⁶ Heads of Argument para 1.3

(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 the enterprise;

(b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;

(c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that will reasonably be expected to be associated with the status or position held by that black person; or

(d) involving the conclusion of an agreement with another enterprise in order to achieve or enhance the broad-based black economic empowerment status in circumstances in which-

(i) there are significant limitations, whether implicit or explicit, on the identity of the 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;..."

[44] For our purposes, the functions and investigative powers of the Commission, as reflected in ss: 13F(1)(d), 13J (3) and 13J(7)(b), need referencing. In terms of 13F (1), the functions of the Commission are:

"13F (1)

(a) to oversee, supervise and promote adherence with this Act in the interest of the public;

(b)...

(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, in any matter concerning broad-based black economic empowerment;

(2) A complaint contemplated in subsection 1(c) and (d) must be-

(a) in the prescribed form; and

(b) substantiated by evidence justifying an investigation by the Commission...”

[45] When examining the investigative power of the Commission, s 13J of the Act reads:

“(1) Subject to the provisions of this Act, the Commission has the power, on its own initiative or on receipt of a complaint in the prescribed form, to investigate any matter arising from the application of the Act, including any B-BBEE initiative or category of B-BBEE initiatives.

(2) The format and the procedure to be followed in conducting any investigation must be determined by the Commission with due regard to the circumstances of each case, and may include the holding of a formal hearing.

(3) Without limiting the powers of the Commission, the Commission may make a finding as to whether any B-BBEE initiative involves a fronting practice.

(4)...

(7) (a) The Commission may publish any finding or recommendation it has made in respect of any investigation which it had conducted in such manner as it may deem fit..”

[46] Regulation 15 of the B-BBEE Regulations deals with the lodging of a complaint and in relevant parts reads as follows:

“Lodging a Complaint-

(1)...

(3) The Commission must acknowledge the complaint in writing within five (5) days of receipt of a complaint, allocate a distinctive case number, and notify the complainant of the case number.

(4) the Commission must within one (1) year of receipt of the complaint-

(a)...

(d) notify the respondent of the complaint;

(e)...

(f) hold a formal hearing in terms of section 13J(2) of the Act, as may be necessary, in accordance with the procedures of the Commission; and

(g) make a finding, with or without recommendations...

(8) Where the Commission initiates an investigation on its own, the Commission shall initiate an investigation by issuing a notice to investigate in the prescribed Form B-BBEE 10 and follow the process in Sub-Regulation 4 (d)- (f) above.”

[47] The applicant relied on the matters of *Sasol Oil Limited v The B-BBEE Commission and Others*,²⁷ and *Gargo Carriers Proprietary Limited v Broad-Based Black Economic Empowerment Commission and Others*²⁸. The case of *Sand Shifters Africa (PTY) LTD and Others v Commissioner Broad-Based Black Economic Empowerment Commission and Another*²⁹ was also considered.

Discussion

[48] To recap, the preliminary question around which this matter pivots is whether the Commission made an interim or final finding. To determine this question, it appears to me that the letter dated 14 October 2019 is a good starting point. In this letter, the Commission informed the applicant that Mr. David Appeal Khoza had lodged a complaint on behalf of eight former employees of Peri Formworks Scaffolding Engineering (Pty) Ltd. As already mentioned *supra*, and referring to paragraph 4 of the letter, the Commission stated that Fasco Empowerment Trust deed appeared to contain clauses contrary to the objectives of B-BBEE Act and may amount to fronting. This warranted an investigation in terms of ss 13F(1)(d) and 13J (1) of the B-BBEE Act read with Regulation 15 of the B-BBEE Act.

[49] For the sake of accuracy and, *ex abundanti cautela*, I will take the liberty to quote copiously from the correspondence of the parties. Having stated that the letter served as a notification in terms of regulation 15(4)(d) of the B-BBEE Regulations, the Commission wrote:

“Based on the assessment, it appears that your entity treated the beneficiaries purely as employees and not owners of an interest in the entity through the ESOP and therefore did not consider appraisal of their interests when they were dismissed. We therefore also wish to determine if the shareholding recognized did take this into

²⁷ Case no:21415/2020 GD, Pretoria

²⁸ Case no:76000/2019 GD, Pretoria

²⁹ Case no:2021/61622 GD, Pretoria

account as a restriction on ownership, and other aspects of the trustee that appear inconsistent with the requirements.”³⁰

[50] In essence, this letter set the tone and paragraph 8 thereof could not have been clearer, as it stated that after the submission of the requested information, the Commission would proceed to finalise the investigation. Furthermore, the Commission said: “Upon the investigation, the B-BBEE Commission may make findings in terms of section 13J(3) of the B-BBEE Act and in such a case you will be afforded an opportunity to respond to the findings within (30) days of receipt of such findings...”

[51] Following the warning of possible dire consequences, in terms of s 13O (3) (a) of the B-BBEE Act, which could be visited on the applicant, the Commission expected a response from the applicant on 29 October 2019.

[52] On 25 October 2019, the applicant responded, through its lawyers. After challenging the Commission's failure to follow Regulation 15(8), mentioned *supra*, the applicant stated at paragraph 10 that:

“The averment in paragraph 4 of your letter to the effect that certain clauses in the Fasco Empowerment Trust may amount to fronting practice or misrepresentation, lacks the necessary details as required by the Act...”

[53] In the same letter, the applicant wrote that the approach adopted by the Commission, relating to the issue of vested rights of beneficiaries of the trust, appeared to be a misdirection premised on an incorrect interpretation of the code and was further not supported by any legal and/ or verification factors.³¹ At paragraph 18, the applicant nailed its colors to the mast and wrote:

³⁰ Supra para 5

³¹ Applicant's letter dated 25 oct 2019 para-14.

“There is no evidence to suggest any wrongdoing on the part of our client and in due consideration of the nature and extent of the Commissioner’s request as contained in the letter under response, it appears that the commissioner lacks the proper understanding of our client’s ownership structure.”³²

[54] On 17 December 2020, following this engagement, the Commission issued a letter titled: “INVESTIGATION FINDINGS: DAVID KHOZA // PERI FORMWORK SCAFFOLDING ENGINEERING (PTY) LTD”

[55] The Commission did not mince its words in this letter. Its opening stanza does not admit to prevarication. It states:

“Kindly be advised that the B-BBEE Commission has finalized its investigation regarding the above mentioned complaint in terms of 13F (1) (d) and 13 J (1) of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Act No. 46 of 2013 (“B-BBEE Act”) ...”³³

[56] That the letter sets out the question and response method of engagement is proof of how the findings were reached. In fact, the first and second respondents stated that the issues raised in the applicant’s letter were considered and addressed. To illustrate the first and second respondent’s interrogation of the issues, I mention, for the sake of brevity, only one such exchange namely:

“3.1 That it is noted that the Complainant does not allege any violation of the B-BBEE Act and as such, the B-BBEE Commission has no mandate to proceed to investigate the complaint under the B-BBEE Act;

3.2 Response: The complainant made allegations without specifying a specific violation as listed in the B-BBEE act in the form of either fronting practice or misrepresentation of status. It is not uncommon for complainants to do so as not all complainants are familiar with the specific provisions of the B-BBEE Act. Complainants write their concerns and on assessment, the B-BBEE Commission will determine if there is merit in the complaint...The B-BBEE Commission’s letter

³² The applicant’s letter dated 25 October 2019 annexure F9 para-18.

³³ The letter dated 17/12/2020 annexure F10 para 2.

of 14 October 2019 made it clear what was alleged and that the Commission concluded that there is merit to investigate.”

[57] This interaction dispels any doubt that the Commission arrived at findings. Furthermore, paragraph 4 of the letter is dispositive of the argument as it states:

“Having investigated the allegation in terms of the mandate under section 13F (1) (d) and section 13J(1) of the B-BBEE Act, the B-BBEE Commission has in terms of 13J(3), read with regulation 15(4) (g), makes the following findings:”³⁴

[58] However, counsel for the first and second respondents contented that this was still an interim finding. To prove that this was an interim report, he referred the court to paragraph 8, referred to *supra*, referencing the part that said the applicant was afforded an opportunity to respond to these findings within 30 (thirty) days after which they would issue the final findings.

[59] Following probing questions from the court, counsel was constrained to concede that the letter was at best confusing, as it plainly said that these were findings and in the same breath gave the applicant 30 days to respond.

[60] Counsel for the applicant submitted that this case was akin to the *Sasol Oil Limited* matter, in which the court said:

“‘Given the above-mentioned findings, the Commission may pursue certain remedial steps.’ The latter statement seems to confirm the finality of the findings already made... when the Commission clarifies pthat the purpose of the letter was ‘to notify you of the findings in respect of this complaint’ after which it invites Sasol oil to respond. In light of the excerpts quoted above the ambiguity is of the invitation is at best puzzling.”³⁵

³⁴ *Supra* para 4

³⁵ See *Sasol Oil* case at para 48-49.

[61] After an exchange of emails, in which a week's extension was requested for the submission of the response, the applicant responded on 22 January 2021. Therefore, paragraph 21.2 of the answering affidavit is incorrect in stating that the applicant "was afforded an opportunity to comment on the proposed decision of the Commission but failed to do so by taking an unreasonable stance that the decision was already final."

[62] What the applicant wrote in this letter was analogous to its letter dated 25 October 2019. It re-stated that neither the complainants nor Fasco Empowerment Trust were ever the applicant's shareholders. Consequently, there could not be "any legitimate expectation to receive any benefits (income and/or capital) from the applicant as shareholders"³⁶. Pointing out to the glaring confusion as to who initiated the complaint, the applicant argued that the Commission initiated the investigation and, therefore, failed to comply with the statutory obligation in terms of Regulation 15(8).

[63] Since this response is, in the main, a carbon copy of the letter dispatched on 25 October 2020, it is inconceivable that the Commission would have had a moment of epiphany and altered its findings. Having already engaged and dealt with the reply in the first letter, if anything, this response served to confirm the correctness of their findings. Therefore, these were final findings, and it would be *non sequitur* to conclude otherwise. Hence, there was no correspondence thereafter. At the expiry of three months without any further correspondence from the first and second respondents, the applicant fulfilled its promise, made in the letter, of approaching the High Court for relief.

[64] In the unlikely event that there is still any lingering doubt that the Commission made final findings, paragraph 3.11 of the Answering Affidavit drives the final nail in the coffin. It states:

"The Applicant's above-mentioned approach to the matter was most regrettable because in light of clause 8.8 of the Trust Deed and information of the Applicant there

³⁶ Applicant's Letter 22 January 2021

was no permanent re-distribution of wealth within the Applicant to Black employees in that such distribution, if it ever took place, would be conditional on the sole discretion of the trustees of the Trust and also only temporary in nature and only while in the employ of the applicant . As a result, it is nothing else but fronting.”

[65] From that last statement, there is no room for concluding otherwise without being irrational. Hence, this court, on the preliminary question, finds that the Commission’s findings were final. Due to the uncanny similarities between this matter and the *Sasol Oil* matter, counsel for the applicant heavily relied on it and asked for an order similar to *Sasol Oil*’s. Having juxtaposed several paragraphs from *Sasol Oil*, which bear a striking resemblance in the choice of words and thought process, with paragraphs in this matter, he submitted that this court must follow the route travelled by Justice Baqwa in *Sasol Oil Limited*. This submission resonated with this court.

[66] Having disposed of the preliminary issue, this court shifts its focus to the review application. There is no *lis* between the parties on the nature of the Commission’s findings of 17 December 2020, and this court finds that the Commission’s findings had a direct external legal effect and adversely affected the applicant’s rights. Consequently, they constitute an administrative action within the definition of PAJA, as elucidated in the matter of the *Minister of Defence and Military Veterans v Motau and Others*³⁷. The court held:

“The concept of “administrative action”, as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions...”³⁸

³⁷ (CCT 133/13) [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014

³⁸ *Supra* para 33

[67] Fundamentally, the applicant in the notice of motion asks for the review of the findings dated 17 December 2020 and a declaratory order. I am of the view that the applicant failed to make out a case for a declaratory order. The applicant's heads of argument telescoped the grounds of review into four.

- The first ground of review is based on the statement that: "...as an indirect shareholder, who owns a specific portion in the shareholding through the trust, the beneficiary's interests or right must be properly appraised so that he /she is paid for his stake on exit." In this regard, the applicant relies on s 6 (2) (e) (iii), (vi), s 6(2) (f) (ii) and s 6 (2)(h) of PAJA.
- The second ground of review is centered around the absence of a proper procedure, and in particular the failure to afford the applicant a formal hearing in terms of s 13J (2) of the B-BBEE Act and regulation 15(4)(f). The applicant relies on s 6 (2) (e) (iii), (vi), s 6(2) (b) and (c) of PAJA.
- The third ground of review is based on the Commission's failure to interpret the operation of the trust because the Commission was influenced by an era of law and from reasons not authorized by the B-BBEE Act and Regulations. In this case the applicant submitted that s 6 (2) (d) of PAJA was violated.
- The fourth ground of review is the respondents' failure to interpret the provisions of the trust in the company structure. In this regard the attack is mounted on the violation of s 6 (2) (e) (iii), (iv) and s 6 (2)(h) of PAJA.

[68] For reasons ventilated *supra*, this court finds that the Commission's findings violated section 6(2) of PAJA in several respects, including:

a) Section 6(2)(e)(iii) of PAJA, as the finding and decision taken by the Commissioner because irrelevant considerations were taken into account and relevant considerations were not considered;

b) Section 6(2)(e)(vi) of PAJA, as the action taken by the Commission was arbitrarily or capriciously.

c) Section 6(2)(d) of PAJA, as the action was materially influenced by an error of law;

[69] Notwithstanding that the Commission's findings are demonstrably flawed and fall to be reviewed and set aside, the first and second respondents' counsel's concession on merits serves as confirmation of the correctness of this court's conclusion. Consequently, I find that the findings of the first and second respondents dated 17 December 2020, to the effect that the applicant has engaged in a conduct and arrangement that undermines the objectives of the B-BBEE Act which resulted in the misrepresentation of the B-BBEE status of the applicant; and fronting practice as defined in section 1 of the B-BBEE Act 53 of 2003(as amended), reviewable in terms of s 6(2) of PAJA.

Costs

[70] it is trite that the award of costs revolves around two principles. Firstly, it is within the purview of a court's discretion, unless expressed otherwise. Secondly, the successful party should have its costs, as a general rule³⁹. The first principle always takes precedence and must be exercised judiciously. This is a real discretion as opposed to a loose one. As Officers of the court, counsel are bound by the oath of office to assist the court to arrive at justice and at all times must display *uberrima fides* in dealing with the court, regardless of how lofty they may esteem themselves or lowly they may esteem the presiding officer. The deference is to the Office and not a person, people come and go.

[71] As will be dealt with shortly, when this court asked counsel for short heads of argument, it was treated with disdain. This recent phenomenon of cantankerous or

³⁹ Ferreira v Levin 1996(2) SA 621

boisterous display by counsel of all hues must be nipped in the bud before it takes root. Otherwise, it is a slippery slope to anarchy and mayhem. I agonised long and hard about this issue and came to an inescapable conclusion that our law has not developed enough to deal with this behaviour. Awarding costs to such a party is equivalent to an endorsement and encouragement. Awarding costs against on an attorney and client scale will not dissuade recalcitrant practitioners, nor will a *de bonis propriis* order. In the exercise of my discretion, I decided that each party should pay its own costs. All things being equal, this is a textbook example of a case the court should have removed from the roll for lack of an input necessary for justice to be done.

[72] Finally, it is now history that this court issued a directive on 16 February 2024, which was followed by another on 20 February 2024 for reasons unnecessary to state here. To cut a long story short, the court canvassed the views of counsel on the conspicuous absence of an African counsel in a B-BBEE matter. The question was framed in broad terms, namely: "...the possible violation of section 9(2) of the Constitution due to failure to have an African counsel on brief in this matter."

[73] It helps no body to camouflage what ensued, counsel cocked a snook at the court and wrote a memorandum. The prologue reads: "You will note from the heading of this document that I do not intent submitting heads of argument as ordered/ requested by yourselves but, instead, will deal with the matter in this memorandum." As if that was not enough, counsel at para 17 wrote: "I will also submit this memorandum to the Chairman of the Pretoria Bar, the Chairman of the GCB and, insofar, as I have been requested to do so, to the Rapport Newspaper, Pretoria FM and Afriforum. I do this because justice must be seen to be done..."

[74] Save to state that this is a perfect display of the deep-seated racial divisions still prevalent in SA, despite some gallant efforts to bridge the gap in the past thirty years, and without any doubt an officer of the court does not comport himself/herself in that manner, I choose to not deal with this multilayered response here.

[75] Be that as it may, the heads of argument I subsequently received were not helpful and mostly stated the obvious, such as roles of counsel and the cab-rank

rule, contained in paragraph 26 of part IV conduct of advocates and in 34(2)(a)(i) of the Legal Practice Act 28 of 2014. Relying and quoting at great length the matter of *Fischer and Another v Ramahlele and Others*⁴⁰, counsel cautioned against descending into the arena lest the court gets blinded by the dust from the brawl. Furthermore, they referred to cases that deal with the adversarial nature of our system.⁴¹To the applicant's credit, it identified that in terms of s9(2) a duty is placed on the State to take measures to promote equality but argued that it found no application in this matter. They also referred to a possible infringement of separation of powers.

[76] The first and second respondents' heads of argument, compiled by an African counsel who was not part of the proceedings, was the most disappointing as it amounted to saying they don't see race. They only look at experience to procure counsel. Having tabulated that their senior counsel had 33 years' experience at the bar and his junior counsel had 15 years of experience *vis-a-vis* their opponent's senior and junior counsel who had 25 and 18 years of experience at the bar, respectively, he wrote: "In conclusion, we submit with respect that the two counsel were appointed mainly because of their experience at the bar irrespective of their colour of skin."⁴²

[77] This submission is most ahistorical, antithetical to the B-BBEE Act, they were supposed to enforce, and utopian. It begs the question of would we find any Africans employed at the Office of State attorney or any institution for that matter if that was the criterion. Painfully, it is revealing that the keen statistic of races of counsel briefed over the years is just for box-ticking exercise. The less said about this perplexing submission the better. The point both parties missed is that this court was hobbled by the absence of a view from an African counsel. The issue faced by this court was

⁴⁰ 2014(4)SA 614 (SCA) para13 to 15

⁴¹ National Commissioner of Police and Another v Gun Owners South Africa 2020(6) SA 253(CC) [234] and Minister of Defence and Military Veterans and Another v Kume and Others 2024 JDR 0457 (GP)

⁴² Heads of Argument of the respondents at para 5.10

a patent challenge of potential injustice resulting from the lack of a submission from the one who feels where the shoe pinches.

[78] Lastly, this court, as a member of society, could not help but noticed the whirlwind generated by this matter. Indeed, correctly so, because in our Constitutional Democracy - whilst the spirit and heartbeat of the country may be located inside the executive and legislature- the soul of South Africa is firmly in the courts. Therefore, the future of the country stands or falls on just briefing patterns. Courts should not abdicate their responsibilities, as they have done since the dawn of democracy, under the pretext that this is a political or policy issue. Nothing could be further from the truth; it is about the future of our Constitutional Democracy. How are African lawyers going to garner the requisite knowledge, skill and experience if courts shrivel from their responsibilities contemplated in s 165(2) of the Constitution; and inadvertently maintain the *status quo ante*? By design, the current system largely advantages one race group. From where are future Judges of “a high calibre” expected to come? For love of country, let us call a spade a spade.

[79] In the result, I make the following order.

Order

1. The findings of the first and second respondents dated 17 December 2020, to the effect that the applicant has engaged in conduct, arrangement or act that undermines the objectives of the B-BBEE Act, which resulted in misrepresentation of the B-BBEE status of the applicant are reviewed and set aside.
2. The findings of the first and second respondents dated 17 December 2020, to the effect that the arrangement, conduct or act of the applicant amounted to misrepresentation of the B-BBEE status and fronting practice as defined in

section 1 of the B-BBEE Act 53 of 2003 (as amended) are reviewed and set aside.

3. The application for a declaratory order is dismissed.

4. Each party is to pay its own costs.

M. P. MOTHA

JUDGE OF THE HIGH COURT, PRETORIA

Date of hearing: 23 January 2024

Date of judgement: 19 April 2024

APPEARANCES:

For the Applicant Adv A. Subel SC and Adv J. A. Klopper instructed by
Dingley Marshall Lewin Inc.

For the respondent Adv J Brand SC and Adv A. Granova Instructed by
The State Attorney