



**BBBEE 2013/5A**

**PHOLOSANG**  
BEE RESOLUTION SERVICES

(43)

**SUBMISSION ON**  
**BROAD BASED BLACK ECONOMIC EMPOWERMENT**  
**AMENDMENT BILL**

To The Portfolio Committee of Trade and Industry  
8 March 2013, Cape Town





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# About Pholosang

- **Pholosang BEE Resolution Services (Pty) Ltd** is a multi-disciplinary consultancy company that focuses on the Black Economic Empowerment sector.
- We provide **legal, business, forensic accounting** and company secretarial services to those requiring such.
- We **structure transactions** and also represent **black shareholders** who have been defrauded through fronting and other unethical practices.



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## **Debating the Economy**

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- Pholosang further promotes public debate and awareness about Black Economic Empowerment through the arrangement of regular Frank Dialogue seminars on BBBEE
- The company will in 2013 conduct a number of workshops to impart skills regarding relevant legislation including the B-BBEE Act, as well as corporate governance best practice and policies including the Codes of Good Practice.



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## **Our Submission**

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- We believe the Bill to be both timely and well thought through in that it captures virtually all the elements of the wrongdoing and comprehensive solutions.
- Our submissions are therefore limited to a few areas that could be improved.



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## **The ills the Bill seek to address**

- The ills the Bill seek to address are now fairly widespread.
- The reason these practices are so widespread is that there are at present no penalties for this type of conduct except long drawn out civil cases.
- This leads to a lack of accountability



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## A difficult legal framework

- A expeditious and cost effective legal framework to curb these abuses not available at present.
- Offenders therefore become repeat offenders and victims become destitute.



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# The BEE Commission

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- The **Commission set up by the Bill** assists in this regard. We hope that the Regulations will provide for an inquisitorial method of adjudication and be less formal than court proceedings.

*Co's Act allows Amagumbe to be investigated.*

# The Nature of Fronting

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- The cases we deal with demonstrate the following:
  - fronting does not only happen in a crude manner *(fleece - too many to detail with)*
  - large reputable companies devise sophisticated schemes *(Nauru)*
  - through complicated agreements, <sup>*(black shareholders)*</sup> BEE entity is fleeced
- cases we handle now range from R60 to R300 million *(ie loss suffered by the JSE entity)*



# **Areas of Improvement**

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- We set out below those areas in the Bill we believe can be improved.
- **ROLE OF STATE OWNED ENTERPRISES**
- **REPORTING**
- **NAME AND SHAME PROVISIONS**
- **PRESCRIPTION**
- **CAPACITY FOR OVERSIGHT**

## Role of State owned Enterprises

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- Typically fronting and misrepresentations take place in the context of doing business with the state. The role of SOE's or public entities is therefore vital in stamping out these types of fraud.
- Management of SOE's often ignore complaints by victims and view them as shareholders disputes. *(अप्रकारित संरक्षण & कानून वाद-कारुण्य से)*
- Even if they wish to intervene legal implications re cancellation of contract

## **Role of State owned Enterprises**

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- No doubt aware of some of these problems, the Bill in a new 13A does provide that a SOE can cancel such agreement.
- This is permissive as opposed to pre-emptory. We suggest that this provision be improved in the following manner:

## Role of State Owned Enterprises

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- The cancellation should not only be on the basis of the supply of false information but also where evidence of fronting discovered in the course of execution of the contract.
- This is because the wrong the Bill seeks to address is not only the misrepresentation, but also the rationale and consequences of such misrepresentation including fronting. There is of course also the option of suspension of the contract whilst the investigation is under way.
- Once there has been a conviction the contract **must** be cancelled and put out to tender again

## Role of State Owned Enterprises

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- “In 13B, it is provided that each organ of state (it should also include public entity) must assist the Commission to “*exercise its authority and perform its functions effectively*”.
- Provision should be made for immediate preliminary investigation <sup>by the SOE</sup> with possible deadline eg within 30 days of complaint.
- This will lighten the burden of investigation on the Commission and provide sufficient detail instead of a mere referral required now in 130 (2)”

# Name and Shame Provisions

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## **Section 13 P (2) may need to be revised.**

- At the moment the decision of which natural persons from a legal person to be excluded from doing business is to be decided by the court.
- This would be cumbersome and whilst individuals can simply set up new entities, both the entity and all the directors should be included in the list unless there is evidence that they were not aware of the wrongdoing.
- This section requires more detailed provisions



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# Reporting

- Section 13B (2) requires public companies listed on the JSE to report on their compliance with B-BBEE.
- Our experience is that more often than not public companies **set up subsidiaries and insulate their core business from BBEEE.**
- The transaction is usually structured in such a way that the **wrongdoing happens not in the holding company but in the subsidiaries or joint ventures which mean they are not obliged to report on these in terms of King 111 or JSE Regulations.**
- Regulatory bodies therefore have the ability to avoid dealing with the problem.
- **At least one important regulatory body has refused to investigate flagrant financial wrongdoing of a company on this basis when we lodged a complaint.**

# Reporting

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- We would suggest therefore that this section be amended by adding that public companies should report on their subsidiaries and joint ventures.
- A threshold of say 25% per cent could be placed which will oblige them to report on any company they hold 25% of shares or more.



# Prescription

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- Due to lack of resources on the part of victims of BEE fraud, it often takes them a long time to gather the strength and resources to take action.
- Whilst in criminal actions, prescription is not an issue, it may be in civil cases.
- It may for instance present an obstacle to even begin an investigation which is likely to be used by fraudsters.
- It may be necessary to provide an amendment to the 3 years or in some other way remove this potential obstacle.

# Capacity

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- As we indicated above, on the basis of enquiries and anecdotal evidence, fronting and other kinds of fraud is widespread.
- There is therefore likely to be an avalanche of cases once the amendments are promulgated.
- There are significant constraints already on prosecuting authorities. Taking into account the often sophisticated nature of the fraud, a wide range of professional skills are required. In-house building of capacity and skills in long term is preferable to outsourcing.
- We would suggest that a **special division within law enforcement agencies be developed**



# TRANSITION

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- The Committee should consider what complainants can do in the interim period between the promulgation of the amendment of the Bill and the establishment of the Commission.
- It might be prudent for the President to issue a Special Proclamation to expand the mandate of the current SIU to deal with offences committed in terms of the B-BBEE Act.
- Regardless of the form we would urge the Committee to consider an interim arrangement whilst the Commission is being set up expeditiously.