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## **Exposing the use of Fronting to Circumvent Mainstreaming of African Women to Managerial Positions in the South African private sector**

By Motlhatlego Dennis Matotoka<sup>1</sup> and Kolawole Olusola Odeku<sup>2</sup>

### **Abstract**

This paper examines fronting practices within the private sector that are used to circumvent and bypass the law in South Africa. Fronting aims to present an illusion of compliance with laws that compel the broad mainstreaming of Black African women in managerial echelons and positions within the private sector. Companies that engage in fronting install women in managerial positions to convince law enforcers that they complied with the law, but the women are merely hired to “front” for the company. Most of these women lack the qualifications necessary for managerial positions, but they are included in reported statistics as women that have been mainstreamed within the private sector in compliance with the economic empowerment laws in South Africa. Those fronting and the recruiters for fronting are subject to civil and criminal consequences. This paper exposes fronting within the private sector and how it is used to circumvent the law and to deceive law enforcers by portraying Black women in managerial positions when, in fact, they are used as window dressing. This paper looks at how to tackle and combat fronting and proposes consequences for it.

*Keywords:* Equity, Fronting, Black South African women, Underrepresentation, Private sector

### **Introduction**

Fronting is a practice that highlights the lack of commitment within the private sector to appoint qualified Black South African women in managerial positions (Juggernath, 2019). This practice often results in the superficial inclusion of historically disadvantaged persons into mainstream economic activities with no actual transfer of wealth or control (Warikandwa and Osode 2017, 1-43). The exclusion of Black people from economic power has its genesis in the racial discrimination in South Africa before 1994 that denied Black people access to productive economic assets. This relegated most Black people to abject poverty. Particularly, African women were mostly excluded from economic participation and their exclusion was uniquely based on race, gender and class (Ntim and Soobaroyen 2013, 121-138). Post-1994, South Africa enacted the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 (B-BBEE Act) that was subsequently amended in 2013 by the Broad-Based Black Economic Empowerment Amendment Act, No. 46 of 2013 (B-BBEE Amendment Act) (Van de Rheede 2020).

The principal purpose of the B-BBEE Act is to increase Black ownership and participation at management levels in enterprises that contribute to the country’s economy (Krüger

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2014). This is necessary, because the private sector engages in fronting practices to circumvent the process of equitable economic transformation. Before the enactment of the B-BBEE Amendment Act, fronting was a common-law offence of fraud. As such, fines or imprisonment were imposed on companies or directors that participated in circumventing the B-BBEE Act (Hareeparsad 2015). The B-BBEE Amendment Act introduced legislative and regulatory measures to enable organs of state to award tenders based on a preferential point system to companies within the private sector that had significant shareholding by previously marginalised people. Corporations are given preferential points on the condition that their historically disadvantaged shareholders actively participate in the running and control of the tendering enterprise to an extent commensurate with their ownership (Shai *et al.* 2019, 1-27).

The practice of superficial inclusion of historically disadvantaged people within mainstream economic activities with no actual transfer of wealth or control is addressed by the B-BBEE Amendment Act and is classified as a fronting practice (Gerber and Curlewis 2018). Section 1 of the B-BBEE Amendment Act defines a fronting practice as: a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the BBEE or the implementation of any of the provisions of the BBEE, including but not limited to practices in connection with a B-BBEE initiative- a). In terms of which black persons appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise; In terms of which 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; Involving the conclusion of a legal relationship with a black person for that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person; or involving the conclusion of an agreement with another enterprise to achieve or enhance broad-based black economic empowerment status in circumstances in which—there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers; the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available; the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.

According to Steyn, this definition of fronting practices is overly broad and may have the unintentional effect of including legitimate Broad-Based Black Economic Empowerment (B-BBEE) initiatives (Steyn 2017). Warikandwa and Osode correctly observed that Section 1 of the B-BBEE Amendment Act encompasses three forms of fronting: window dressing, benefit diversion, and the use of opportunistic intermediaries (Warikandwa and Osode 2017, 1-43). Window dressing and benefit diversion are common practices used within the private sector to either limit participation of Black women in companies or pay Black women lower remuneration compared to male employees performing work of equal value (Okoye-Manu 2011). Window dressing involves not allowing a Black female appointed at management levels to make management decisions. Benefit diversion means that the benefits received by the company, because of its B-BBEE status, are not enjoyed by Black persons in the company according to the ratio specified in the relevant legal documentation.

Essentially, fronting practices undermine the achievements and advancements in employment equity, as the appointees hired to front for the companies are not actively performing the required duties of their positions or enjoying economic benefits that would ordinarily be received by people in their positions. The appointment is merely a “front” to appear compliant with the B-BBEE Act and the Employment Equity Act, No. 55 of 1998 respectively. The case of *Chowan v Associated Motor Holdings (Pty) Ltd and Others* 2018] ZAGPJHC 40 (*Chowan*) set an important precedent that exposed how companies within the private sector engage in fronting practices to enhance their B-BBEE status. In the case of *Chowan*, the Southern Gauteng High Court in South Africa delivered a landmark judgement that demonstrated the prejudice that Black women experience in the workplace despite their educational background and other qualifications. In the *Chowan* case, the respondent (the chief executive officer) was found to have violated the rights to dignity of the applicant (a female employee) in 2018 by referring to the employee in question as “a female, employment equity, technically competent, they would like to keep her but if she wants to go she must go, others have left this management and done better outside the company” (*Chowan* paragraph 22).

In the *Chowan* case, the applicant was assured of a Chief Financial Officer (CFO) position twelve months after being employed as a Group Financial Manager of the company. After several years of receiving this assurance, the applicant was overlooked for the CFO position despite having the required academic qualifications and work experience. The company offered the CFO position to a white male, who lacked experience in the industry and lacked the accounting and transaction knowledge required for the CFO position. The Chief Executive Officer (CEO) of the company argued that the female applicant required more years (i.e., three to four years) of experience to enhance her leadership skills.

The *Chowan* case demonstrates that fronting exists within the private sector, wherein female candidates are hired and trained but overlooked for available management opportunities. It was submitted that this practice amounts to window dressing. This undermines the goal of economic empowerment in South Africa to ensure that Black African women enjoy the benefits and opportunities guaranteed in the post-apartheid South African Constitution as members of designated groups in Section 1 of the Employment Equity Act, No. 55 of 1998 (Archibong and Adejumo 2013, 14-27). It is of note that affirmative action was established to redress gender as well as racial imbalances perceived to be consequences of apartheid in South Africa (Archibong and Adejumo 2013, 14-27).

### **Fronting Practice in the South African Private Sector**

In terms of Section 1 of the B-BBEE Act, fronting is defined as any initiative or practice that frustrates or undermines the objectives of the B-BBEE Amendment Act. In this paper, we consider fronting to be practices that seek to portray a company as compliant with the B-BBEE Act whilst it is not (Gerber 2018). As such, fronting often takes the form of window dressing that is used to score more points to qualify for a state tender or to acquire a required license to operate in specific industries such as the mining sector (Arya and Bassi 2011, 674-695). Generally, Black people are listed as directors, shareholders, and beneficiaries so that the company appears to have achieved the required B-BBEE status (Zulu 2018). According to Moreoverlu, fronting in South Africa is prevalent and remains

in the highest category of complaints received by the Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) (Gillan and Verdhuizen INC 2018). The B-BBEE Commission was established in compliance with Section 13B of the B-BBEE Act, which took effect on 24 October 2014. It reported that as of 31 March 2018, 83.5% of the allegations it had probed were related to fronting (Gillan and Verdhuizen INC, 2018). According to the B-BBEE Commission, the overall Black ownership participation, Black women's ownership participation, and the proportion of Black designated groups and Black new entrants, who hold rights of ownership in entities, are still low (Modjadji 2017). The B-BBEE Commission asserts that B-BBEE still has a long way to go in terms of women's economic empowerment. About 15% of the registered major B-BBEE transactions do not have Black women's ownership participation and 43.6% do not have Black women's voting rights (Modjadji 2017).

In 2017, the B-BBEE Commission investigated Altius Trading 40 (Pty) Ltd t/a Reliant Electric to determine whether the employee share scheme used by that entity to claim B-BBEE ownership points complied with the B-BBEE Act (Modjadji 2017). This occurred because it was reported that one of the Black shareholders was a receptionist with no involvement in the company's decision-making. Similarly, in 2017, the B-BBEE Commission had to investigate Tempest Fire CC to determine whether it had engaged in fronting practices relating to two Black members of the corporation, who had shares since 2005 in violation of the B-BBEE Act (Modjadji 2017). The B-BBEE Commission also initiated an investigation in 2017 into Forklift Parts World (Pty) Ltd to determine whether the B-BBEE ownership (50% Black and 25% Black female) claimed by the entity in its B-BBEE certificate complied with the B-BBEE Act (Modjadji 2017). Finally, the B-BBEE Commission investigated Nokia Solutions and Networks South Africa (Pty) Ltd to determine whether the B-BBEE ownership transaction involving the employee trust and Sekunjalo Investment Limited (Pty) Ltd through specific entities (resulting in 26% Black ownership) and the subsequent change in Black ownership (resulting in 31.28% Black ownership in Sekunjalo Investment Limited) complied with the B-BBEE Act (Modjadji 2017).

The crux of the complaint in the case of *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* was a fronting practice. Hidro-Tech's concern prompted it to investigate the reason behind Viking's unabated competitive edge over their company. It was found that Viking had received more tenders based on its high historically disadvantaged individual profile. Historically disadvantaged individuals held the majority (70%) of Viking's shares whereas the opposite was the case for Hidro-Tech's shares. Consequently, Viking received more preference points, which resulted in more tenders being awarded to it. It was argued that historically disadvantaged individuals were neither remunerated nor allowed to participate in the management of Viking to a degree commensurate with their shareholding or their positions as directors. Hidro-Tech further argued that the benefits that Viking received from tenders awarded due to its seemingly progressive shareholding profile were being routed to its sister company, Bunker Hills Pumps (Pty) Ltd t/a Tricom Systems (Bunker Hills), which was a wholly white-owned company. It was argued that the historically disadvantaged people's shareholding in Viking was not legitimate and that their Black shareholders were mere tokens used to secure business deals.

The B-BBEE Act essentially allows private sector companies to conduct business with the state through tenders and contracts provided that the private sector companies are compliant with the B-BBEE Act (Mpanza 2016). The Code of Good Practice (Codes) under section 9(1) of the B-BBEE Act prescribes that B-BBEE compliance is measured through a scorecard. The scorecard takes various elements into account and assigns a maximum of 100 points (excluding bonus points) in terms of the Codes. The following elements are considered when measuring B-BBEE compliance:

1. Ownership (20%): This element assesses or determines the company's percentage of black ownership. This is a key element and failure to comply with the minimum target (40% of Net Value) will result in the Level obtained being discounted. Companies that aim to circumvent the B-BBEE appoint more black persons to meet the 40% target, but they deny these appointees the opportunity to make decisions at a management level.
2. Management control (10%): This element determines the directorship, executive management, senior management, middle management, junior management, and the role of disabled employees in the company.
3. Skills development (15 points): This element is used to measure the amount of money spent on training Black employees and Black people.
4. Enterprise development (15 points) and supplier development (20 points): This element measures the company's spending for assisting other Black-owned enterprises to grow as both suppliers and non-suppliers of the company. This is regarded as a priority element and failure to comply with the minimum target of 40% in all categories will result in the level obtained being discounted.
5. Socio-economic development (5 points): This element measures whether the company provides financial assistance to charitable organisations.

These elements determine a company's level of compliance with the B-BBEE Act. If a company is compliant, it receives a particular B-BBEE status and a subsequent B-BBEE recognition level (Kloppers 2014, 58-79). The recognition level is significant, because it determines the level whereby a company enters into business through tenders with the state. The Codes stipulate various beneficiaries described by the elements stipulated above (Knoetze 2006). These beneficiaries include Black women, who should constitute between 40% to 50% of the beneficiaries. Whilst the importance of the legislation addressing economic inequality in South Africa is incontestable, Sibanda argues that implementation of the B-BBEE Act remains challenged by fronting (Sibanda 2015). It has been unearthed that member of the private sector in South Africa place Black people as stakeholders in their companies, sometimes without their knowledge, as a form of fronting in order to get higher B-BBEE rankings (Liedtke 2020). These fronting practices include instances of Black African women being appointed to core positions within a company and then, being barred from participating in the core activities of the company.

Ntingi asserts that the actual involvement of Black people in the economy is woefully low, because fronting is used deliberately to exclude Black people from participating in shareholding and management structures (Ntingi 2016). According to Sibanda, fronting practices in South Africa are an assault on the principles of good corporate governance, which hinge on an unaltered exercise of the fiduciary

responsibilities of directors, stakeholder governance, and ethical leadership (Sibanda 2015).

Against this backdrop, it is evident that within the South African private sector, fronting excludes African women from core activities in the companies that employ them (Warikandwa and Osode 2018). Fronting results in appointed candidates not having the necessary experience to enhance their management skills (Arya and Bassi 2011, 674-695). This practice excludes a pool of eligible African women candidates from managerial positions in the workplace (Durrheim *et al.* 2011).

It is apparent that, due to poverty and high unemployment levels in South Africa, not all fronting practices are challenged or questioned by Black women, because challenging such practices may jeopardise their job security. According to Statistics South Africa (SSA), 2011, a large number of African women that are 25 years-old and above have no formal schooling compared to coloured, Indian, and white women. Consequently, a large number of African women are excluded from participating effectively in the South African economy. The lack of formal education confines Black women to unskilled jobs, e.g. as domestic workers. According to SSA,

African women are less likely to be employed than not only African men, but also than women and men of other population groups. In 2011, only about a third (30,8%), of African women were employed compared to 56,1% of white women, 43,2% of coloured women, and 40,2% of Indian/Asian women.

Black women experience a unique form of discrimination that is based on race, gender, and class that affects their representation in the private sector. This form of prejudice has the effect of coercing Black women to accept and not challenge their high prevalence at lower levels of employment and their participation in fronting practices. Moreover, the lack of pipeline measures and commitment to appoint Black women at management levels within the private sector may also not be challenged by most Black women due to the high unemployment and poverty levels in South Africa.

### **Laws fostering Mainstreaming of Black South African Women and Attempts at Circumventing them within the Private Sector**

It was reaffirmed in the case of *AERO-DUCT Moya v Minister of Public works and another* (Case No: 936/2019 unreported at Para 31) that “fronting practice is a very serious irregularity which undermines the objects sought to be achieved by the preferential procurement policy sanctioned by the Constitution.” Economic redress for previously disadvantaged people lies at the heart of the constitutional and legislative procurement framework in South Africa (Mabece 2019, 279-313). Section 217(2) of the Constitution provides for categories of preference in the allocation of contracts and for the protection or advancement of people, or categories of people, disadvantaged by unfair discrimination. Section 217(3) of the Constitution provides for the means to achieve these goals in the form of national legislation that prescribes a framework wherein the policy must be implemented.

The B-BBEE Act together with the generic Codes of Good Practice provides the legislative framework for B-BBEE in South Africa. The Codes of Good Practice have also

been issued under the B-BBEE Amendment Act (Malherbe 2019). These Codes include measures and scores for management control and skills development. The B-BBEE Amendment Act makes it clear that broad and sustainable involvement by Black people is required and that the development and transfer of necessary skills for their involvement are integral parts of such transformation (Dreyer et al. 2021). The Commission for Employment Equity (CEE) reports from 2006 to 2017 found that white groups in the private sector enjoyed preferential treatment in terms of recruitment, promotion, and training opportunities. This preferential treatment deliberately excludes Black African women and thus, contributes to their minimal representation in managerial positions due to lack of sufficient training. The Court in *AERO-DUCT Moya v Minister of Public works and another* (Case No: 936/2019 unreported) expressed the following:

Substantive empowerment, not mere formal compliance, is what matters. It makes a mockery of true empowerment if two opposite ends of the spectrum are allowed to be passed off as compliance with the substantive demands of empowerment. The one is a misrepresentation that historically disadvantaged people are in control and exercising managerial power, even when that is not the case. That amounts to exploitation. The other is to misrepresent that people who hold political power necessarily also possess managerial and business skills. Neither situation advances the kind of economic empowerment that the Procurement and Empowerment Acts envisage. Both employ charades.

#### *Broad-Based Black Economic Empowerment Act, 2003*

The fundamental objective of the B-BBEE Act is to produce economic transformation and enhance the economic participation of Black people in the South African economy (Grobler *et al.* 2019). In terms of section 11(2) of the B-BBEE Act, the Minister must formulate a strategy for broad-based Black economic empowerment. The strategy must provide for an integrated, coordinated and uniform approach to broad-based Black economic empowerment by all organs of state, public entities, the private sector, non-governmental organisations, local communities and other stakeholders. A B-BBEE strategy must be rooted in a vision to develop the economy and to redress the exclusion of Black people and women from access to South Africa's wealth, income equality, skills development and equal opportunities in general (EY, Ernst and Young Global Limited 2013).

The significance of the B-BBEE Act is that it recognises the need to offer Black women opportunities to manage existing and new enterprises (Meyer 2018). According to Kleynhans and Kruger, the notions of a balanced scorecard and targets were created to ascertain the compliance by B-BBEE companies (Kleynhans and Kruger 2014). According to Acemoglu *et al.*, if a company wishes to bid for a government contract, renew a license, or enter into a partnership with the public sector, it has to prove that it is B-BBEE compliant under the Codes of Good Practice (Acemoglu *et al.* 2007).

A B-BBEE compliant company would demonstrate *inter alia* that it has shares owned by Black people and that several directors and senior management positions are held by Black people. If a company is B-BBEE compliant, a B-BBEE Certificate will be



issued, which results in a public-private economic relationship in terms of economic transactions (Acemoglu *et al.* 2007). The existence of a public-private economic relationship essentially means that the private sector company, after acquiring a B-BBEE Certificate, is allowed to bid for tenders and contracts with the South African State. In other words, the B-BBEE Certificate increases the eligibility of a private sector company to bid for tenders issued by the public sector (Ponte *et al.* 2006).

In South Africa, companies that do not comply with the B-BBEE Act often resort to fronting in order to qualify for a B-BBEE Certificate (Knoetze 2006). Sibanda confirms this assertion and submits that some business entities have been accused of contravening the legislation by deliberately misrepresenting facts about the extent of their compliance with various empowerment obligations, such as the up-skilling of Black people within the employ of the company to obtain high scores on the B-BBEE scorecard (Sibanda 2015).

In the case of *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* [2017] 3 All SA 971 (GJ), the Passenger Rail Agency of South Africa (PRASA) approved the award of a tender for the supply of various train locomotives to a recently incorporated company, Swifambo Rail Leasing (Pty) Ltd (Swifambo). The award was vitiated by several material irregularities, primarily the dishonest and corrupt conduct of officials of PRASA in advertising the request for proposals regarding the supply of locomotives and in awarding the contract. Swifambo argued that it had no knowledge of PRASA's dishonesty and that it was not equitable to set aside the contract under the circumstances. Thus, Swifambo insisted that it was an innocent tenderer, and that the contract between it and PRASA ought to remain in existence and that the parties involved should be permitted to continue performing their respective obligations. However, the Court determined that the business arrangement between Swifambo and Vossloh constituted a fronting practice, because (among other things) Swifambo merely received monetary compensation in exchange for the use of its B-BBEE rating by Vossloh. This was merely a front for Vossloh, which had subcontracted all of the work required under the PRASA tender to Vossloh. It was argued that such fronting practices result in Black women being appointed as "tickets" to obtain a B-BBEE certificate.

According to Hammer, women are appointed to senior positions, but they remain in supportive roles. While these roles are certainly important, they do not lead to women obtaining top positions (Hammer 2015). Hammer asserts that it is imperative for the private sector to actively source and appoint women to critical profit-and-loss positions, i.e. core business roles, which will result in substantial gender transformation at CEO and executive levels (Hammer 2015). Core business roles include business strategy, operations or finance positions. In the JSE top 40 listed companies, 79% of the executives are white, while only 21% of executives are Black South Africans, and 17% of executives are female, while only 7% of executives are Black females (Hammer 2015). Despite the B-BBEE Act's objective of redressing economic inequalities and transforming the economy, large numbers of African women have not assumed executive positions in South Africa. To address this issue, it has been suggested that companies must become proactive and strategic about achieving transformation at their managerial levels. Thus, African women must be appointed to core business functions whereby they will be positioned for strategically influential roles that can lead to executive positions (Hammer 2015).

Davis asserts that window dressing is still prevalent in the workplace insofar as women are promoted to supposedly prominent positions but have no real business power (Davis 2015).

Vokwana agrees with this claim and points out that typically, Black women are often appointed for purposes of window dressing, and possibly for allaying guilt, while the barriers to deep change remain as immovable as ever (Vokwana 2005). It has been submitted that transformation within the private sector must go beyond a “faces and numbers game” insofar as there must be a change in the institutional culture, which includes ideologies that influence attitudes and perceptions about women in the workplace. This change is achievable through gender mainstreaming, which provides a work environment that respects the rights of all employees irrespective of their gender, sex and race.

*Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.*

The Broad-Based Black Economic Empowerment Amendment Act came into effect on 24 October 2014 and amended the Broad-Based Black Economic Empowerment Act to affirm it as the principal legislation concerning B-BBEE in South Africa. The B-BBEE Amendment Act makes the application of the generic Codes of Good Practice by all government departments during the procurement process peremptory. The B-BBEE Amendment Act also imposes penalties for conduct that qualifies as fronting or misrepresentation of B-BBEE information. Consequently, a person who intentionally engages in fronting or deliberately misrepresents their B-BBEE status commits an offence and may be subjected to a fine or imprisonment not exceeding 10 years, or to both a fine and imprisonment. The B-BBEE Amendment Act stipulates that companies engaging in fronting practices or misrepresenting B-BBEE status are subject to a fine of up to 10% of their turnover. However, it is unclear if the imposition of fines will be able to deter fronting practices, because companies still fail to comply with the equity measures despite fines for non-compliance. Bezuidenhout argues that imposing fines for non-compliance has not compelled South African companies to comply, primarily because the companies budget for such fines in advance (Bezuidenhout 2008). Consequently, imposing a fine does not impact a company’s finances. This view was shared by the CEE (2007) at the parliamentary briefing in 2007 wherein it was asserted that the B-BBEE Amendment Act fines do not have much effect on non-compliant companies. It was affirmed additionally that companies budget for fines regardless of their amount.

**South African Legislation does not compel the Private Sector to promote African Women to Managerial Positions**

The B-BBEE Amendment Act was intended to ensure that previously disadvantaged groups are represented at all levels in the workplace. However, since its enactment, the private sector has not progressed in ensuring that previously disadvantaged groups are represented at all levels in the workplace. According to Oosthuizen and Naidoo, the rationale for introducing the B-BBEE Amendment Act in South Africa was to enforce transformation, because organisations would not empower sufficient numbers of Black employees of their own free will (Oosthuizen and Naidoo 2010). Moreover, African women are underrepresented at managerial positions in the private sector whilst white males are overrepresented. The B-BBEE tasks designated employers (including those within the private sector) with developing and implementing B-BBEE plans to achieve equity in the workplace (McGregor 2014). A B-BBEE plan often requires designated employers to set specific employment equity targets that will result in achieving equity in

the workplace (Horwitz and Jain 2011, 297-317). The employment equity targets set in these B-BBEE plans are often informed by the underrepresentation of previously disadvantaged groups at certain occupational levels (Thomas 2003). Oosthuizen and Naidoo assert that employment equity in the workplace is intended to redress the injustices committed under apartheid rule, but it fails to achieve this result, because it is applied inconsistently and is often not aligned with specific skills development programmes (Oosthuizen and Naidoo 2010).

In *Solidarity and others v Department of Correctional Services and others* [2013] ZALCCT 38; [2014] 1 BLLR 76, the Court asserted that employers need to take into consideration both regional and national demographics when preparing a B-BBEE plan. The Court reasoned that consideration of national demographics recognises past injustices suffered by the African majority in South Africa. Similarly, consideration of regional demographics maintains the right to substantive equality for Africans, coloureds and Indians. Essentially, a B-BBEE plan that does not consider both regional and national demographics is defective. An employer's failure to consider both national and regional demographics in its B-BBEE plan provides legitimate grounds for African women to complain of unfair discrimination and exclusion if they are denied job opportunities when the plan is implemented.

Louw argues that numerical goals and even quotas are relevant only in the pursuit of an objective of equality in the outcomes and asserts that where the objective is simply to treat all persons equally, fairly and impartially, there is no place for a numerical goal or quotas for the representation of previously disadvantaged persons in the workplace (Louw 2015, 669-733). In the case of *South African Police Service v Solidarity obo Barnard*, the Courts succinctly stated that the distinction between numerical goals and quotas lies in the flexibility of the standard. To this end, the Court stated that quotas amount to job reservations that are prohibited in terms of Section 15(3) of the B-BBEE Amendment whilst numerical goals serve as flexible employment guidelines. Moseneke ACJ in *South African Police Service v Solidarity OBO Barnard* 2014 (6) SA 123 (CC) observed that the rationale of affirmative action measures in South Africa is to progressively assist previously disadvantaged groups to access opportunities in the workplace. However, these measures must not unjustifiably violate the rights to dignity of those who were previously advantaged. Thus, it was argued that quotas are arbitrary and capricious and that they display naked preference in nature and have the effect of establishing an absolute barrier against previously advantaged persons. Following this premise, the B-BBEE Amendment Act disallows the application of quotas to achieve equity.

The Court majority judgement in *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* 2017 (3) SA 95 (SCA) emphasised that “affirmative action measures are designed to ensure that suitably qualified people, who were previously disadvantaged, have access to equal opportunities and are equitably represented in all occupation categories and levels.” The majority judgement further emphasised that “due to our country’s history and the constitutional obligation, post-democracy, to redress the past injustices, measures directed at affirmative action may in some instances embody preferential treatment and numerical goals but cannot amount to quotas.” In advancing employment equity and transformation, flexibility and inclusiveness are required. In a dissenting judgement, Madlanga expressed that “before invalidating a measure meant to

achieve substantive equality for being rigid, it must be looked at in context or in a 'situation-sensitive' manner. It can never be one-size-fits-all.”

Madlanga views rigidity and its purported prejudice against white people as a “perceived disadvantage and is by (sic) their undeniable continued dominance at the final stage.” Madlanga emphasised that there can never be any justification for white people, a small minority, to disproportionately dominate most professions and industries, including insolvency practice, as they do. This view aligns with the argument of this paper insofar as it is inconceivable that white males and females within a democratic state continue to dominate managerial levels in the corporate sector whilst Black women are poorly represented at these levels.

The minority judgement in *Minister of Justice and Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others 2017 (3) SA 95 (SCA)* further observed the matter of *Thibaudeau v Canada [1995] 2 S.C.R 627* about which the Canadian Supreme Court stated that “the fact that a measure may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial.”

Sharing Madlanga’s dissent, this paper argues that flexibility in targets has led to undue preferences for white males and females and has disadvantaged Black women. Unsurprisingly, flexibility in setting targets and numerical goals to comply with the B-BBEE Amendment has not resulted in Black women being adequately represented at managerial positions in the South African private sector. Moreover, the application of flexibility in setting targets does not result in legal consequences for the private sector if the targets are not achieved. Sanctions are not imposed, because the targets are flexible, so companies that fail to achieve their targets simply revise their numerical goals and set new targets. The achievement of equity for Black women in the private sector should not merely be an aspiring paradigm, which the private sector attempts to approximate, but must be a required objective that it must achieve and that is strictly enforced by applying quotas and excluding flexibility.

Louw objects to setting numerical goals based on demographics for the following reasons (Louw 2015). Employers may legitimately apply affirmative action only in cases where a group is not equitably represented in the workplace. This determination must be made on some reasonable and rational basis, but what is the basis for a finding that the existing representation of such a group is not equitable? Only once inequitable representation is established may steps be taken to address this, which should proceed from setting a goal for the representation of such a group that would be equitable. Since a goal must itself be equitable to address the existing inequality, the setting of the goal must also involve a rational and reasonable exercise of judgment. This, however, can be achieved only by considering objectively verifiable facts as opposed to value judgments. The B-BBEE Amendment Act's preference for an objective of equality of the outcomes imposes exactly such a value judgment as to which facts should sway the scales, at the very outset in the target-setting exercise (Louw 2015, 669-733).

It has been argued that flexibility in setting targets has not resulted in the proliferation of Black women in managerial positions (Thomas 2002, 237-255). Moreover, the implementation of the B-BBEE Amendment Act is challenged by practices such as fronting or window dressing and therefore, has not progressively realised the increase of women in management positions (Haruna 2007). Because of these problems, it has been

argued that a quota system is needed to ensure that the private sector develops concrete plans to appoint suitably qualified Black women at management levels (Shezi 2011).

### **Tackling Fronting used in Circumventing Mainstreaming of Black African Women**

The Courts in South Africa have provided guidelines to tackle fronting within the private sector. In *Viking Pony Africa Pumps (PTY) Ltd t/a Tricom Africa v Hidro-tech systems (PTY) Ltd and Another* 2011 (1) SA 327 (CC), the Court expressed that conclusive evidence is not required for an investigation to be initiated into fraudulent misrepresentation by a successful tenderer to profit from preference points. In other words, discovering, getting to know about, coming to the realisation of, being informed about, having reason to believe in or entertaining a reasonable suspicion of a fraudulent misrepresentation by a successful tenderer to profit from preference points warrants an investigation by an organ of state.

Regulation 14(1) of the Preferential Procurement Regulations, 2017 provides that upon detecting that a tenderer submitted false information regarding its B-BBEE status, level of contributor, local production and content, or any other matter required by B-BBEE regulations, which will affect or has affected the evaluation of a tender, or that a tenderer has failed to declare any subcontracting arrangements, the organ of state must inform the tenderer accordingly and give the tenderer an opportunity to make representations within 14 days as to why: a) the tender submitted should not be disqualified; b) if the tender has already been awarded to the tenderer, the contract should not be terminated in whole or in part; c) if the successful tenderer subcontracted a portion of the tender to another person without disclosing it, the tenderer should not be penalised up to 10 percent of the value of the contract.

It is against this backdrop that the B-BBEE Commission was established in 2016 to oversee, supervise and promote adherence with the B-BBEEA in the interest of the public. These responsibilities include:

- Strengthening and fostering collaboration between the public and private sector and to promoting and safeguarding the objectives of broad-based Black economic empowerment
- Receiving complaints relating to broad-based Black economic empowerment in accordance with the provisions of this Act
- Investigating, either of its own initiative or in response to complaints received, any matter concerning broad-based Black economic empowerment
- Promoting advocacy, access to opportunities and educational programmes and initiatives of broad-based Black economic empowerment
- Maintaining a registry of major broad-based Black economic empowerment transactions, above a threshold determined by the Minister by notice in the Gazette.

The B-BBEE Commission has jurisdiction throughout South Africa to oversee the implementation and application of the B-BBEE Amendment Act (Kassner 2015). However, the Commission is not granted authority to impose penalties or other criminal sanctions. It may only investigate and determine whether a B-BBEE practice amounts to fronting (Van der Walt 2020). The B-BBEE Commission may refer matters to the National Prosecuting Authority for prosecution, to the South African Police Service for criminal

investigation or even to the South African Revenue Services for examination (Gerber 2018).

In 2019, the B-BBEE Commission investigated a complaint lodged by Ms. Winniefred Ntletleng Mashigo (former employee), who was employed at Risc Technology Integration (Pty) Ltd from 11 February 2009 to 7 January 2015 as a receptionist and who left the company after discovering in August 2014 that she had been listed as a 33% shareholder in Risc Technology Integration (Pty) Ltd without her knowledge or consent (B-BBEE Commission, 2020) This former employee asserted that she did not receive any dividends from her 33% shareholding in Risc Technology Integration (Pty) Ltd and that she was informed she had been made a shareholder to enhance the B-BBEE status of Risc Technology Integration (Pty) Ltd in order for the company to access tenders in government entities.

Following this complaint, the B-BBEE Commission found that the allegations pointed to fronting and misrepresentation of B-BBEE status. It was observed that the conduct of Risc Technology Integration (Pty) Ltd reflected a practice that amounted to window dressing and to benefit diversion by using Black women to enhance their B-BBEE status and to receive benefits through misrepresentation. Many companies misrepresent their compliance with the B-BBEE by portraying Black employees as beneficiaries, directors or shareholders when they are in fact not. Fronting practices of this sort are regarded as deceit or fraud.

Following the complaint against Risc Technology Integration (Pty) Ltd, it became clear that fronting hampers economic transformation in South Africa and that companies do not embrace transformative ideals in the workplace but rather, use Black women for purposes of compliance with B-BBEE scorecards. This practice deprives suitably qualified Black women of deserved opportunities to obtain managerial positions and to participate in making decisions in their companies.

Prior to 2014, fronting was not a statutory offence that resulted in imprisonment. This changed after the B-BBEE Amendment Act was enacted. In terms of Section 130 of the B-BBEE Amendment Act, a person found guilty of fronting is liable for a fine or imprisonment for a period not exceeding 10 years, or for both a fine and imprisonment or, if the convicted person is not a natural person, to a fine not exceeding 10% of their annual turnover. Furthermore, Section 13P of the B-BBEE Amendment Act prohibits any person that has been convicted of a violation of the Act from doing business with organs of state for up to 10 years.

The successful investigation of fronting practices in South Africa often depends on whether the affected women will be able to report violations without fear of jeopardising their job security. Women may opt not to report violations if the laws and systems do not guarantee job security. The private sector capitalises on this vulnerability of female employees to perpetuate fronting practices in South Africa. Thus, monitoring and evaluation systems need to be adopted within the private sector to identify and address fronting practices. Once fronting practices are identified in the private sector, these systems can provide job security and prevent any form of discrimination, such as the exclusion of employee benefits, being used as retaliation for reporting or identifying fronting.

## Conclusion

In South Africa, fronting often results in African women neither having control over tendering companies nor active involvement in their management to an extent proportionate with their positions or degrees of ownership. Achieving equity and economic transformation requires more than appointing Black women as managers or as majority shareholders in companies. Black female managers and shareholders must also actively participate in company decisions and receive benefits commensurate with their positions and shareholding.

The B-BBEE Amendment Act is a significant legislation intended to expedite economic transformation by offering Black women the opportunity to assume leadership positions, but fronting practices undermine the aspirations of the Amendment. Moreover, B-BBEE compliance is only mandatory for companies that aim to enter into business with the State through tenders. Companies that do not enter into business with the State are technically not obliged to ensure economic transformation that allows suitably qualified Black women to advance to leadership positions. Consequently, it has been argued that the application of quotas will fast-track the equitable representation of African women at managerial levels. The B-BEE Amendment, although significant, has not fully produced equity within the private sector.

## Recommendation

Achieving equity and representation of Black African women in the private sector requires bold steps. Thus, this article recommends that quotas be set in various economic sectors to ensure equitable representation of suitably qualified people from designated groups at all occupational levels in the workforce.

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