

# A 'KNOWING PERSON'

Amendments to The B-BBEE Act (The Act) in 2013 were introduced to address the shortfall in the 2007 Codes of Good Practice. The most prominent amendments were the formation of the B-BBEE Commission, a clear definition of what Fronting Practices are and the introduction of the terms 'knowing', 'knowingly' or 'knows' which relates to people driving B-BBEE Strategies and perpetrating an offence.

A game-changer were the fines and penalties introduced for a person or people found guilty of Fronting Practices. Such a person or people found guilty of a Fronting offence in terms of Section 13O (1) (d) of The Act means they may be issued with a fine or face imprisonment of up to 10 years. In the worst cases, both may apply.

Section 13O (2) or Section 12N (3) of The Act sets out the offence and penalty for an offence of 'Knowing People' that are at risk of imprisonment for up to 12 months. The term means that such a person knowingly turned a blind eye or should have known that a claim or initiative did not align with the Code they are measured on or The Act, which has outlined a 'Knowing Person' as follows:

- > had actual knowledge of that matter; or
- > was in a position in which the person reasonably ought to have –
  - had actual knowledge;
  - investigated the matter to the extent that would have provided the person with practical knowledge; or
  - taken other measures which, if taken, would reasonably be expected to have equipped the person with actual knowledge of the matter.

Who is a 'Knowing Person' as outlined in The Act?

To reiterate, a 'Knowing Person' is anyone who knows or should have known about Fronting Practices, an offence in terms of The Act. A 'Knowing Person' would be at risk of prosecution if they:

- > Hinder, obstruct or attempt to influence the B-BBEE Commission in performing their duties;
- > Provide false information to the B-BBEE Commission;
- > Misrepresent or attempt to distort the B-BBEE status of an organisation;
- > Provide false or misrepresent information during a B-BBEE Verification;
- > Are involved in and consented to the implementation of strategies or initiatives that are a Fronting Practice; and
- > Failed to report awareness of suspected offences to the B-BBEE Commission, in the case of a Verification Professional or other individual.

Who is a 'Knowing Person'?

A 'Knowing Person' is any person who feeds into an organisation's B-BBEE Strategy, from those driving procurement to those in a Human Resources Department or those implementing training strategies. Moreover, a Board of Directors is responsible for the management of an organisation. Their role is to lead an organisation to make strategic and operational decisions; subsequently, they are responsible for ensuring that an organisation meets its statutory obligations, and are therefore either knowingly or unknowingly considered to be 'Knowing People'.





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Mariette van Wyk heads up the Verification Service Desk at the BEE Chamber and is a qualified Chartered Accountant. Following more than a decade in the verification space, she has a solid technical understanding of both the Codes and The B-BBEE Act. With her experience as a Technical Signatory, Mariette is versed on the SANAS audit requirements and is more than equipped to guide organisations through their B-BBEE Verification.

The rationale behind this is the expectation that directors have sufficient knowledge of The Act and Codes applicable to their organisations so they can identify and halt Fronting Practices implemented by employees or consultants.

Often organisations are advised against implementing an initiative that is suspected of being a Fronting Practice by their B-BBEE Consultant, Advisor or B-BBEE Rating Agency, but ignore such advice. It is important to note that any person operating in the B-BBEE Arena is legally obligated to report Fronting Practices to the B-BBEE Commission. Should a B-BBEE Consultant, Advisor or B-BBEE Rating Agency not report Fronting Practices, they would be guilty of an offence.

The accountability of a 'Knowing Person' remains intact irrespective of whether a director or employee who is a 'Knowing Person' breaks ties with the organisation in question. Many directors and employees who feed into an organisation's B-BBEE Strategy are oblivious to the liability or the penalties attached to Fronting Practices. The most common reason is an over-reliance on consultants to drive an organisation's B-BBEE Strategy without internal competence. Organisations have, in the past, generally opted to lean on the knowledge and ethics of third parties. Although the majority of B-BBEE Consultants act within the realms of legislation, some unknowingly do not align with the B-BBEE Commission's interpretations, while others purposely choose not to.

Taking poor advice from a third party is not a defence against Fronting Practice. When it comes down to it, it will not be the third party who will be penalised; it will be those directly involved and all other 'Knowing Persons' acting on behalf of an organisation. To mitigate the risk of taking third-party advice, an organisation should have at least one 'Knowing Person' who is competent within an organisation that can identify Fronting risks, then adequately question or investigate them.

Organisations must ensure that 'Knowing People' feeding into their B-BBEE Strategy are fully versed on not only The Act but The Codes or the relevant Sector Code on which they are measured, along with all related practice notes and statements of clarity. The BEE Chamber offers support and training to arm 'Knowing People' with the tools to protect themselves and the organisation they represent.

The BEE Chamber, as part of their comprehensive service offering to its members, provides a B-BBEE Fronting Audit option. By identifying Fronting Practices in the short-term, it allows an organisation to put remedial action in place to rectify the potential risk. A Fronting Practice Audit identifies Fronting Practices, thus provides the opportunity for organisations to respond to potential liability.

The Fronting Practice Audit process entails a comprehensive analysis of an organisation's B-BBEE data and supporting documentation, such as contracts, that are evidence in an organisation's B-BBEE Verification. After identifying a Fronting Practice risk, an organisation may elect to exclude such B-BBEE claims from their B-BBEE Verification or elect to address the Fronting Practice, thereby eliminating the threat from all future audits. However, organisations are encouraged to develop their internal competency or conduct a B-BBEE Fronting Audit to provide input for a risk management plan.

