Criminal liability requirements of the new Broad-Based Black Economic Empowerment (B-BBEE) statutory fronting offence

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OPSOMMING

Strafregtelike aanspreeklikheidsvereistes van die nuwe Breë Basis Swart Ekonomiese Bemagtiging (SEB) statutêre "front" misdryf

Die implementering van 'n regsraamwerk en -beleid in 2004 om ekonomiese bemagtiging in Suid Afrika vir swart mense te bevorder, is gedoen in lyn met die voorskrifte van die Grondwet, 1996 om gelykheid te bevorder en armoede te beveg. Die implementeringsraamwerk en -beleid maak voorsiening vir besighede om deur vrywillige deelname hulle bydrae tot transformasie-aktiwiteite te laat meet en daarvolgens gegradeer te word. Sodanige gradering hou voordeel in vir besighede om meer kompeterend te wees vir die doen van besigheid met die staat, staatsondernemings en ander groot korporatiewe instellings.

Ongelukkig het verskeie besighede hulle gewend tot oneerlike transaksies wat 'n skyn van transformasie skep waar die besigheid inderdaad die kompeterende voordeel ontvang, maar die transaksie inderwaarheid net 'n "front" of voordoening is. Pogings van die owerhede om die praktyke hok te slaan as opsetlike wanvoorstellings ooreenkomstig die gemeenregtelike misdryf, bedrog, was nie suksesvol nie. Dit het ook duidelik geword dat ongewenste transaksies en praktyke wat besighede 'n onregverdige voordeel verskaf toenemend gesofistikeerd en ingewikkeld raak.

Weens die stadige pas van transformasie is die bemagtigingsbeleid in 2013 hersien met die afkondiging van 'n gewysigde metingsdoelwit asook die implementering van 'n wetswysiging in die vorm van die Breë Basis Swart Ekonomiese Bemagtiging Wysigingswet 46 van 2013 wat op 24 Oktober 2014 in werking getree het.

Weens die hoër vereistes wat die nuwe bemagtigingsraamwerk stel, veral die oordrewe fokus op swart eienaarskap gekoppel aan die feit dat strafregtelike vervolging vir wanvoorstelling in die verlede onsuksesvol was, het die wetgewer 'n ongewenste praktyk waarna as 'n "front praktyk" in die wet verwys word gekriminaliseer met hoë boetes en vonnisse. 'n Statutêre liggaam in die vorm van 'n SEB Kommissie is ook ingestel met wye magte om nakoming te verseker, ondersoeke van stapel te stuur, persone te ondervra en dokumente te *subpoena*. Kommentators het vanuit die staanspoor die omskrywing van die "front praktyk"-misdryf as wyd en vaag beskou.

Die artikel bekyk die moontlike grondwetlike struikelblokke wat die nuwe misdryf se omskrywing in die gesig staar asook na die vereistes vir suksesvolle strafregtelike vervolging. 'n Interessante verskynsel van die nuwe misdryf is dat die *mens rea*-element as vereiste statutêr omskryf is en op die oog af op opset as vereiste dui, maar inderwaarheid by nadere beskouing nalatigheid ook as vereiste stel wat die bewysstandaard vir die vervolging drasties verlaag.

1 INTRODUCTION

A "fronting practice" generally refers to those activities or transactions that serve as a cover for the secret or illegal activities of a person or group.[1] Other pieces of legislation, such as the Income Tax Act,[2] the Companies Act[3] and the Labour Relations Act,[4] describe these practices as avoidance, circumvention or non-genuine operations or activities. In the context of Broad-Based Black Economic Empowerment (B-BBEE), practices of so-called window-dressing or tokenism are referred to as "fronting" or "fronting practices".[5] These practices describe disguised or deceiving B-BBEE initiatives as a "token of the superficial inclusion of historically disadvantaged persons into mainstream economic activities with no actual transfer of wealth or control".[6]

Although circumvention practices are not unique to the B-BBEE environment, the term "fronting" or "fronting practice" is unique to B-BBEE, as it was for the first time officially incorporated in 2005 as part of the first draft of the then B-BBEE Codes of Good Practice (B-BBEE Codes) containing a detailed statement, followed by guidelines in 2009 identifying fronting risks and proposing how these risks should be dealt with by the industry.[7] Since 2005 the term "fronting" has become embedded within the B-BBEE policy framework and was largely dealt with as a disqualifier of any B-BBEE initiatives.

Before 2013 fronting, from a criminal justice point of view, was dealt with under the common law offence of fraud. The overall view (although misplaced) was that this form of misrepresentation could hardly be dealt with as a criminal offence under the common law.[8] According to Vuyo Jack, a chartered accountant

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1 Hornby *et al Oxford advanced dictionary of current English* (1986) 347; Collins *English dictionary* (2011) 312.

2 Act 58 of 1962.

3 Act 71 of 2008.

4 Act 66 of 1995.

5 Codes of Good Practice – Statement 001 – Fronting practices and other misrepresentation of BEE Status published in *GG* 28351 of 20 December 2005.

6 Warikandwa and Osode "Regulating against business 'fronting' to advance black economic empowerment in Zimbabwe: Lessons from South Africa" 2017 *PER/PELJ* 17.

7 Codes of Good Practice – Statement 001 above.

8 Rampedi *The Star* 13 August 2012. It was briefly reported that a top medical company was alleged to have appointed a domestic worker, Elizabeth Tsebe, as a 40% shareholder and director without her knowledge. During this period, the company was able to obtain tenders to the value of over R160 million. According to Tsebe, she had been fraudulently presented with documents to be signed effecting the transaction by her employer who claimed that the documents related to the Unemployment Insurance Fund. Due to the lack of punitive measures in making fronting a punishable offence, according to the report, no consequences may be faced for the misrepresentations. Tsebe, however, has instituted claims from the medical company for an amount of R10 million for the compensation she should have received as a director, and the value of any dividends declared which would have accrued to her in her capacity as shareholder in the company.

who developed the B-BBEE rating index,[9] uncertainty and a lack of guidance from the authorities largely contributed to the notion that verification agents are prevented under their contractual obligations towards clients from reporting matters of B-BBEE fraud.[10]

Fronting has over time become increasingly sophisticated and problematic for the authorities to regulate, which is illustrated by this statement by the Minister of Trade and Industry, Rob Davies, in 2010:

> "It is not just the obvious one, where you take the factory-floor worker and call him the managing director . . . It's now beginning to involve accountants, lawyers and verification agents that are giving people ideas of more sophisticated ways to front . . . Fronting is becoming analogous to tax avoidance and tax evasion."[11]

The Minister and a senior official from the Department of Trade and Industry, Nomode Mesatywa, further illustrated the growing concern about fronting, by stating that the department has received between 150 to 200 complaints of fronting every year, but has successfully secured a prosecution in only one matter. The Minister and the Department have blamed this poor prosecution rate on the fact that fronting is "hard to prove".[12] In an address to the B-BBEE Advisory Council in 2011, the President of South Africa emphasised the presence and origin of fronting practices and stated: "Fronting and tender abuse is an unintended consequence of an overemphasis on diversity of ownership and senior management in implementing broad-based black economic empowerment."[13]

In order to address this ever-growing trend of misrepresentation, as well as the inability of the authorities to deal effectively with fronting under the common law, the B-BBEE Act of 2003 was amended with the enactment of the Broad-Based Black Economic Empowerment Amendment Act (B-BBEE Amendment Act of 2013),[14] which criminalises "knowingly engaging in a fronting practice" as a statutory offence in terms of section 13O(1)(d).[15] From the onset, legal professionals have described the formulation of this offence as broad, vague and problematic.[16]

In order to enforce the new fronting provisions, the B-BBEE Commission was established in May 2016,[17] amongst other things, to oversee compliance with the

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9 Jack *Broad based BEE the complete guide* (2015) 32 38–44. The establishment of a company, Empowerdex, of which Jack was a co-founder as developers and compilers of the B-BBEE Codes on instruction and guidance of the Department of Trade and Industry.

10 *Ibid* 479.

11 Mokone "Fronting under fire" 12 November 2010 *Business Report, The Times*; Pressly "Fronting is rife – but proof is score" 12 November 2010 *Cape Times*.

12 *Ibid*.

13 Zuma *IOL* 1 April 2011.

14 Act 46 of 2013 with commencement date 24 October 2014.

15 Act 53 of 2003. The O as sub-section refers to the grammatical character and not the numerical zero.

16 *Legal Brief Today* 20 February 2017. According to Clark, a legal professional, "the definition of fronting practice in the BEE Act is broad and includes any transaction, arrangement or other conduct that undermines the achievement of the objectives of the BEE Act. This definition has not yet been tested by the courts and may be refined over time". See also Jeffery *BEE helping or hurting* (2014) 186.

17 Regulations published in *GG* 40053 of 6 June 2016 to regulate the functions of the B-BBEE Commission.

B-BBEE Act of 2003,[18] and with vast powers to investigate fronting practices and misrepresentation, subpoena people and documents, and even to make a determination that a specific initiative is a fronting practice.[19]

This article examines the statutory formulation of a fronting practice as a criminal offence, provided for in section 13O(1)(d) of the B-BBEE Act of 2003, and the legal liability requirements of the new statutory fronting offence.

Very few people can argue about the need to criminalise circumvention practices which would undermine the objectives of the B-BBEE Act of 2003,[20] and the redress imperatives provided for by the Constitution, 1996, such as poverty relief and social justice.[21]

This article does not attempt to answer the question of whether we need fronting laws or to find loopholes in the law, but rather whether the new statutory fronting practice offence would provide authorities with a more effective mechanism to root out illegal practices, and serve as a proper deterrent for fronting activities.

Apart from the common law and constitutional requirement of legality, the requirements for criminal liability can be divided into four categories, namely, (i) an act or conduct; (ii) compliance with the definitional elements of the crime; (iii) unlawfulness; and (iv) culpability.[22] For purposes of this article, the requirements of legality and culpability are the most important. The other criminal liability requirements are included in the discussion only to the extent that they would illustrate the relationship between these various requirements for criminal liability, and place the more important requirements into context.

2 PRINCIPLE OF LEGALITY IN CRIMINAL LAW

The criminal justice system by nature resorts to ensuring the presence of offenders at trial, a fair trial and the punishment of offenders. These actions by necessity amount to interference with basic rights to life, liberty and property. The nature and manner of this interference with basic rights should not infringe upon the civil and political rights prevailing in society according to norms of justice and fairness.[23] In South Africa, as in other Western democracies, such interference is subject to the rule of law and the Bill of Rights entrenched in the Constitution of South Africa, 1996.[24]

The principle of legality can be described as a mechanism to ensure that the state, its organs and officials, in making and executing law, do not regard themselves as above the law, but subject to it. This would protect citizens from

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18 Ss 13F and 13J of the B-BBEE Act of 2003.

19 S 13J(3) of the B-BBEE Act of 2003; Jeffery 188.

20 Jack 470.

21 Ss 26–29 of the Constitution, 1996 (hereafter "the Constitution"). See also Liebenberg *Socio-economic rights adjudication under a transformative constitution* (2016) 21 22. According to Liebenberg, it was hoped that recognising the social-economic dimensions of human dignity, freedom and equality would "enrich participatory democracy by enabling persons marginalised by poverty to challenge decisions and omissions which have an impact on social-economic well-being".

22 Liebenberg 34.

23 Burchell *Principles of criminal law* (2016) 35.

24 The supremacy of the Constitution and the rule of law is contained in its founding provisions.

arbitrary action and sanctions by government, and ensure that citizens are dealt with within the clear and existing provisions of the law. This principle in criminal law is known as *nullum crimen sine lege*, and literally translated means "no crime without a law".[25]

The *nullum crimen sine lege* principle is at the centre of the rule of law, and is in essence nothing else than respect for human dignity.[26] This long-standing common law principle is now enshrined in section 35 of the Constitution, as part of the Bill of Rights ensuring that everyone has the right to a fair trial. The *nullum crimen sine lege* principle originated from the separation of powers doctrine, which is also a constitutional principle under the Constitution.[27] The rule of law requires the exercising of public power to be rationally related to a legitimate government purpose.[28] This means that Parliament can create statutory offences to be executed by the executives and state officials, subject to the validity of such actions being sanctioned, approved or struck down by the courts.[29] According to Burchell, it is a prerequisite for the doctrine of the separation of powers to function effectively that the legislature in the formulation of offences should make its intention clear.[30]

Apart from the constitutional right to a fair trial and the sanctions of separation of powers, section 8(3)(a) of the Constitution further requires that a court, in giving effect to a right contained in the Bill of Rights, develop the common law, where necessary, to the extent that the common law does not give effect to such a right. Section 39(2) of the Constitution obliges the courts in developing the common law or customary law, to "promote the spirit, purpose and objects of the Bill of Rights". This right given to the courts is, however, not an open-ended authority, but only permission to develop common-law offences to give effect to constitutional rights. The principle of separation of powers and the courts' scope of extending the application of an offence came under the spotlight in *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies, Amici Curiae)*.[31] In this case, the Constitutional Court was prepared to extend the offence of rape beyond its common law definition and application of vaginal penetration of a female, to anal penetration of a female person, but not to anal penetration of male persons.

This judgment had evoked conflicting views and comment. Snyman is of the opinion that the judgment is disturbing, as such extension relies on emotional considerations and leads to uncertainty. His argument is that such an extension sets a dangerous precedent and leads to the unwanted extension of various other offences by the courts, contrary to the principle of legality and a fair trial.

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25 Snyman *Criminal law* (2014) 36.

26 Burchell 35.

27 Budlender "People's power and the courts – Bram Fischer memorial lecture" 2011 SAJHR 582 states that the courts, in terms of the rule of law, must carry out their constitutional mandate to ensure compliance with the Constitution and the law.

28 Price "The evolution of the rule of law" 2013 SALJ 649 describes the rule of law as a baseline or "safety net standard of legal validity".

29 Burchell 45. See also *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24 which demonstrates the evolution of the rule of law by striking down an irrational and therefor invalid decision by President Zuma to appoint Mr Menzi Simelane as National Director of Public Prosecution.

30 Burchell 45.

31 2007 5 SA 30 (CC); 2007 8 BCLR 827 paras 39–45.

According to Snyman, the Constitutional Court overstepped its judicial functions and violated the principle of legality. He argues that the origin of the distinction between vaginal penetration and other forms of penetration is to prevent unwanted pregnancy of females, and that vaginal penetration has a rational basis for being treated in a different way.[32]

Phelps, on the other hand, argues that *Masiya* does not infringe on the principle of legality, as the principle has never completely prohibited any development. It can bring new forms of behaviour within the application and scope of the common law. She also pointed out that the common law might be brought into line with the Constitution.[33] We agree with Phelps's view in this regard, as the common law application might often be out of step with the requirements of a modern society that differ vastly from society's moral convictions millennia ago when the common law principles were established. Snyman also acknowledges that this reality might necessitate much-needed development of the common law.[34]

The principle of legality is firmly incorporated in the Bill of Rights, and anyone has the right to a fair trial as protected under the Constitution.[35] The Bill of Rights is binding on all spheres of government, namely, the legislature, the executive, the judiciary and all organs of state.[36] In *Du Plessis v De Klerk*[37] the Constitutional Court confirmed the application of section 39(3) of the Constitution, i.e., that any provision of the common law, the statutory law or customary law which is inconsistent with the Bill of Rights may be declared null and void by a court.

The criminal offence of a person who knowingly engages in a fronting practice[38] consists, apart from the terms "knowingly" and "engages", largely of the definition of a "fronting practice".[39] The definition of "fronting practice" refers to various other definitions[40] and provisions[41] contained in the B-BBEE Act of 2003. The term "this Act" included in the definition of a "fronting practice" includes not only the provisions of the B-BBEE Act of 2003, but also the provisions of all secondary legislation.[42] This constitutes a very complex, elaborate and broad definition of the offence, which in many respects is ambiguous and unclear. The vague, broad, ambiguous and unclear nature of the definition of the fronting offence, as well as the fact that it includes terms such as "directly" or "indirectly" and "other act" or "conduct", makes the conduct prohibited difficult to conceive or to foresee.

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32 Snyman 46.
33 Phelps "A dangerous precedent indeed – A response to CR Snyman's note on Masiya" 2008 *SALJ* 649–653.
34 Snyman 45.
35 S 35(3)(l) and (n).
36 S 8 of the Constitution.
37 (CCT8/95) [1996] ZACC 10; 1996 3 SA 850 (CC); 1996 5 BCLR 685 para 189.
38 S 13O(1)(d) of the B-BBEE Act of 2003.
39 S 1 of the B-BBEE Act of 2003.
40 Such as "broad-based black economic empowerment", "B-BBEE initiative", "this Act" and "black person".
41 Such as the objectives of the B-BBEE Act of 2003 contained in s 2 of the Act.
42 S 2 of the B-BBEE Act of 2003 defines "this Act" "to include any codes of good practice or regulations made under this Act".

Snyman correctly indicates that law is generally formulated in broad terms, and because of grammar limitations would always have some interpretational aspects.[43] However, it is also a constitutional principle that provisions cannot be drafted in vague, broad, unclear and ambiguous terms, as this would be inconsistent with the constitutional right to a fair trial and the legality principle of *ius certum.* The crime must exist and be clear at the commission of the offence, and not when the court has interpreted the provisions.[44] The Supreme Court of Appeal was in a matter of substance reluctant to lay down a general rule.[45]

Fronting offences often relate to "substance-over-form"-matters, and that is also the interpretational principle provided by the B-BBEE Codes.[46] The attempt by the legislature to formulate a universally-applicable rule[47] under the circumstances could be the rule's downfall as being too broad and wide. In terms of the *ius strictum* rule of the legality principle, the courts would interpret such provisions narrowly should any doubt exist as to the possible inclusion of conduct under the definitional element. The courts may even strike down an act for being unclear and formulated too broadly.

3 ACT OR CONDUCT

In terms of the definitional elements, "engages" in the general formulation and in terms of the "fronting practice" definition, "a transaction arrangement or other act or conduct" and "B-BBEE initiative" would constitute the act or conduct as an element of the offence. The definition of the "fronting practice" offence creates a materially-defined crime in the sense that the conduct described in the definition is not *per se* prohibited, but rather the result flowing from the conduct, the direct or indirect undermining or frustration of the achievement of the objectives of the B-BBEE Act of 2003, or the implementation of the provisions of the B-BBEE Act. These results would form the interest that the legislation aims to protect. The specific transactions provided for in the second part of the definition under (a)–(d)[48] must also have the result of compromising the protected interest. Any one of these results or protected interests provided for in the general formulation of the fronting-practice definition could apply in the alternative.

The phrase appearing in the "fronting practice" definition, "includes but not limited to", means that the specific transactions provided for in paragraphs (a)–(d) of the fronting practice definition are not the only transactions that could be included. A fronting offence could therefore be committed in a variety of ways. The term "indirectly" also refers to the fact that the offence could be committed by an intermediary as well. The term "directly" or "indirectly" would not necessarily indicate a form of intention to commit the offence or to create the prohibited result, as would have been the case with another term, such as "in order to".

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43 Snyman 43.

44 *Ibid*.

45 *S v Legoa* 2003 1 SACR 13 (SCA) para 23.

46 Para 2.1 Statement 000 of the B-BBEE Codes.

47 Warikandwa and Osode 17 and 18 describe the definition of fronting as an "elastic definition" of which the first part of the definition being a "broad, catch-all . . . open-ended definition . . . characterised by an element of vagueness intended, in this particular case, to ensure coverage of conduct or activities which may amount to business fronting but which may have been unwittingly excluded by the legislature".

48 S 1 of the B-BBEE Act of 2003 definition of a "fronting practice".

The conduct in terms of the definition would be completed as soon as the prohibited result is actually achieved, and any attempt would be seen as an act that "indirectly frustrates" or "undermines", which would make an attempt to commit a fronting offence unlikely.

The conduct of fronting could be committed by any natural person, corporation or association. Corporations would be held liable for the prohibited conduct of directors and servants or individuals acting on their instruction or expressed or implied permission. This application of section 332 of the Criminal Procedure Act 51 of 1977 was endorsed by the judgment in *Swifambo*,[49] in which the court held in respect of tender fraud, corruption and fronting that individuals in the organisation who colluded or conspired to commit these offences, would be imputed to the organisation.

For the commission of a fronting offence, misrepresentation or dishonesty is not required as in a case of common law fraud. Also, a specific black individual does not have to be disadvantaged in the process as a fronting practice is deemed to disadvantage all those that the B-BBEE policy aims to benefit, and that would undermine and frustrate the achievement of the objectives of the B-BBEE Act of 2003.[50]

According to the formulation of a fronting practice, an entity that engages in a fronting practice does not under all circumstances have to benefit from such a practice. The definition "B-BBEE initiative" contained in section 1 of the B-BBEE Act of 2003, and referred to in the "fronting practice" definition, provides that an initiative must "affect compliance with this Act or any other law promoting broad-based black empowerment". One would be inclined to think that the word "affects" in the context of an "initiative" is intended to mean that an entity's B-BBEE status would have to be affected positively, giving the entity a B-BBEE advantage. However, the term "affects" could also mean a negative effect on an entity's B-BBEE status. This would be the literal interpretation that could lead to an unintended meaning.

All those specific transactions included under paragraphs (a)–(d) in the "fronting practice" definition, apart from the one listed under paragraph (a), have the requirement that they had to relate to the B-BBEE status, B-BBEE compliance or the achievement or enhancement of the B-BBEE status of those involved in such transactions. These transactions would require a B-BBEE benefit from the offending person.

There are also transactions, arrangements or other acts or conducts contained in the general part of the "fronting practice" definition that do not form part of the specific transactions listed under paragraphs (a)–(d), or the definition of a B-BBEE initiative. These are transactions, arrangements, acts or conducts that do not require a B-BBEE benefit to be achieved, or to relate to aspects concerning B-BBEE compliance. These transactions, arrangements, acts or conducts must

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49 *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* (2015/42219) [2017] ZAGPJHC 177 para 110.

50 *Esorfranki Pipelines v Mopani District Municipality* (40/13) [2014] ZASCA 21 para 26; *Swifambo* paras 114 115.

merely undermine or frustrate the objectives or the implementation of the B-BBEE Act of 2003 in a direct or indirect way.[51]

It is clear that the formulation of a fronting practice is very broad and could include almost any conceivable act remotely related to B-BBEE. By provisionally cutting out words or phrases, a fronting offence could be committed by "any act that directly or indirectly frustrates or undermines the achievement of the objective or implementation of the provisions of the B-BBEE Act of 2003". As the term "this Act" referred to in the "fronting practice" definition also includes secondary legislation, such as the B-BBEE Codes and Sector Charters,[52] it effectively makes every provision of the B-BBEE Act of 2003, the B-BBEE Codes and Sector Charters potential provisions for enforcement under the definition of a fronting practice.

The "fronting practice" definition "casts its net so wide" that it could include those who wish by choice not to participate in the B-BBEE programme, bearing in mind that the B-BBEE programme of assessment and obtaining a B-BBEE compliance level or status is a voluntary system. Those who do not participate or influence others not to participate would be directly or indirectly undermining or frustrating the achievement of the objectives of the B-BBEE Act of 2003. This wide interpretation could lead to absurd consequences. As custodian of the B-BBEE policy implementation, the Department of Trade and Industry (which often is justifiably criticised for, among other things, its inefficiency in giving directives, failure to publish crucial documents on time, and allowing the industry for many years to operate under extremely poorly-drafted B-BBEE Codes)[53] could also be seen to directly undermine and frustrate the achievement of the objectives of the B-BBEE Act of 2003, and consequently commit a fronting offence.

4 CRIMINAL LIABILITY OF CORPORATE BODIES

The new statutory offence of fronting is aimed at criminalising prohibited conduct largely to be committed by corporate bodies, such as companies, close corporations and partnerships.

The criminal liability of corporate bodies is an exception to the general or traditional rule in law that only human beings can perform an act which gives rise to criminal liability. Corporate bodies are abstract, artificial or notional persons with rights and obligations, without having a physical body or mind. In the electronic era, we live in we could also refer to corporate bodies as "virtual" persons. The law distinguishes between legal or juristic persons, on the one hand, and natural persons on the other.[54]

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51 S 1 of the B-BBEE Act of 2003 defines the general part of the "fronting practice" definition to mean "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".

52 Issued for a particular sector of the economy in terms of ss 9 and 12 of the B-BBEE Act of 2003.

53 Jeffery 172 182 205 211 215; Gerber "BEE starts running into flak from private sector" 23 March 2016 *Business Day*; Gerber "How can BEE score goals if goal posts move" 20 April 2016 *Business Day*.

54 Snyman 245; Burchell 460.

It is often argued that a corporate body cannot think for itself but does so by means of its directors and servants, and that these natural persons should rather be held criminally liable. Because of the role corporate bodies play in society, it is legally desirable that corporate bodies should be held liable, especially in instances of corporate bodies performing specifically-imposed statutory duties, or where results of wrongdoing by a corporate body may have severe and extensive human consequences.[55]

The matter of criminal liability for corporate bodies is governed by the provisions of section 332 of the Criminal Procedure Act.[56] This section provides for the liability of a corporate body for the acts of a director or servant of the corporate body, as well as the liability of the director or servant for an act performed by the corporate body. Acts performed by a director or servant, or an act performed on the instructions of a director or servant, or with expressly or implied permission, are imposed on the corporate body. For the corporate body to be liable for such conduct, a director or servant must not exercise their powers and duties for their own benefit, but in furthering the interests of the corporate body.

Under earlier theories of corporate criminal liability, a corporate body could only be liable for offences committed by its agents or employees. This would be similar to imputing to a corporate body the acts of certain individuals who stand in close relationship to it, such as employees and agents in terms of the vicarious liability principle. The criminal liability imposed by section 332 of the Criminal Procedure Act has a wider application than that of conventional vicarious liability.[57] Under vicarious liability the employer or corporate body would be held liable for the conduct of its employees and agents. The principle is to prevent employers or corporate bodies from escaping liability by hiding behind the conduct of their employees or agents. In terms of the provisions of section 332 of the Criminal Procedure Act, liability will be imputed to the corporate body, not only through the conduct of an employee or agent, but also the conduct of a director him- or herself, a servant, or conduct performed on the instruction of a director or servant, or with their implied or expressed permission.

The fact that a body corporate that is entitled to all the protection provided for in terms of the Constitution[58] could be held liable for the fault of others although itself has no fault, could be considered a strict liability or no-fault liability and be deemed unconstitutional.[59] Indeed, the presumption created in terms of section 332(5) of the Criminal Procedure Act which provides for the personal liability of a director or servant for a crime by the corporation was declared unconstitutional. In *S v Coetzee*[60] the reversed onus of proof in section 332(5) was found to be

55 Snyman 245; Burchell 458. Eg, certain statutory offences created under the Occupational Health and Safety Act 85 of 1993, and negligence as element of culpability to punish corporates in terms of the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993.

56 Act 51 of 1977.

57 Burchell 46.

58 S 12(1) of the Constitution provides for the right to freedom and security and s 8(2) provides for the extension of the protection of the Bill of Rights to corporations.

59 Burchell 412 461. No-fault or strict liability may be incompatible with s 35(3) of the Constitution providing for the right to a free trial; or on the basis of the wide formulation of s 332 of the Criminal Procedure Act to be "overbreadth" from a criminal legality and *ius certum*-principle.

60 (CCT 50/95) [1997] ZACC 2; 1997 4 BCLR 437; 1997 3 SA 527 (CC) paras 43 44.

inconsistent with the presumption of innocence[61] and could not withstand the limitations-test provided for in the Constitution.[62]

Section 332(7) of the Criminal Procedure Act provides for the liability of an association of persons which is not a corporate body, such as clubs, partnerships and unincorporated associations, where any member who was a member of the association at the time of committing the offence would be liable unless, with a reversed onus created by the section, that member could prove that he could not have prevented the commission of the offence, or that the association is managed by a committee governing or controlling the association. It is expected that this reverse onus created in section 332(7) would be declared unconstitutional on the same basis as that held by the Constitutional Court in *S v Coetzee*[63] above in respect of the previous presumption provided for in the Criminal Procedure Act.[64]

Burchell suggests a much-needed legal development in respect of corporate liability in line with some other jurisdictions which are more consistent with our constitutional order. He questions the fairness of holding a corporation liable for the conduct of "one lowly employee". He points out that the existence of a corporation could be jeopardised by the conduct or negligence of an insignificant or junior employee. He suggests a development that would base corporate liability on "collective or organisational fault" which is flexible and could be determined by a variety of factors such as the policies, procedures and collective decisions made by, for instance, the board of directors of a corporation.[65]

Section 214 of the Companies Act[66] further provides that a director or any other person in a company could be personally liable for false statements, reckless conduct and the non-compliance of the company with certain provisions.

In certain circumstances, directors of a company are protected from delictual claims under the so-called "business judgment rule" in *bona fide* exercising of their duties where they rely on the advice of, amongst others, a co-employee. The business judgment rule is an American common law mechanism that limits a director's liability to the company in performing her duties and exercising her duty of care when using her discretion in making business decisions. This mechanism has been codified in the South African Companies Act under sections 76(3)–(4) and 77(2). Directors have a defence in the event of a delictual claim for damages instituted by the company or the shareholders if the directors had acted after taking reasonably diligent steps to become informed about the matter,[67] and relied on information, opinions, professional opinions and opinions of employees or committees under certain circumstances.[68] Section 75 of the Companies Act may not only provide a delictual defence to directors under the business judgment rule, but may also constitute a defence for the company and, by virtue of section 332 of the Criminal Procedure Act and the Constitution, to the individual directors.[69]

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61 S 35(3)(h) of the Constitution.
62 S 36 of the Constitution.
63 (CCT50/95) [1997] ZACC 2; 1997 4 BCLR 437; 1997 3 SA 527 (CC).
64 Snyman 248.
65 Burchell 466.
66 Act 71 of 2008.
67 S 76(4)(a) of the Companies Act 71 of 2008.
68 S 76(4)(b) and (5) of the Companies Act.
69 Snyman 247.

5 DEFINITIONAL ELEMENTS AND UNLAWFULNESS

The definitional elements refer to the exact description of the particular requirements determined by law for liability for a specific crime which would also distinguish that crime from the requirements of other crimes. The definitional elements would contain the model or formula by which an ordinary person and the courts would be able to know or establish what specific or particular requirements would be applicable to a specific crime. The definitional elements should be a fair reflection of what kind of conduct or wrongdoing is prohibited by law. This should also be readily determinable by lay persons. The element of criminal liability requires that the act or conduct of an accused must fulfil the definitional elements.[70]

The definitional elements would not only make reference to the kind of conduct, but would also set forth the circumstances and way that an act must be committed; the characteristics of the person acting; the nature of the object in respect of which the act is to be committed; and often the place where or time when the act is to be performed.[71]

The definitional elements contain the minimum elements to be proved by the prosecution in order to establish a *prima facie* case against an accused in a criminal trial. Should the definitional elements be established, and no grounds of justification exist, the presence of the definitional elements and unlawfulness is referred to as wrongdoing or *actus reus. Actus reus* includes all the elements of the crime with the exclusion of the element of culpability.[72]

The B-BBEE Commission[73] has the powers to find that a practice is a "fronting practice".[74] These powers would have little bearing on the criminal liability of an alleged offender. Such a finding by the B-BBEE Commission would at best amount to *prima facie* evidence that a person's conduct meets the definitional elements of the crime, as a basis for referring the matter to the National Prosecuting Authority or for investigation by law enforcement agencies.[75] The rules that the court would apply, as well as the standard of proof in criminal proceedings would differ vastly from those adopted by the B-BBEE Commission as a statutory body in terms of the Promotion of Administrative Justice Act.[76]

It is possible for the National Prosecuting Authority and a court to come to a totally different conclusion than the finding of the B-BBEE Commission. Such a finding by the B-BBEE Commission would be of administrative value only, and would not create any precedent in respect of future criminal prosecutions for a

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70 Snyman 71.
71 *Idem* 72.
72 *Idem* 74.
73 To enforce the new fronting provisions, the B-BBEE Commission was established in May 2016 by means of the B-BBEE Regulations published in *GG* 40053 of 6 June 2016 to regulate the functions of the B-BBEE Commission. The Commission is a statutory body created by s 13B of the B-BBEE Act of 2003 to oversee compliance with the Act with vast powers to investigate fronting practices and misrepresentation, summon people and subpoena documents as provided for by ss 13F and 13J of the Act.
74 S 13J(3) of the B-BBEE Act of 2003.
75 S 13J(5) of the B-BBEE Act of 2003.
76 Act 3 of 2000.

fronting offence.[77] In each case of criminal prosecution, the National Prosecuting Authority in considering possible prosecution, and the court in hearing the matter, would consider and adjudicate the case on its own merits to determine whether the prohibited conduct would fall within the definitional elements of the offence. Circumstances are possible where the B-BBEE Commission finds that a fronting practice has in fact been committed, but it is not a fronting offence from a criminal point of view. The fact that conduct falls within the definition of a "fronting practice", or is found to be the case by the B-BBEE Commission, does not fulfil the definitional requirements unless the fronting practice also involves engaging in that practice "knowingly".

The fact that conduct falls within the definitional elements does not mean it is unlawful. The test for unlawfulness is separate from the definitional elements. Although the B-BBEE Act of 2003 does not explicitly provide for any grounds of justification, conduct that is justifiable according to the general notions and local convictions of society would not be regarded as a violation of a norm.[78] Various justifications in respect of a fronting practice may exist, especially the context of rules that were developed by our courts in respect of simulated transactions as to the intention and purpose of the transactions; the commercial sense and business rationale of a transaction; the normality and general commercial practices relating to the transaction; and the complexity of the transaction.[79] Other legislation may exist to justify deviation from the transactions listed as specific transactions that would be deemed to be fronting practices.[80]

6 CRIMINAL CULPABILITY AND *MENS REA* REQUIREMENT

Criminal culpability refers to the capacity of a person to distinguish between right and wrong and then to act according to that insight. Those who have the capacity to act according to their insight would only be blamed and be at fault if their state of mind meets the requirements for intention or negligence (*mens rea*).[81] Certain statutory offences might dispense with the culpability element and are referred to as "strict liability" offences.[82] They would normally be limited to administrative offences which regulate health and safety matters in the interest of public welfare.[83] Strict liability offences might be unconstitutional.[84] If culpability

77 Due to the separation of powers contained in Ch 4 of the Constitution, the courts and executives are not authorised to create law.

78 Snyman 99.

79 *CSARS v NWK* (27/10) ZASCA 168 para 42; *Roshcon (Pty) Ltd v Anchor Body Builders CC* [2014] 2 All SA 654 (SCA); [2014] 4 SA 319 (SCA).

80 S 7 of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value issued in terms of s 54 of the Employment Equity Act 55 of 1998.

81 Snyman 148 155; Burchell 60.

82 Snyman 240 241; Kemp *et al Criminal law in South Africa* (2017) 235; Coetzee fn 61 paras 40 43 44 where O'Regan J regarded the pre-eminence of fault or *mens rea* as inherent to everyone's right not to be deprived of their freedom and security.

83 Burchell 30; Snyman 239.

84 Snyman 238 argues that strict liability offences are incompatible with the right to a fair trial in terms of s 35(3) of the Constitution and the right of freedom of security provided for in s 12(1) of the Constitution. In *Khohliso v S* [2014] ZACC 33 para 9 the court found that the provisions of a statute created by the President of the former Republic of Transkei that it would be no defence in prosecution of an offence in terms of a particular statute (Decree 9 (Environmental Conservation) of 1992) that the accused had no knowledge of some fact, created a strict liability offence, and without the element of intent

continued on next page

is not specifically excluded in a statute, the courts as a general rule would infer culpability. The language, purpose of the statute, complexity and severity of punishment are all factors that the court would consider to determine which form of culpability is required. As a general rule, the courts would at least require negligence as a form of culpability.[85]

Intention as a form of fault, blameworthiness or *mens rea* could be manifested in three forms, namely, direct intention, indirect intention and intention foreseeing an act or outcome (*dolus eventualis*). With regard to foreseeability, what a person foresees must not be far-fetched, but real and reasonable.[86] To satisfy the requirement for *dolus eventualis* an accused must also reconcile himself or herself with what or she he foresees and act recklessly in the sense that he or she would proceed to act irrespective of the result. If what he or she foresees is unreasonable or he or she unreasonably reconciles him- or herself with the outcome, it would be said that he or she acted negligently.[87] The difference between negligence and intention in this sense of foreseeability does not lie in what is foreseen but rather in the way the person reconciles him- or herself with what is foreseeable.[88] A person would seldom reconcile him- or herself with

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usually required for criminal liability may exclude ignorance of the law as defence and therefore unconstitutional based on the right to a fair trial and particularly the presumption of innocence in terms of s 35(3)(h) of the Constitution. See also *Minister of Justice and Constitutional Development v Masingili* 2014 1 SACR 437 (CC) where the Constitutional Court was not prepared to confirm a judgment by the High Court to declare s 1(1)(b) of the Criminal Procedure Act unconstitutional in respect of the lack of the intention requirement for aggravating circumstances for the offence of robbery. The Constitutional Court found that intention was established for the offence of robbery and that s 1(1)(b) of the Criminal Procedure Act with the addition of aggravating circumstances did not create a new offence. The absence of intention in respect of the aggravating circumstances may be taken into account for purpose of sentencing.

85 Burchell 30.

86 See *Masingili* para 56. The Constitutional Court found that the accused may be held accountable for his reckless choice even if he did not intend or foresee the exact circumstances that occurred, or method used. The court found that there is no constitutional requirement under s 12 of the Constitution that intent regarding the specific circumstances foreseen by the accused be proved in order to secure a conviction.

87 In *S v Humphreys* 2013 2 SACR 1 (SCA) paras 18 and 19 the Supreme Court of Appeal differed from the trial court in that the accused, although by a process of inferential reasoning, had subjectively foreseen the death of his minibus passengers as a possible consequence of his conduct, it nevertheless had not been established that the accused reconciled himself with the consequences of his conduct which he subjectively foresaw. The court justified this view by emphasising that there was no evidence that the accused reconciled himself to the possibility of his own death or that of his passengers as he thought this would not happen and he successfully performed the same manoeuvre in virtually the same circumstances previously.

88 In *DPP v Pistorius* [2015] ZASCA 204 the Supreme Court of Appeal differed from the trial court by finding that the accused had foreseen the possibility of someone behind the toilet door being killed and the appeal court considered the foreseeing of this possibility as sufficient for a conviction for murder based on *dolus eventualis* in the form of *dolus indeterminatus* (general intention) when the accused nevertheless went ahead recklessly. The trial judge excluded foresight of the unlawfulness of the accused's conduct as she accepted that the accused might have excluded the deceased from his foresight of death because he might have thought that the deceased was in the bedroom at the time and not in the toilet when he fired the fatal shots.

what is far-fetched. Intention also requires knowledge of the circumstances as well as knowledge of unlawfulness.[89]

Any mistake as to the circumstances or the definitional elements should be a *bona fide* or genuine mistake. Lack of knowledge of unlawfulness, "mistake" or ignorance of the law as defence in our law, excludes intention. A person would have intention and be at fault if he did at least foresee that a law might exist, but would be excused if he is subjectively unaware of the existence of any prohibition of his conduct.[90]

However, such a person may still be negligent if he should have known or ought to have known, or if a reasonable person in his position would have taken steps to be informed. Obtaining legal advice and acting on such advice would exclude intention even if the advice is later proven to be incorrect. In the case of legal advice that is absurd or obtained from a legal advisor who is out of his depth and under circumstances in which a reasonable person would have concluded differently, relying on such legal advice would be contrary to what a reasonable person would have done and be negligent.[91]

Negligence requires a duty of care, which entails obtaining further and better advice. The fact that ignorance of the law excludes knowledge of unlawfulness as a requirement for intention, and therefore culpability, has been criticised, and the suggestion is that the law should only excuse reasonable mistakes and not all mistakes of law.[92] It is expected of people who embark on a certain area of the law or a specialised activity, to acquaint themselves with what the law requires of them. If they do not, it would be said that they had not acted according to the standard of care the law requires of them, and such conduct would be negligent. It is not a requirement that a person must have actual awareness of the law, but if it was reasonable, foreseeable negligence would be established.[93]

Negligence would apply to formally and materially-defined crimes. Legislatures often require negligence for culpability as a lower standard of proof, instead of intention, for cases that require a higher duty of care, or where the defences available under intention would lead to the accused person avoiding legal responsibility to frustrate the purpose of specific legislation.[94]

The *mens rea* requirement in respect of a fronting offence is established by the definition of "knowing", "knowingly" or "knows" provided for in section 1 of the B-BBEE Act of 2003. The definition provides that

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89 In *S v Campher* [1987] 4 All SA 87 (A) paras 7 18 20 21 the court found that knowledge of unlawfulness means firstly that a person must be aware that his conduct is not justified or covered by any grounds of justification and secondly, knowledge of unlawfulness also means that he must have been aware that his conduct is prohibited by law and constitutes an offence. In this instance, different from knowledge of the existence of circumstances, it is the knowledge of law, not facts, which is required.

90 Burchell 61; Kemp *et al* 69 70; *S v Blom* 1977 3 SA 513 (A) introduced the principle that ignorance of the law, even if it is unreasonable, is a defence to exclude intention.

91 In *S v Zemura* 1974 1 SA 584 (RA) the court held that it is against public policy to penalise an accused who *bona fide* acted on the advice of a responsible public official.

92 Snyman 202–204.

93 *Idem* 405.

94 Burchell 431.

> "'knowing', 'knowingly' or 'knows', when used with respect to a person, and in relation to a particular matter, means that the person either –
> (a) had actual knowledge of that matter; or
> (b) was in a position in which the person reasonably ought to have –
> (i) had actual knowledge;
> (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
> (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter".

This definition is an exact copy of the term "knowing", "knowingly" or "knows" found in the Companies Act.[95] In the Companies Act it fulfils a role in relation to certain statutory offences,[96] but its role is mainly to regulate the conduct of directors and prescribed officers to prevent them from escaping responsibility when claiming not to be aware of matters they should have prevented or acted against. In the context of the B-BBEE Act of 2003, the term "knowingly" is used almost exclusively to deal with the criminal offences created in the Act.[97]

The term has a very strong emphasis of being aware and having knowledge of certain matters. Terms used in statutory offences such as "maliciously", "knowingly", "corruptly" or "fraudulently", usually are indicators of the fact that intention as a form of *mens rea* is required.[98] Looking at the term "knowingly" as it appears in the B-BBEE Act of 2003, the initial inclination would be that only intention (*dolus*) as a form of *mens rea* is required. The term "knowingly" is traditionally used as synonym for one of the elements of intention as the intentional commission of an offence is often referred to as being committed "wilfully" and "knowingly".

A similar term in the Prevention of Combating of Corrupt Activities Act (PCCAA)[99] referring to having knowledge of a fact and "knowing" is defined as

> "that a person has actual knowledge of the fact, or the court is satisfied that the person believes that there is a reasonable possibility of the existence of that fact, and the person has failed to obtain information to confirm the existence of that fact".

Looking at the "knowledge of fact" and "knowing" definition in the PCCAA it creates intention in the form of *dolus eventualis* by using terms such as "person believes that there is a reasonable possibility" and "failed to obtain information to confirm existence". To illustrate the difference between *dolus eventualis* as a form of intent and negligence in *Mtshiza*,[100] in his minority judgment Holmes JA formulated the distinction between *dolus eventualis* and negligence as follows:

> "The result is that nowadays criminal liability is not regarded as attaching to an act or a consequence unless it was attended by *mens rea* . . . Accordingly, if A assaults B and in consequence B dies, A is not criminally responsible for the death unless –
> (a) he foresaw the possibility of resultant death, yet persisted in his deed, reckless whether death ensured or not; or

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95 S 1 of the Companies Act 71 of 2008.
96 S 14 of the Companies Act provides for the liability of a director or prescribed officer who is "knowingly" party to the contravention of s 99, s 215(1)(e) who "knowingly" provides false information to Companies Commission, s 29(6)(b) "knowingly" involving certain acts relating to the financial statements of a company.
97 Ss 13N(3) and 13O of the B-BBEE Act of 2003.
98 Kemp *et al* 234; Burchell 397.
99 S 2(1) Act 12 of 2004.
100 1970 3 SA 747(A); [1970] 4 All SA 12 (A).

(b) he ought to have foreseen the reasonable possibility and resultant death.

In (a) the *mens rea* is the type of intent known as *dolus eventualis*, and the crime is murder;

In (b) the *mens rea* is *culpa*, and the crime is culpable homicide."[101]

The difference between *dolus eventualis* and negligence was further illustrated in *S v Ngubane*[102] where the court held that "*dolus* postulates foreseeing, but *culpa* does not necessarily postulate not foreseeing. A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing". The court has also held that proof of intention does not necessarily exclude a finding of negligence.[103]

The requirements for negligence are: would a reasonable person in the same circumstances as the accused have foreseen the reasonable possibility of the occurrence of the consequence or the existence of the circumstances and the unlawfulness; would a reasonable person have taken steps to guard against that possibility; and did the accused fail to take steps which the accused ought to reasonably have taken to guard against such possibility?[104] With regard to a duty to guard, a person may take a slight risk on the basis of what is socially practical or the urgent and commendable action the accused is engaged[105] in, or that the prevention measures may have been difficult, inconvenient or costly to the extent that a reasonable person would not have guarded against the possibility of the unlawful event.[106]

The provision in paragraph (a) of the "knowing" definition in respect of the fronting offence – "had actual knowledge of that matter" – clearly indicates the presence of intention. Other terms used in paragraphs (b)(i)–(iii) of the "knowingly" definition such as "reasonably ought to have", "taken other measures" and "would reasonably be expected" are indicative of the requirement for negligence.

The culpability requirement of *mens rea* for an offence of a fronting practice is therefore either intention or negligence. Negligence is a lower standard of fault than that required for the commission of a corrupt activity in terms of PCCAA. The PCCAA requires reasonable foreseeability by what a person believes, but that person is then reckless towards that foreseeability, and reconciles himself with that foreseeability by not obtaining information. In the event of a fronting offence, the term "knowingly" requires a duty of care to obtain information and take reasonable steps to be informed. The obtaining of legal advice could be relied on even if the advice is later proven to be incorrect on condition that it is not far-fetched and that a reasonable person would also have accepted such advice. Failure to obtain advice in circumstances in which it is difficult, inconvenient or costly to do so may also be an acceptable defence.

7 CONCLUSION

The common law principle of legality, *nullum crimen sine lege*, holds that a person should only be punished according to valid and applicable law. This

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101 *Mtshiza* paras A–C.
102 1985 3 SA 677(A); [1985] 2 All SA 340 (A).
103 1985 3 SA 677 (A); 1985 2 All SA 340 (A) paras G–H.
104 Burchell 419.
105 *S v Harber* (341/1986) [1988] ZASCA 34; [1988] 4 All SA 496 (A) paras 39 53.
106 *Khupa v South African Transport Services* [1990] 4 All SA 397 (W); 1990 2 SA 627 (W) 405.

correlates with the principle of the rule of law and the common law principle of criminal legality enshrined in the Bill of Rights (section 35 of the Constitution) relating to an accused person's right to a fair trial. Although statutory offences are drafted in general terms, and considering grammatical limitations that exist, the legislature is expected to formulate provisions in such a way that they are clear enough for persons to know before the commission of an offence which conduct is prohibited.

Various examples exist where the courts were prepared to strike down provisions as being too wide and ambiguous, and where the courts interpreted broad and wide provisions narrowly in favour of the accused. The court in *Masiya*[107] was prepared to extend the application of the common law offence of rape. In respect of statutory offences, it is expected that the courts would leave such extensions to the legislature in terms of the doctrine of separation of powers.

Although no grounds for justification are provided for in the formulation of an offence, and similarly not in the definitional elements of a fronting offence, any justification that would coincide with society's perception of justice would be a valid ground to exclude the unlawfulness of the conduct. Such grounds may exist in statutory provisions or case law, and justify practices that might *prima facie* appear to be unlawful. The B-BBEE Commission's authority to find a practice to be a fronting practice would be of administrative value or might establish *prima facie* evidence to refer the matter for criminal investigation or possible prosecution. Such findings would also not create an offence or set any precedent in relation to the criminal law, as such an authority in terms of the constitutional principle of the separation of powers cannot be assumed by the executive or a statutory body. The National Prosecution Authority in its consideration to prosecute, and the courts in hearing a criminal matter, would use the more protective principles of criminal justice, instead of the administrative law that the B-BBEE Commission as statutory body is expected to follow.

The terms requiring the conduct of a fronting office to be prohibited are very wide and refer to "directly" and "indirectly" or "other act or conduct". Some transactions and arrangements fall outside of the definition of a B-BBEE initiative and are not related to the obtaining or achievement of any B-BBEE benefit. A literal interpretation of the wide formulation could lead to absurd consequences and in essence "criminalise" all the provisions of the B-BBEE Act of 2003 and the enabling or sub-ordinary provisions. Even government departments and their staff could technically be prosecuted in terms of the fronting provisions of the B-BBEE Act of 2003 for inefficiency which jeopardises the protected subject matter of the B-BBEE Act of 2003, being the wide policy statements contained in the objectives of the Act. Even a person not choosing to participate in the voluntary B-BBEE programme could, according to the wide formulation, be prosecuted for committing a fronting practice offence as such person would be frustrating or undermining the achievement of the objectives of the B-BBEE Act of 2003.

The term "engages" would include both parties participating or involved in the fronting practice, for instance an established white company and a B-BBEE company colluding or conspiring under circumstances as transpired in *Swifambo*.[108]

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107 See discussion in para 2 above.

108 See *Swifambo* fn 49 above relating to the arrangement between the respondent and a multinational entity to use a South African shelf entity without resources and business operations as a front to gain access to a lucrative contract by a state-owned entity.

The terms "undermining" and "frustrating" are a matter of degree. The question is how far a person needs to go to undermine or frustrate. An entity not achieving all the points on the B-BBEE scorecard could also, to a certain degree, although minimal, be seen to "frustrate" and "undermine". That degree of frustration and undermining would increase as an entity moves lower down the ladder of B-BBEE compliance. The point at which a person's conduct becomes intolerable and falls within the prohibition of the fronting offence is currently a matter of subjective interpretation and not objectively determinable. This would be analogous to an offence of driving under the influence of drugs and alcohol[109] without any statutory threshold or requirements and to leave that open to law enforcement agencies and the courts to interpret on an *ad hoc* and arbitrary basis.

The *mens rea* requirement for a fronting offence is either intention (*dolus*) or negligence (*culpa*) which is a lower culpability requirement than only intention (*dolus*) or *dolus eventualis*, as for instance required for the commission of a corrupt activity in terms of the Prevention and Combating of Corrupt Activities Act.[110]

Setting a minimum *mens rea* requirement of negligence by the legislature, instead of intention, is popular in modern formulation of offences. Negligence is also interpreted by the courts to be the requirement in the absence of clear statutory provisions regarding the requirement of culpability. This lower form of *mens rea* normally is required when the legislature wants to penalise reckless, careless or negligent behaviour. Cases where offenders could easily escape liability by merely raising a defence to exclude intention could also prompt the legislature to rather require a lower form of fault. In the absence of a specific provision as to the form of fault required, the more severe the penalty the more the tendency would be that intention would be required. The courts may also, in the absence of a clear provision as to the fault requirement, not apply a low norm of fault such as negligence if the application of negligence would lead to unreasonableness or undue hardship for the ordinary person in the event of complex legislation.[111]

The legislature, in formulating a fronting offence, has set the bar lower as far as the fault requirement is concerned, and this would make prosecution easier than would be the case with the common law offence of fraud. Furthermore, no misrepresentation or element of dishonesty is required to commit a fronting practice, as would be the case with fraud, and no prejudice or potential prejudice will have to be proven by the state as committing the offence of fronting is deemed to disadvantage people in general, namely, the intended beneficiaries of the B-BBEE legislation.

The legislature places a higher onus and duty of care on persons involved in the B-BBEE programme to take reasonable steps to be informed and obtain the necessary knowledge. Ignorance and lack of knowledge of a fact or the law would only be a defence if the obtaining of knowledge is unreasonable.

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109 S 65(1) of the National Road Traffic Act 93 of 1996.
110 Act 12 of 2004.
111 Kemp *et al* 235.