IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: **3800/2022**

In the matter between:

M SCHUTTE CONTRACTORS CC [Registration number: **2009[…]]**	First Applicant
MICHELLE JOUBERT	Second Applicant
and	
THE BROAD-BASED BLACK ECONOMIC EMPOWERMENT COMMISSION	First Respondent
SEBITLOANE BOESMAN MOTHULI [Identity number: **7[…]]**	Second Respondent

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CORAM: **VAN ZYL, J, DANISO, J *et* CRONJÉ, AJ**

HEARD ON: **12 SEPTEMBER 2023**

DELIVERED ON: **24 OCTOBER 2023**

JUDGMENT BY: **CRONJÉ, AJ**

CRONJÉ, AJ:

I INTRODUCTION

[1] The applicants brought an application to review and set aside the final report of the first respondent ("the Commission") dated 14 March 2022,[1] where the Commission made a finding that: the second respondent ("the Corporation") was guilty of fronting.[2] Mrs Joubert was the sole member of the corporation. The review is premised on the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") alternatively, legality. The Commission opposed the application whilst the second respondent ("Mr Mothuli") did not, nor did he file a confirmatory affidavit to the answering affidavit of the Commission.

[2] There are few legislative instruments in South Africa that stir as much aspiration, controversy and emotion as the Broad-Based Black Economic Empowerment Act, 53 of 2002 ("the Act"). This Court has to evaluate the facts and apply the law dispassionately.

[3] The purpose of the Act has succinctly been set out by the Constitutional Court in *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another*[3] (*Viking*), which for the sake of brevity is not quoted.

[4] The preamble of the Act provides, *inter alia*, that it has as purpose 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.

[1] The final report's date is 7 March 2022 – Record, p. 43.

[2] This was already alleged in a letter dated 17 February 2020; Pleadings, p. 244, para 4.

[3] (CCT 34/10) [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) (23 November 2010).

[5] A "B-BBEE initiative" means any transaction, practice, scheme or other initiative which affects compliance with the Act or any other law promoting B-BBEE.

[6] Section 1 of the Act defines "broad-based black economic empowerment" as:

> *"the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to—*
>
> *(a) increasing the number of black people that manage, own and control enterprises and productive assets;*
>
> *(b) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;*
>
> *(c) human resource and skills development;*
>
> *(d) achieving equitable representation in all occupational categories and levels in the workforce;*
>
> *(e) preferential procurement from enterprises that are owned or managed by black people; and*
>
> *(f) investment in enterprises that are owned or managed by black people."*

[7] Fronting is defined as:

> *""fronting practice" means a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the 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—*
>
> *(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 that 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 would 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 broad-based black economic empowerment status in circumstances in which—

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

[8] Section 13J provides that 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, which may include the holding of a formal hearing.

[9] The Commission is a statutory body established in terms of Section 13B (1) of the Act. It has the powers in terms of Section 13F(1)(c) – (d) and 13J (1) of the Act to receive complaints and conduct investigations relating to any matter arising from the Act. Regulation 15 prescribes the process for lodging and processing of complaints.

[10] The Corporation was registered in 2009. It mainly specializes in general pest and weed control and initially appointed Mr Mothuli during 2010 in terms of a verbal employment contract. The cost of employment was R2 400.00 per month, which may increase on meritorious performance and depending on his input. It was required that he has to do a pest control operator's course within two (2) years.

[11] On 2 April 2012, the Corporation and Mr Mothuli concluded a written contract of employment. He was appointed as supervisor and pest control officer with additional related duties as may conveniently be performed therewith from time to time.

[12] At that stage Mrs Joubert held 100% of the total member's interest ("interest"). Due to the impressive performance of Mr Mothuli, he was offered a member's interest in the Corporation and a Memorandum of Agreement ("MOA") was thereafter entered into in terms of which he acquired 26% of the interest for R300 000.00. The price was payable in instalments of R5 000.00 per month, which would be deducted by the Corporation and paid to Mrs Joubert. Upon payment of the full price, Mrs Joubert would transfer his interest.

[13] On 20 August 2013, Mr Mothuli became a member of the Corporation, remained an employee and his income increased. Mr Mothuli enrolled for a weed control skills course, a structural pest control skills course and a bush cutter-operating course at AgriSETA. With the assistance of Mrs Joubert, he obtained a driver's licence during 2013.

[14] Mr Mothuli was a hardworking member and employee until or about 2017. On 4 May 2017, he was issued with a notice of suspension pending investigation of possible fraud and/or theft. He refused to sign the notice of suspension and on 25 May 2017, he was provided with a notice to attend a disciplinary hearing where complaints/charges of theft and/or fraud of fuel, theft and/or fraud of assets, intimidation and acting in bad faith, stealing of overtime funds, and threatening the continuation of the well-being of the Corporation were levelled against him. The notice *inter alia* stated that if he does not attend the enquiry, it may be proceeded in his absence and his services be terminated. He was found guilty on all the charges on 13 October 2017. He was dismissed on 19 October 2017. It does not appear that he referred a dispute against his dismissal to the Commission for Mediation and Arbitration ("CCMA") or an accredited Bargaining Council.[4]

[15] Mrs Joubert thereafter brought an application in the Free State High Court[5] for a declarator that he shall cease to be a member of the Corporation; the fair

[4] The services are free.

[5] Case No. 4079/2019.

value and consideration of his 26% interest was determined to be R116 638.58; she shall acquire his entire interest; he was indebted to her for R85 000.00 (balance of purchase price); and the R85 000.00 be set off against the amount of R116 638.58. It does not appear that he brought an application to rescind the judgment or to appeal against the judgment.

[16] On 15 October 2019, apparently in pursuance to the Court order, he was removed as member of the Corporation. As stated above, he did not file an answering affidavit nor a confirmatory affidavit and the allegations therefore are uncontested.

II MR MOTHULI'S COMPLAINT

[17] On or about 9 September 2017, he deposed to an affidavit when opening the case against the Corporation. His version of events is broadly as follows. He bought the interest for his children's future and did not receive any dividends but borrowed R20 000.00 from Mrs Joubert in 2014 and R20 000.00 from Ms Joubert's husband in 2015. He already paid R240 000.00 for his interest. The Corporation lent him money to buy a house, but it was registered in the name of the Corporation as it was for more than R100 000.00. Mrs Joubert or the Corporation assisted him to buy a Mazda 3 motor vehicle for R80 000.00 and in terms of a verbal agreement and it was registered in Mrs Joubert's name. He would repay that amount after paying for the interest.

[18] According to him, the Corporation succeeded in obtaining a tender at the Tshepong mine and a level 1 BEE rating. When he requested a certificate, Mrs Joubert refused to provide same and when he enquired about his dividends he was informed that he received them in 2017. He did not receive same and was informed that it was transferred into the Company's account. According to him he never received any monies. He was thereafter requested to return all the assets of the Corporation, including the vehicle and the cell phone. He confirms that he learned of allegations of theft and fraud when he

was requested to sign for receipt of the suspension notice. According to him this was the result of his legal representatives' engagement with Mrs Joubert about his interest. He was then offered an opportunity to resign from the Corporation and to abandon his interest. He denies that a hearing was held.

[19] He went to the South African Revenue Services (SARS) and was informed that he received a refund in 2014 but that the money was paid to the Corporation. An amount of R9 519.00 appears in a Statement of Account: Assessed Tax of SARS dated 19 April 2017. Provisional tax of R9 520.00 was applied leaving a deficit of R61.00.

III THE APPLICANTS' VERSION

[20] One of the applicants' complaints is that the Commission failed to comply with Regulation 15(4) in that it received the complaint on 5 September 2017, made preliminary findings in a letter dated 17 February 2020 and the final findings and recommendations were only received on 15 March 2022. The COVID-19 pandemic was only classified as National Disaster on 15 March 2020 and it could not have prevented timeous investigation. Regulation 15(4) provides that its findings and recommendations should be made within one (1) year of receipt of the complaint.[6] From case law sourced by Daniso J the merits of the complaint appear to be dispositive of the application in the applicants' favour. I deal with the merits on the basis that I may be wrong on this score.

[21] Mr Mothuli received annual income of R120 000.00 in 2014, R125 000.00 in 2015, R129 500.00 in 2016, R133 652.00 in 2017, and in the year of his dismissal (2018), he received R56 180.00 for five (5) months. In respect of dividends/bonuses he received R22 100.00 in 2014, R5 000.00 in 2015 and R20 000.00 in 2016. The Mazda vehicle was bought for R85 500.00 and he used it to drive to and from work and for his personal use. He stayed in a property in Odendaalsrus which belongs to Mrs Joubert and never paid for

[6] See *Sasol Oil* para [56] – [62].

occupation. The Corporation bought a mattress and base set for him in an amount of R3 998.00, paid R10 122.00 to GL Electrical for electrical services for the property where he stayed, and made payment of R122 714.20 from June 2013 to February 2017. He received a cash payment of R15 000.00 during May 2016 for his wedding.

[22] Mrs Joubert was largely in charge of the pest and weed control operations whilst Mr Mothuli visited the sites, attended site meetings, was in control of the employees on the sites. She was in the process of teaching him to do quotations and cost estimates. She dealt with general administration, which included quotations, salaries, creditors, bookkeeping and ordering of stock. They shared an office and met on a daily basis to discuss the day-to-day activities. No formal meetings were held and no minutes of meetings were kept. Decisions were made verbally and jointly on day-to-day basis. A written resolution by the members, dated 17 August 2016, shows that Mrs Joubert was authorized to sign a lease agreement on behalf of the Corporation. They both signed a business overdraft agreement with Standard Bank on 7 December 2016.

[23] The financial statements for 28 February 2014 show that Mrs Joubert earned a gross salary of R154 950.00 whereas Mr Mothuli received R101 320.00. Dividends were declared in favour of the parties respectively of R77 900.00 and R22 100.00.

[24] Whereas the Corporation had a profit of R208 546.00 in 2014, the 2015 statements showed a decrease in revenue of approximately R500 000.00, and a loss of R173 763.00. No dividends were declared for that year. The Corporation’s financial situation improved in 2016 but it still suffered a loss and no dividends were declared. The financial statements of February 2017 show that an amount of R367 484.00 was *borrowed* from Welkom Paint with no fixed terms of repayment at an interest rate of 8% per annum. It does not appear that any dividends were declared for that financial year, which is not

surprising as the Corporation had to borrow monies for operational expenses.

[25] In their supplementary affidavit, the applicants state that the Final Investigation Report (FIR) of the Commission was not previously supplied to them. The Commission had the power to summon the applicants to appear and answer questions but failed to do so and adjudicated factual disputes without hearing evidence. Importantly, they state that the Commission's deponent does not have personal knowledge.

[26] They deny any misrepresentation to Harmony Gold in respect of its status as the Corporation's rating did not change after Mr Mothuli became a member. The averment that Mr Mothuli did not derive any economic benefit is denied.

[27] The applicants concede that the financial statements were not signed by Mr Mothuli, but denies that it excluded him. I pause to state that Section 58(3) of the Close Corporations Act provides that: *"the annual financial statements shall be approved and signed by or on behalf of a <u>member holding a member's interest of at least 51 per cent</u>, or members together holding members' interests of at least 51 per cent, in the corporation."* The financial statements were available to Mr Mothuli and could be discussed at any stage.

IV THE COMMISSION'S VERSION

[28] Only the Commission opposed the application. It firstly asked that condonation be granted for the delay in filing the answering affidavit. I am satisfied with the explanation and condonation should be granted, the Commission to pay the costs thereof.

[29] The explanation for the delay in finalising the investigation is to be found in paragraph 37 of the answering affidavit. It states that it had limited resources to conduct investigations; the COVID-19 National Lockdown Restrictions were imposed which affected timelines in multiple matters under investigation. The

applicants were notified as required regarding the need for additional time to complete the investigation.

[30] Regulation 15(5) provides for the conditions for extension of time for investigation:

> "*If the Commission is of the view that more time is warranted to conclude its process in respect of an investigation as contemplated in sub-regulation (8), the Commission must inform the complainant of the need to extend the time, the circumstances warranting a longer period, and the exact period required as an extension".* [my emphasis]

[31] The record filed by the Commission is silent on when, where and how Mr Mothuli was informed. An exact period is also absent. During argument Ms K Moroka SC (assisted by Mr L Bomela), for the Commission, submitted that the reference to "*the Applicants*" who were allegedly requested for an extension is a typographical error and should refer to the "*Complainant*". The Commission did not ask for condonation for the delay in finalising the investigation. I will revert to this later herein. The Commission avers that Mr Mothuli filed a complaint on 28 August 2017. This is denied by the applicants stating that it was 5 September 2017. It is common cause that the Commission issued its preliminary findings on 17 February 2020 and made its final findings available on 14 March 2022.

[32] The Commission denies that there is any basis to invoke the provisions of PAJA in the review. Its salient remedial recommendations were:

> *That the Corporation and Mrs Joubert must within thirty (30) days pay reasonable compensation to Mr Mothuli for his role as the owner of the 26% interest in the Corporation, calculated from the date on which Mr Mothuli was recorded on CIPC as the beneficial owner of the 26% interest in the Corporation, the calculation of which must be approved by the Commission;*

That the Corporation and Mrs Joubert must within thirty (30) days of the findings issue a <u>written apology</u> to Mr Mothuli for the <u>improper conduct</u>, the content of which must be approved by the Commission;

The Corporation and Mrs Joubert must, within ninety (90) days <u>attend a training session on the B-BBEE Act</u> with any institution accredited to provide such training in terms of the South African Laws and provide proof to the Commission;

That the Corporation and Mrs Joubert must, within ninety (90) days <u>attend a training session on corporate governance</u> with any institution accredited to provide such training in terms of the South African Laws and provide proof to the Commission;

The Corporation and Mrs Joubert must within thirty (30) days of the findings submit a <u>written undertaking under oath that they will refrain from any conduct that is contrary to the objectives of the B-BBEE Act</u> and that they will for a period of twenty-four (24) months seek an advisory opinion from the Commission prior to implementing a B-BBEE ownership initiative or scheme. [my emphasis]

[33] It submits that the decision to sell the interest was not because Mrs Joubert was impressed with the performance of Mr Mothuli but for an ulterior purpose. The terms and conditions of the MOA were not negotiated at arm's length on a fair and reasonable basis in that all power and control was concentrated in Mrs Joubert's interest whereas he was excluded from running the business and could not veto any decisions due to his 26% interest. The 26% interest points to fronting. It appears that the Commission took issue with the fact that Mr Mothuli was both a member and an employee.[7]

[34] It refers to Clause 7.1 of the MOA that provides that:

"*The business and affairs of the Close Corporation shall be managed by Michelle Schutte (Mrs Joubert) and she will observe and give effect to all relevant provisions of the Act and all resolutions and decisions of the members as to the nature, scope, extent, limitations, duration and location of any business to be conducted by the Close Corporation and as to the methods and procedure of such conduct and the allocation of duties among the members and generally without limitation by reason of*

[7] There is nothing in our law that prohibits it.

the aforegoing, as to any matter or thing relating to or concerning the business or affairs of the Close Corporation."

[35] The Commission takes issue with this, essentially averring that Mrs Joubert has wide powers and the MOA was "*designed to exclude*" Mr Mothuli from the core business and operations in contravention of the Act and the Code. The Applicants deny this and refers to Clause 10 which does empower Mr Mothuli to participate. According to the Commission it is demonstrated that it was correct in finding that there were no meetings or recorded resolutions, indicating that Mr Mothuli was never part of any major decisions. This is clearly incorrect. A resolution by members was appended to the founding affidavit that authorised Mrs Schutte to sign for the renewal of the lease agreement.

[36] The Commission justifies its failure to hold a hearing on the basis of s 13F (1)(d) and 13J (1) of the Act and states that due process was followed and the applicants afforded adequate opportunity to reply to the allegations. It undertook its own investigation and arrived at an independent finding. It could not conclude the investigation within one (1) year. The applicants were notified that it needs additional time to complete the investigation.[8]

[37] The Commission states that the increase in income of Mr Mothuli from R2 400.00 to R10 000.00 per month was purely related to Mr Mothuli's employment contract and had nothing to do with his interest. At cessation of membership, Mr Mothuli paid R240 000.00 but never received any profit for his interest.

[38] The Commission points out that Mrs Joubert approached the Court[9] in the midst of the investigation into the alleged conduct of fronting and in

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[8] The applicants deny it and nothing supporting the Commission's averment could be found in the pleadings or record of proceedings.

[9] The application in the Free State High Court referred to above.

anticipation of the outcome

[39] The Commission denies that the financial statements were kept on the desk for discussion by the members. It states that there is no record of such discussions and relies on Clause 7 of the MOA.

[40] As stated above, Mr Mothuli did not present any version in answer to the applicants' founding affidavit, nor was there a supporting affidavit to the answering affidavit. What the Commission states is therefore not even close to hearsay but only deductions.

[41] The Commission states that in terms of the mining charter and supply chain policy of Harmony Gold Mine, a 26% member's interest was required to qualify to participate in the Supply Chain Procurement of the mine. It relies on the contract entered into between the mine and the Corporation on 15 and 27 September 2016 respectively. Clause 12 deals with Black Economic Empowerment. It refers to the Broad-Based Socio-Economic Empowerment Charter for the South African Mining industry ("*Charter*") which requires meeting procurement spend targets.[10] Should the mine determine that the credentials of the Corporation are unsatisfactory, it shall notify the Corporation in writing whereafter the mine and the Corporation shall meet in an attempt to agree on an appropriate resolution. In the event that no resolution is reached, the mine shall be entitled (but not obliged) to terminate the agreement.

V THE PROCESS OF INVESTIGATION AND TIMELINES

[42] During 7 March 2018, nearly a year after the complaint, the Corporation received a letter of complaint from the Commission. The Commission requested certain documentation. Thirteen (13) days thereafter, the attorneys for the Corporation dispatched the documents via courier.

[10] Mining Charter, 2018: Broad-based Socio-Economic Empowerment Charter for Mining and Minerals Industry: Amendment (www.gov.za).

[43] Three months later, on 18 June 2018, the Corporation received a letter from the Commission, dated 15 June 2018, wherein it stated that it finalized an assessment and that there was merit to warrant an investigation in terms of Section 13F(1)(d) and 13J(1) of the Act, read with Regulation 15. It may upon investigation, make findings in terms of Section 13J(3) of the Act and the Corporation will be afforded an opportunity to respond within thirty (30) days of the findings. The Commission sought additional documentation and the Corporation had to reply by 26 June 2018, leaving it eight (8) days.

[44] The Corporation replied that most, if not all, the additional documents that were requested did either not exist or was irrelevant for purposes of the investigation. During February 2020, approximately 20 (twenty) months after the last engagement and before the COVID-19 lockdown, the Corporation received a letter from the Commission wherein the applicants were informed that the Commission "*finalized*" its investigation and found that the Corporation engaged in fronting. The applicants were afforded 30 (thirty) days to respond.

[45] Within the 30 (thirty) days, on 16 March 2020, the applicants' attorneys replied and stated that the applicants reject the adverse findings and recommendations. It quoted Regulation 15(4) which provides that the Commission must within one (1) year of receipt of a complaint, investigate the complaint and make a finding, with or without recommendations. The Commission failed to do so and the complaints of Mr Mothuli were vexatious and without any merit. The High Court application was appended to the letter and a brief overview of the engagement of Mr Mothuli in the Corporation was provided. Reference is made to his unlawful conduct which led to the disciplinary inquiry. The members duly managed the affairs of the Corporation jointly, he was an active member and was afforded an opportunity to vote and actively participated. He received a substantial salary increase from R2 400.00 per month to R10 000.00 per month after becoming a member. He

shared in the profits as and when the business made a profit. He was assisted in the purchase of a vehicle and with rental of a property.

[46] Although the Commission states that a request for extension of the investigation was made, I could not find same in the pleadings or the record.

[47] Approximately 2 (two) years later, on 15 March 2022, the applicants received the final findings of the Commission, dated 7 March 2022. The salient findings of the Commission were:

> *"Mr Mothuli did not receive an economic interest, voting rights and net value realization, which conduct or act directly or indirectly undermines the objectives of the Act. It was also stated that Mr Mothuli was "discouraged and/or inhibited" from substantially participating in the core activities of the Corporation. The economic benefits received by the Corporation "as a result of its broad-based black economic empowerment status", did not flow to Mr Mothuli commensurate with his 26% member's interest as a black person.*
>
> *The financial statements for 2017 reflect that Welkom Paint "benefitted through loans, a company owned by Mrs Joubert, and no records or resolutions of members exist in respect of such significant transfers of funds".*
>
> *The financial statements of the Corporation are devoid of Mr Mothuli's signature, indicating a prohibition from accessing the financial information as well as involvement in financial control and/or financial decisions which shows a gross undermining of the transformation requirements of the Act.*
>
> *The Corporation contravened Section 48(1) of the Close Corporation Act, and "Where voting rights can be exercised and which would have demonstrated his participation and in the absence of the records "<u>it is not possible to test and confirm participation, or lack thereof</u>". [my emphasis]*
>
> *Black ownership appears on paper, cannot successfully be confirmed in practical terms for exercisable voting rights, economic interest and net value, which points to a fronting practice in terms of Section 130(1)(d) of the Act.*
>
> *The reduction of Mr Mothuli's activities to fully exercise his powers and rights, failure*

to have a decision-making structure in place, failure to hold strategic member meetings, shows undermining of the principles of corporate governance and the Close Corporations Act and non-compliance with the provisions of the Act.

Mrs Joubert shows non-compliance with the objectives of the Act and total disregard of the principles of Corporate Governance and the provisions of the Corporations Act, "in an improper and unethical manner, thus pointing to him [sic] possible being unfit to hold any membership or directorship in any entity."

The applicants knowingly misrepresented the status of the Corporation in presenting it as 26% black-owned, using BEE certificates, whilst knowing that Mr Mothuli was not actively involved, which conduct is contrary to the spirit and objections of the Act and an offence in Section 130(1)(a) of the Act "<u>if that person knowingly misrepresents or attempts to misrepresent the status of an enterprise</u>".[my emphasis]

[48] The applicants were afforded fourteen (14) days to agree to implement the recommendations contained in paragraph 8 of the letter which, *inter alia*, provides that if the applicants are not agreeable to the implementation of the recommendations in paragraph 7, "*which are reasonable and appropriate to remedy the adverse findings*", the Commission may: institute criminal charges in terms of Section 13J(5) and 13O(1)(a)(d) of the Act; refer the corporate governance to CIPC with a view to institute proceedings in Court to declare Mrs Joubert as delinquent and unfit to hold a membership or a directorship; institute proceedings to restrain the apparent breach of the Act, including fronting and misrepresentation of its status or other remedial relief provided for in Section 13J(4) of the Act; refer the findings to National Treasury for invoking processes in the Preferential Procurement Policy Framework Regulations (PPPFR) relating to submission of false information in respect of status of the Corporation; register them for restricted supply on the register for tender defaulters in terms of Section 13P of the Act; and to bar them from contracting or transacting any business with an organ of state or public entity for up to ten (10) years upon conviction.

VI SUBMISSIONS MADE BY THE PARTIES

[49] Mr W Groenewald, appearing for the applicants, argues that Mr Mothuli was able to fully exercise his powers and rights as a member. There was no misrepresentation of the B-BBEE status as the Corporation was already approved as a vendor of Harmony before Mr Mothuli became a member. The findings of the Commission are therefore not supported by facts.

[50] Section 48(1) of the Corporations Act provides that a member may by notice to another member call a meeting of members for purposes disclosed in the notice. It is therefore not peremptory. The members met on a daily basis and there was no need to convene meetings. Welkom Paint was a creditor of the Corporation and not the other way round. The rationale for the loan was clearly stated as to the purchase of herbicides and discussions surrounding the loan were held and the loan reflects in the financial statements.

[51] The High Court already declared the fair value and consideration of Mr Mothuli's 26% interest and the Commission could therefore not make a recommendation for payment of reasonable compensation to Mr Mothuli.

[52] He argues that the conclusion of the Commission that there seems to be "*no possibility*" that Mr Mothuli may still owe money on the purchase price of his shareholding, is without basis. Mr Mothuli was charged with substantial misconduct and a threat of a disciplinary hearing to obtain the interest is unsupported by the facts. The deponent of the Commission did not sign the preliminary findings or the recommendations and therefore does not have personal knowledge.

[53] He submits that the decision by the Commission constitutes administrative action which is reviewable. The Commission failed to duly consider the written response to the preliminary finding and rejected the applicants' version and merely accepted the version of Mr Mothuli. The Commission made a finding on incorrect facts and the decision of the Commission therefore stands to be reviewed in terms of Section 6(2) of PAJA.

[54] Ms Moroka SC argued that the purpose of the Act is to increase the effective participation of the majority of South Africans in the economy and to promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people and more equitable income distribution.

[55] They submit that the credentials of the Corporation were recognized by Harmony without Mr Mothuli benefitting any economic interest, voting rights and value realization. Mr Mothuli was prevented from substantially participating in the core activities of the Corporation and the benefits did not flow commensurate with his interest. There is no proof that Mr Mothuli had knowledge of the loan of Welkom Paint. He was by "*agreement*" side-lined from participation and the business was left in the hands of Ms Joubert.

[56] They argue that the Commission assessed the merits, considered the representations to the preliminary report, conducted an investigation and made remedial recommendations. The benefits attributed to Mr Mothuli are reconcilable with an employment relationship and do not ordinarily flow to a member. Mr Mothuli did not receive dividends or an interest in his capacity as a 26% interest holder.

[57] They affirm the basis for the delay in completion of the investigation as found in the answering affidavit. Non-compliance with the time-frames were not due to any fault of the Commission.

[58] It is argued that in line with the threat of termination of the contract between the applicants and Harmony, the applicants were obliged to enter into the MOA. Mr Mothuli found himself in a position of disadvantage, lack of economic advantage and skills as enunciated in the pre-amble of the Act. They submit that the MOA, the lack of documents and financial records, demonstrate that the MOA was just a rouse designed to disguise a window-

dressing type of relationship as an empowerment deal. Reference is made to *CCRC E-loco Supply (Pty) Ltd v Broad-based Black Economic Empowerment Commission and 2 others*[11] where the Court held that the test for establishing a fronting practice by the Commission and its recommendations flowing from and linked to the outcome of its investigations is whether the Applicant is adversely affected in his rights and have an immediate, final and binding effect on those rights.[12]

[59] The Commission filed supplementary heads of argument. It is submitted that fronting is egregious conduct that is likened to <u>cartel conduct</u>, in that it is harmful and <u>secretive</u>, difficult to detect unless a whistle-blower or aggrieved party reports. It submits that the findings and recommendations are not subject to a review in terms of PAJA with reference to *Viking supra*.

[60] For a decision to be reviewable under PAJA it has to adversely affect the rights of a person and have direct and external effect. Only when the recommendations are implemented, does it have an external legal effect. The recommendations are not binding and PAJA does not find application. The Commission's powers should be likened to the Competition Commission which may refer the conduct to the Competition Tribunal. In *Computicket (Pty) Ltd v Competition Commission of South Africa*[13] it was held that a decision to refer a complaint to the Tribunal did not constitute an administrative action and therefore not reviewable. It could be reviewed under the principle of legality.

[61] It argues that paragraphs 18.5 to 18.5.4 of the final report makes it clear that the Commission had no power to force implementation of the remedial recommendations.

[11] Gauteng Division, Case No. 34701/19 (5 July 2021).

[12] At para [28].

[13] (118/CAC/APR12) [2012] ZACAC 7 (29 October 2012).

[62] The Commission is not obliged to hold a hearing and the applicants were called to a meeting to employ alternative dispute resolution mechanisms.

[63] In respect of non-compliance with the one (1) year period for investigations Ms Moroka SC argues that the applicants and Complainant were notified regarding the need for additional time. She refers, by analogy, to *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited*[14] ("*Pickfords*") that dealt with the Competition Act. The Constitutional Court, *inter alia*, held:

> *"[18] Therefore, this matter raises a constitutional issue. In addition, this matter raises at least two arguable points of law of general public importance, namely: (a) whether section 67(1) of the Competition Act constitutes a prescription provision proper or a procedural time-bar; and (b) whether the Tribunal has the power to condone instances of non-compliance with section 67(1) of the Competition Act by virtue of its powers under section 58(1)(c)(ii) of the Competition Act. The matter raises novel and complex questions that this Court has not as yet pronounced on. And, as will be seen later, there are strong prospects of success. It is therefore in the interests of justice that leave to appeal be granted. The potential inability of the Commission to investigate and prosecute prohibited practices and cartel behaviour has far-reaching consequences, as it also impacts on the civil and criminal remedies available under the Competition Act."* [my emphasis]

[64] Ms Moroka SC submits that the Commission had sufficient evidence to find that its findings were rational, reasonable and lawful. They submit that the increase in income to R10 000.00 is misleading as Mr Mothuli had to pay R5 000.00 towards his interest. The bank letter was sent to Ms Joubert as sole member. Ms Joubert took a staff loan and did not pay it back at the stage when the complaint was filed, yet Mr Mothuli was required to pay R5 000.00 and was never consulted regarding her loan. There was no difference between Mr Mothuli's day-to-day operations as employee. The

[14] (CCT123/19) [2020] ZACC 14; 2020 (10) BCLR 1204 (CC); 2021 (3) SA 1 (CC); [2020] 1 CPLR 1 (CC) (24 June 2020).

Commission avers that Clause 92 of Harmony's General Conditions for on-site services, provides that the charter requires Harmony to meet black empowerment procurement spent targets. According to it, the 2014 amendments to the Codes of Good Practice on Black Economic Empowerment placed an obligation on organs of state and public entities to apply the codes when awarding licences, procuring goods and services. The mining charter of 2013 require a 26% black shareholding by 2014.

VII DISCUSSION

[65] The principles applicable to the granting of condonation for delay was affirmed by the Constitutional Court in *Steenkamp and Others v Edcon Limited*[15] *(Steenkamp)* where the Court held:

> *"[36] Granting condonation must be in the interests of justice. This Court in Grootboom set out the factors that must be considered in determining whether or not it is in the interests of justice to grant condonation:*
>
> > *"[T]he standard for considering an application for condonation is the interests of justice. However, the concept 'interests of justice' is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both Brummer and Van Wyk emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.*
>
> *It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's*

[15] (CCT29/18) [2019] ZACC 17; 2019 (7) BCLR 826 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) (30 April 2019).

indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.

The interests of justice must be determined with reference to all relevant factors. However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice."

[66] Public interest and policy considerations act as counterbalances to keep administrative bodies' conduct in check for protection against non-compliance by the State and such bodies. The applicants gave a clear exposition of the delay. The Commission answered to these pertinent complaints in generalised fashion. One of the averments, in reply, was that "*the Applicants were notified*". If the record contained a document that showed notification to Mr Mothuli, there might have been room for arguing that the reference to the applicants was a typographical error. There cannot in my view be any mistaken identity. Even if it did notify Mr Mothuli, the delay is so unreasonable that it would not assist the Commission.

[67] The import of the Regulations under the Act is clear in respect of compliance with the timeframe. Even if I am wrong in my conclusion on condonation, there are only generalised explanations with insufficient content. The public cannot be held ransom by limited resources – of which the papers are silent. The Covid-19 (hard) lockdown did not last for the whole period and only commenced in March 2020. There are no specific references to dates. The

"*multiple matters*" are not specified. Even if there may have been prospects for success, the lack of detail for the whole period does not in my view save the day for the Commission.

[68] In respect of the exercise of a discretion to grant condonation, the Court in *Steenkamp* held

> *"[26] The principle is firmly established in our law that where time limits are set, whether statutory or in terms of the rules of court, a court has an inherent discretion to grant condonation where the interests of justice demand it and where the reasons for non-compliance with the time limits have been explained to the satisfaction of the court. In Grootboom this Court held that—*
>
> > *"[i]t is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation."*
>
> *[27] And that—*
>
> > *"It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case."*
>
> *[28] As a point of departure, this Court must determine the nature of the discretion applied by the Labour Court when considering whether or not to grant condonation: whether it was discretion in the true sense or the loose sense. The nature of the discretion applied will determine the standard of interference this Court must adhere to in this circumstance.*
>
> *[29] The discretion to grant or refuse condonation is wide and allows for a court to consider a wide range of "available courses" each of which falls within the ambit of its powers, as this Court in Trencon explained:*
>
> > *"A discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it. This type of discretion has been found by this court in many instances, including matters of costs, damages and in the award of a remedy in terms of section 35 of the Restitution of Land Rights Act. It is 'true' in that the lower court has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible. In contrast, where a court has a discretion in the loose sense, it does not necessarily have a choice between*

> *equally permissible options. Instead, as described in Knox, a discretion in the loose sense—*
>
> > *'mean[s] no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision'."*
>
> *[30] An indicator of a discretion being "true" is when, in making the decision, "it is possible that there could be a legitimate difference of opinion as to the proper outcome of the exercise of the discretion". It is permissible for the decision-maker to choose any of the options available before them. The discretion is thus "true" where the lower court "has an election of which option it will apply and any option can never be said to be wrong as each is entirely permissible".*
>
> *[31] The decision to grant condonation is either yes or no: there is no wide range of available options for the decision-maker as envisaged in Trencon. A court can either grant or deny the condonation. But the election of either option is equally permissible and is something that reasonable judges could disagree on. To grant condonation is an exercise of judicial discretion that is only fettered by being judicially explained*

[69] Neither party referred to the judgement in *Interwaste (Pty) Ltd and Others v Broad-Based Black Economic Empowerment Commission and Others*[16](*Interwaste*), which was sourced by Daniso, J.

[70] In that matter the Court held that the only possible extension of time to finalise the investigation, would be in terms of Regulation 15(15). If the legislator intended that the non-compliance with Regulation 15(4) (read together with Regulation 15(15)) should be condonable by the Court, it would have expressly provided for it in the Act or Regulations. The Commission's submission in that matter was that it should be held that the time bar in Regulation 15(4) is merely procedural and not a substantive one, as it would defeat the purpose of the Act and would undermine the Commission's work. The Court held that the Commission does not keep in mind the devastating

[16] (34095/21) [2023] ZAGPPHC 1179 (5 July 2023).

consequences a pending investigation by the Commission might have on the accused party in conducting its business while under investigation for an indeterminate period of time. The Commission therefore acted beyond its powers when it issued its findings in breach of the empowering provisions of Regulation 15(4). That Court found that the Commission's final findings fall to be reviewed and set aside in terms of section 6(2)(a), 6(2)(b), 6(2)(d), 6(2)(e)(i) and 6(2)(f)(i) of PAJA. As is evident from my remarks above, I am in agreement with it.

[71] My view is that there are material differences, not only in respect of condonation, but other principles in the Competition Act that underly the findings on a procedural bar.

[72] Contrary to the B-BBEE Act, the Competition Act[17], makes provision for condonation.

> *"58 (1) In addition to its other powers in terms of this Act, the Competition Tribunal may—*
> *(a) – (b) …*
> *(c) subject to sections 13 (6), 14 (2) and 43B (4) (b), condone, on good cause shown, any non-compliance of—*
> *(i) the Competition Commission or Competition Tribunal rules; or*
> *(ii) a time limit set out in this Act."*

[17] 89 of 1998.

[73] In *Pickfords-supra* it was stated:

> *"[50] Save for the exclusions alluded to, section 58(1)(c)(ii) of the Competition Act affords the Tribunal an express, general power to condone non-compliance with time-limits in the Competition Act. The Competition Appeal Court found that there is no express power in the Competition Act for the Tribunal to condone non-compliance. It said that the power must therefore be implied. I disagree. Section 58(1)(c)(ii) of the Competition Act expressly provides a general power of condonation, save for the exclusions mentioned. These specific exclusions must have been deliberate on the part of the Legislature. It brings to bear the maxim inclusio unius est exlusio alterius (the specific inclusion of one implies the exclusion of the other). Of course, this maxim is not a rigid rule of statutory construction, and it must always be applied with great caution. It has been described as a "principle of common sense" rather than a rule of statutory construction. But it is certainly a cogent factor in favour of a finding that the power of condonation for non-compliance with section 67(1) is included in section 58(1)(c)(ii)."* [my emphasis]

[74] The notification of the complaint, the interim findings and the final report all point to administrative decisions that have direct and external effect. The remedial recommendations of payment of reasonable compensation, issuing a written apology, attending a training session on the B-BBEE Act, attending a training session on corporate governance, and a written undertaking under oath to refrain from any conduct that is contrary to the objectives of the Act all point to this. The dire consequences of the implementation of the actions envisaged for failure to do so adds weight to this view.

[75] In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*[18] it was succinctly summarised by Nugent JA as follows:

> "*Administrative action means any decision of an administrative nature made…under an empowering provision [and] taken… by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a*

[18] [2005] 3 ALL SA 33 (SCA) at para 21 as quoted in *Sasol Oil supra.*

natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely effects the rights of any person and which has a direct external legal effect".

[76] Did the Commission make factual mistakes? Mr Mothuli filed a complaint, which the Commission then investigated.

[77] In *Maleka v Health Professionals Council of South Africa and Others*[19] (*Maleka*) it was confirmed that rationality is the first element of reasonable administrative action:

"*[36] Cora Hoexter: Administrative Law in South Africa: states that rationality is the first element of "reasonable" administrative action as expressed in section 33(1) of the Constitution. She states the meaning of rationality as follows:*

"*This mean in essence that* a *decision must be supported by the evidence and information* *before the administrator as well as the reason given for it. It must also be* *objectively capable* *of furthering the purpose for which the power was given and for which the decision was purportedly taken."*"

[78] This was affirmed by the Constitutional Court in *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa*[20] where it held:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with the requirement. If it does not, it falls short of the standards demanded by our Constitution for such action."

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[19] (26463/2017) [2019] ZAGPPHC 319 (10 July 2019).

[20] [2000] ZACC 1; 2000 (2) SA 674 (CC) at para 85. Quoted in *Corruption Watch and Another v Arms Procurement Commission and Others* (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (21 August 2019).

[79] In *Pepcor Retirement Fund and Another v Financial Services Board and Another*[21] (*Pepkor*) the Supreme Court of Appeal held that administrative decision has to be taken on an accurate factual basis as a result of which a material mistake of fact renders an administrative decision subject to review.

> *"[38] The factual mistake is required to be uncontentious and objectively verifiable. The material error of fact will render a decision subject to review if the relevant decision has been made in ignorance of the true facts material to that decision such as for example not considering relevant material and/or all of the material provided and/or personal circumstances.*
>
> *[39] An error of law which has a material impact on the decision renders the decision subject to review where it was decided that a material error of law is an error that influence the outcome of a decision.*
>
> *[40] Section 33(1) of the Constitution of the Republic of South Africa, 108 of 1996, gives anyone a right to administrative action that is procedurally fair. Section 6(2)(c) of PAJA allows review of an administrative action on the ground that the action was procedurally unfair. Hoexter points out that procedural fairness is a principle of good administration where context is all important. She states that "the content of fairness is not static but must be tailored to the particular circumstances of each case. Procedural fairness is one of the grounds of review in terms of PAJA. Section 6(2)(c) of PAJA allows review of administrative action on the ground that the action was procedurally unfair. In terms of sections 3 and 4 of PAJA, the right to procedural fairness is given content.*
>
> *[41] The principle of legality requires rational decision-making. Both the process by which the decision is made and the decision itself must be rational."*

[80] The foundations of the requirement that administrative action has to be lawful, reasonable and procedurally fair can be traced back to our common law. It was held in *Mbina-Mthembu v Public Protector*[22]:

[21] (198/2002) [2003] ZASCA 56; [2003] 3 All SA 21 (SCA) (30 May 2003); See also: *Dumani v Nair and Another* (144/2012) [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA) (30 November 2012).

[22] (208/2018) [2019] ZAECBHC 4; [2019] 3 All SA 241 (ECB); 2019 (6) SA 534 (ECB) (7 March 2019).

> *"[12] At common law, the justification for the power of courts to judicially review exercises of public power stems from the rule of law. The grounds of review that were developed over the centuries fell within three broad categories – unlawfulness, unreasonableness and procedural impropriety. It is from this source that the fundamental right to just administrative action arose – the right to administrative action that is lawful, reasonable and procedurally fair."* [my emphasis]

[81] *Sasol Oil Limited v The B-BEE Commission and Others*[23] (*Sasol Oil*) held: *"Evidently, the Commission's decision regarding the relationship between Wingrove and Sasol Oil was based on incorrect facts which renders it reviewable. At the same time it is rendered irrational in that it is not based on admissible evidence*."[24] [my emphasis] The applicants were not afforded a fair opportunity to present their case *viva voce* in a hearing.

[82] In terms of Section 13B(3)(b) of the Act, the Commission must be impartial and perform its functions without fear, favour or prejudice. In terms of Section 13B(3)(c)(ii) it must exercise the functions assigned to it in terms of this Act or any other law in accordance with the values and principles mentioned in section 195 of the Constitution, which *inter alia* provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including services that are impartial, fair, equitable and without bias.

[83] A perusal of the letter of the Commission, dated 17 February 2020, and the final report, dated 7 March 2022, brings the comments made in *Sasol Oil* in sharp focus where it was held:

> *"[50] Despite the ambiguity Sasol Oil did respond. An examination of the contents of the Final Findings letter with the Commission's Findings however demonstrates that Sasol oil's responses went down like water off a duck's back in that they appear to have received no consideration at all. The Commission's findings in paragraph 6.1 to 6.10 and its threats in paragraphs 9.1 to 9.4 are word perfect*

[23] (21415/2020) [2022] ZAGPPHC 431 (14 June 2022)

[24] At para [23].

copies of the corresponding paragraphs of the Commission's earlier Findings letter on 18 October 2018.

[51] The manner in which the invitation was made and a close examination of the correspondence between Sasol Oil and the Commission lead to the conclusion that the Commission would appear to have been merely paying lip service in its invitation to Sasol Oil and that it was not acting in full compliance with section 6(2)(c) of PAJA and in terms of regulation 15(17) of the BEE regulations. This renders the process followed unfair."

[84] In *Cargo Carriers Proprietary Limited v Broad-Based Black Empowerment Commission and Others* [25] (*Cargo Carriers*) the final findings of the Commission were a copy-and-paste of the preliminary findings.

[85] The problem with the Commission's version is that it is not backed by objective facts contrary to what the applicants state. The Commission opened itself up for criticism in its investigation when its version to the allegations in the founding affidavit were not supported by Mr Mothuli. It rather chose to make deductions and ignore pertinent averments by the applicants under oath. In *Maleka* it was held:

"[38] The factual mistake is required to be uncontentious and objectively verifiable. The material error of fact will render a decision subject to review if the relevant decision has been made in ignorance of the true facts material to that decision such as for example not considering relevant material and/or all of the material provided and/or personal circumstances. relevant decision has been made in ignorance of the true facts material to that decision such as for example not considering relevant material and/or all of the material provided and/or personal circumstances."

[86] *Sasol Oil* held that a decision based on incorrect facts is reviewable. The salient factual errors committed by the Commission can, in my view, be

[25] (76000/2019) [2022] ZAGPPHC 38 (28 January 2022).

summarised as follows:

86.1 The Commission failed to appreciate the division of labour and responsibilities in the MOA. It failed to consider how Mr Mothuli's involvement in the business changed and that the higher income that he received was indicative of a change in role and status. There is no impediment to a person being a member and employee. The increase in income was in any event more than the instalment for the purchase of the member interest. The argument that he received more income to enable him to pay for the interest does not mean that he did not benefit. The alternative would have been a commercial loan. He thereby acquired an interest that had value;

86.2 There was no evidence under oath to controvert the applicants' statement that he was afforded decision making powers commensurate with the change in status and on equal footing with Mrs Schutte. This include insight in the financial affairs, the financial statements and daily meetings and discussions. The finding that there is no significant indication or proof of active participation by Mr Mothuli, is not supported by the facts. The Commission's reliance on Section 48 of the Corporations Act is untenable. He was a co-signatory on the banking account which is supported by a letter from Standard Bank dated 27 November 2014;

86.3 The financial statements are clear in respect of the financial state of the business. It reflects monies paid and also where dividends were paid. The most glaring failure of the Commission is the failure to appreciate the difference between a debtor and creditor as is found in attributing the borrowing from Welkom Paint as a loan to it;

86.4 It failed to apply caution to the averments of Mr Mothuli, who was dismissed for serious misconduct involving dishonesty and which dismissal was not challenged. Even at face value, Mr Mothuli caused the business from which he sought to derive income and dividends harm in stealing from its operations. To complain afterwards of a lack of reward is, to say the least, astonishing. The High Court disposed of many of the issues, including his members interest, what he owed and what was due to him;

86.5 The Corporation was already approved as a vendor of Harmony before the change in membership. It was thus not utilised for ulterior purpose. The conclusion by the Commission that "*without any shadow of doubt, the arrangement between the Applicants and Mr Mothuli constitutes BEE fronting"* [my emphasis] is not supported by the facts, and again, in absence of a pertinent reply under oath by Mr Mothuli himself is fatal to the conclusion;

86.6 The Commission's findings that no profits were distributed to the members during 2014 and 2015, fails to have regard to paragraph 36.3 of the founding affidavit. Mr Mothuli received R383 080.00 in the financial year ending on 29 February 2016 and R19 063.00 for the financial year ending 28 February 2017. Loans had to be paid by Mr Mothuli to Mrs Joubert and therefore reflect in the financial statements;

86.7 The Commission's finding that there is no possibility that Mr Mothuli still owes on the interest purchased and that he should have received his "*economic benefits and participation*" without limitation, is not supported by the Court order granted on 26 September 2019;

86.8 The alleged "*staff loan*" in paragraph 16.7 of the FIR was a payment of the purchase price for the interest;

86.9 Payments to Mrs Joubert was not received due to membership but as repayment of loans.

86.10 Notwithstanding all the indicators to the contrary, the Commission concluded that "*black ownership cannot be successfully confirmed in practical terms for exercising voting rights, economic interest and net value*"; and

86.11 It is unfortunate that it attacked the integrity of Mrs Schutte in stating that her "*<u>total disregard</u> for the principles provided in the Close Corporations Act, in an <u>improper and unethical manner</u>, thus pointing him [sic] possible [sic] being <u>unfit to hold any membership or directorship</u> in any entity*" whereas a proper explanation was provided for the way operations and management were conducted.

[87] The findings of the Commission are not factually nor legally reasonable or justifiable. If the Commission appreciated all the facts, it could not have found that there was fronting.

[88] Is there a legal basis in either the Act or PAJA for the recommendations of the Commission? In *Sasol Oil* the Court expressed itself as follows:

> "*[54] The recommendations were that Sasol Oil's directors and senior executives undergo BEE training and that Sasol Oil undertake to abide by the BEE Act on the advice of the Commission and further that it publicly apologies for its role in the violation of the BEE Act. The most egregious of these recommendations was the recommendation that it contribute 10% of its annual turnover to a bursary fund. Counsel for the Commission was hard pressed when requested by the court to point to the source of the powers that the Commission appeared to have accorded itself.*
>
> *"[55] I find that the Commission's recommendations are reviewable in that the Commission was not authorised to make the recommendations within the meaning of section 6(2)(a)(i) and that the Commission threatened to exercise its statutory powers for an ulterior purpose of compelling Sasol Oil to adopt and implement its unlawful recommendations within the meaning of section 6(2)(e)(ii) of PAJA."*

[89] On the facts taken individually and/or collectively, I cannot find that there was fronting.

[90] I wish to make some observations. It is trite that a Court will not readily interfere in the management of companies/entities unless unlawfulness and/or illegality is manifest. Many trusts, partnerships, family businesses and small companies, do not always keep records, pass resolutions, have formal meetings, or record decisions in writing. This, although not debilitating to the business, may not necessarily be good (corporate) governance. Notwithstanding that these loose arrangements in themselves do not necessarily lead to injustice, there should be more formality in the way the business is conducted, especially where empowerment is undertaken. Empowerment is more than words on paper, an interest, shareholding or being a beneficiary. Immaterial of the motive for empowerment, the practical effect should do justice to our Constitutional values, recognising the value of persons, treating all with dignity, on equal footing and for economic progress.

VIII COSTS

[91] In its argument regarding costs the Commission refers to *Competition Commission of South Africa v Pioneer Hi-Bred International Inc and Others* (*Pioneer*).[26] It submits that no costs should be ordered against the Commission. It asks for costs against the applicants in the answering affidavit but in the heads of argument it does not.

[92] In *Pioneer*[27] it was noted that it is undesirable for the Competition Commission to be inhibited in the *bona fide* fulfilment of its mandate by the threat of an adverse costs award. It flows from the need to encourage organs of state to

[26] (CCT 58/13) [2013] ZACC 50; 2014 (3) BCLR 251 (CC); 2014 (2) SA 480 (CC) (18 December 2013) at para [23] – [24].

[27] At para [23] – [28].

make and to stand by honest and reasonable decisions, made in the public interest, without the threat of undue financial prejudice if the decision is challenged successfully. Factors are not limited to instances of *mala fides* or irregularity on the part of the Commission. The ordinary meaning of fairness goes to the idea of treating parties equitably and in an even-handed way. There should be sensitivity to creating sufficient space for the Commission to be independent in its decision-making and to effectively carry out its powers and duties. Unreasonable, frivolous or vexatious pursuit of a particular stance may, however, justify an order of costs against the Commission. This will depend on the facts of each case.

[93] In *Tebeila Institute of Leadership Education, Governance and Training v Limpopo College of Nursing and Another*[28] the Constitutional Court, however, confirmed the principles enunciated in *Biowatch Trust v Registrar Genetic Resources and Others*[29]

> "*[17] Second, it is nearly six years since this Court handed down Biowatch. The applicant's plaint affords this Court a useful opportunity to restate the principles laid down in Biowatch and to emphasise the rationale behind them. In particular, the case serves as a reminder to judicial officers handing down costs orders that litigants successfully asserting their constitutional rights against state institutions should get their costs unless there are "carefully articulated and convincing" reasons to deprive them of those costs."*

[94] The Act and Regulations set parameters within which the Commission is expected to operate.

[95] It opposed the application of the applicants by selecting what it deemed to be contraventions and ignored material and pertinent facts. It made material errors in analysing and interpreting documents. When confronted with

[28] [2015] ZACC 4.

[29] [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

answers, it did not solicit the assistance of Mr Mothuli.

[96] Its delay was unreasonable, both in its justification and due process. Whilst it may have been *bona fide*, its decisions were not reasonable. Public interest is served by arriving at justifiable reasonable conclusions and if need be deductions supported by facts. It committed irregularities in failing to comply with time limits and acted unfairly in arriving at far-reaching conclusions and recommendations in an even-handed way without affording the applicants a formal hearing. On this basis I am of the view that it would be fair that the Commission pays the costs of the application.

[97] In the premises, I would make the following order:

ORDER

1. Condonation is granted to the first respondent for the late filing of its answering affidavit.

2. The first respondent pays the costs of the condonation application.

3. The final findings of the Commission, dated 7 March 2022, is reviewed and set aside.

4. The First Respondent pays the costs of the application.

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P R CRONJé, AJ

I concur:

____

C VAN ZYL, J

I concur:

N S DANISO, J

On behalf of the Applicants:	Adv W Groenewald Neuman Van Heerden Attorneys Phatshoane Henney Attorneys Bloemfontein
On behalf of the First Respondent:	Adv K D Moroka SC Adv L Bomela State Attorney Bloemfontein