



MEDIA RELEASE

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GAUTENG HIGH COURT DISMISSES APPLICATION TO SET ASIDE B-BBEE COMMISSION'S INVESTIGATIVE REPORT ON CRRC E-LOCO SUPPLY (PTY) LTD

The Broad Based Economic Empowerment (B-BBEE) Commission welcomes the decision handed down by the Gauteng High Court on 05 July 2021 dismissing with costs the application launched by CRRC E Loco Supply (Pty) Ltd to set aside the decision of the B-BBEE Commission and interdict the publishing and implementation of the findings and recommendations. This was triggered by a fronting complaint lodged by Lietsiso Mohapeloa and Juliet Mxhakaza, who were director of Matsete Basadi Consortium (Pty) Ltd, against CRRC E Loco Supply (Pty) Ltd, pursuant to which findings were issued on 1 November 2018 by the B-BBEE Commission. The matter was heard on 28 and 30 October 2020.

The B-BBEE Commission successfully defended the attack on its mandate by CRRC E Loco Supply (Pty) Ltd, a joint venture for the Transnet locomotives contract between CSR Zhuzhou Electrical Locomotives Company Limited, a Chinese owned entity with 70% shareholding, and Matsete Basadi Consortium (Pty) Ltd (MBC), a B-BBEE partner with 30% shareholding. The High Court found that the B-BBEE Commission acted correctly and that its findings were rational in respect of allegations that MBC and its members were denied participation, economic benefits and access to information. The court characterised the shareholders' agreement between the parties as "...just a ruse designed to disguise a window dressing type of a relationship as an empowerment deal."

This ruling cements the authority of the B-BBEE Commission to fearlessly safeguard the objectives of the economic transformation agenda, in particular expose and pursue fronting practices that continue to undermine these objectives. Also, it now paves the way for seamless referral of this type of matters to criminal law enforcement agencies and other regulatory bodies for further consideration. The comprehensive direction provided by the court unlocks delays in a number of other complaints, a welcomed victory for victims of fronting.

In summary, the High Court had to determine the following as summarised:

Whether powers of the B-BBEE Commission in investigating the complaints of the Lietsiso Mohapeloa and Juliet Mxhakaza and issuing its Final Report dated 19 November 2018, constitute administrative action as contemplated in the Promotion of Administrative Justice Act, 3 of 2000.

The court found that the B-BBEE Commission's investigative powers as provided for in section 13J of the Act do not constitute administrative action as contemplated in PAJA and the exercise of those powers must therefore be reviewed in terms of the principle of legality.

Whether the relationship between CRRC E Loco Supply (Pty) Ltd and Matsete Basadi Consortium (Pty) Ltd concerning the implementation of the shareholders' agreement between these parties, constituted a fronting practice as contemplated in the Broad-based Black Economic Empowerment Act, 53 of 2003.

The court further found that there was indeed a practice of fronting through the implementation of the shareholders' agreement as set out in the B-BBEE Act. No requisite skills and experience to manufacture and assemble locomotives was acquired by MBC and its members and there was no evidence of economic interest derived flowing from the contracts awarded.

Whether the Final Report took into account irrelevant considerations and ignored relevant considerations.

The court stated that the investigative powers of the B-BBEE Commission which are found in section 13J (1) of the B-BBEE Act include the powers to decide on the format of the procedures of investigation and the B-BBEE Commission may also use its discretion in using information for investigation purposes.

Whether the findings in the Final Report were materially influenced by errors of law or fact.

The court concluded that there was no error of judgement arising from the information of the investigation.

Whether the findings and/or recommendations in the Final Report are not rationally connected to the information that was before the B-BBEE Commission when the B-BBEE Commission considered the complaints and were unreasonable.

The court found that there were no merits in the assertion that the information was irrationally used by the B-BBEE Commission in its investigation processes. Further, it stated that the actions of the B-BBEE Commission in obtaining information was in line with the Act, and therefore constitute "a process of investigation and not a finding of culpability on the part of the Applicant". The court also stated that it was "disingenuous of the Applicant to claim that it should have been informed that it may face an investigation and remedial action for possible tax invasion".

Whether the findings and/or recommendations of the Final Report are based upon administrative action that is procedurally unfair.

The court found that the B-BBEE Commission is not provided the powers of administration but to rather to investigate, report and approach the Court to apply for an interdict in order to restrain a fronting practice that emanated from the work of the B-BBEE Commission's investigation. The court therefore agreed with the B-BBEE Commission that it was premature for CRRC E Loco Supply (Pty) Ltd to raise an objection of procedural unfairness when investigations were ongoing and not instituted by other regulatory authorities.

In its conclusion the court dismissed the application and ordered the applicant to pay costs of the two legal counsels involved in the court matter. The B-BBEE Commission expresses thanks to its legal team, internally and externally, including the State Attorney, who worked with the team on this matter. The ruling can be accessed on this link: <https://www.bbbee.com.co.za/wp-content/uploads/2021/07/CRRC-E-LOCO-SUPPLY-PTY-LTD-JUDGMENT.pdf>

ENDS

The B-BBEE Commission was established in terms of section 13B of the B-BBEE Act 53 of 2003 as amended by Act No 46 of 2013 with powers effective from 6 June 2016. The B-BBEE Commission's mandate, amongst others, is to supervise and encourage adherence to the B-BBEE Act in the interest of the public, conduct reactive and proactive investigations on fronting and other violations and promote good governance and accountability by creating an effective and efficient environment for the promotion and implementation of the objectives of broad-based black economic empowerment.

Issued the B-BBEE Commission

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