



SUMMARY OF FINDINGS AND RECOMMENDATIONS
IN THE MATTER OF
PHEPHE KHEKHE ELIAS // AFRICAN TUNA TRADERS CC, UMBHALO TRADING (PTY)
LTD AND HOMOTSEGO TRADING (PTY) LTD
CASE NUMBER: 1/12/2017

Summary: *Complainant is Mr Phephe Elias Khekhe – Respondent African Tuna Traders CC & Others – Allegations – Complainant alleged that he was an employee of African Tuna Traders CC and later made a director and shareholder in the empowerment company, and that his credentials were used in Umbhalo Trading (Pty) Ltd to secure fishing rights but with no economic benefits, amongst other things - Findings - Complainant was indeed made a direct shareholder in Homotsego Trading (Pty) Ltd, which entity held 80% shareholding in Umbhalo Trading (Pty) Ltd, without any participation or economic benefits to the said black shareholder, with African Tuna Traders CC holding 20% in Umbhalo Trading (Pty) Ltd. Both Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd were created by members of the white owned African Tuna Traders CC, but had no employees or any trading, other than Umbhalo Trading (Pty) Ltd being the holder of fishing rights. The arrangement is contrary to the objectives of the B-BBEE Act and would amount to fronting practice and misrepresentation of B-BBEE status - Recommendations – the B-BBEE Commission may take any action under the B-BBEE Act and also refer findings to Minister of Agriculture, Forestry & Fisheries and the relevant Portfolio Committee to consider this matter and other rights allocated in the fishing industry to determine if any steps should be taken.*

1. Introduction

- 1.1 The Broad-Based Black Economic Empowerment Commission (“B-BBEE Commission”) is established in terms of section 13B of the Broad-Based Black Economic Empowerment Act No. 53 of 2003 as amended by Broad-Based Black Economic Empowerment Act No. 46 of 2013 (“the B-BBEE Act”).
- 1.2 The B-BBEE Commission is empowered to conduct investigations on any matter arising from the application of the B-BBEE Act, including any B-BBEE initiative or a category of B-BBEE initiatives, in terms of section 13F (1) (d) and section 13J (1) of B-BBEE Act, read with

regulation 15 of the Regulations Regulating the Administration and Implementation of the B-BBEE Act and the Functions of the B-BBEE Commission, 2016 (“B-BBEE Regulations”).

- 1.3 Without limiting the powers of the B-BBEE Commission, in terms of section 13J (3) of the B-BBEE Act, read with regulation 15 (4) (g) of the B-BBEE Regulations, the B-BBEE Commission may make a finding on whether any B-BBEE initiative involves a fronting practice.
- 1.4 In terms of regulation 15 (13) of the B-BBEE Regulations, before making its final findings, the B-BBEE Commission must notify the respondent in writing of the details of the adverse finding(s) and afford them an opportunity to respond to each or any finding within 30 (thirty) days, which on merit can be extended by a maximum period of 10 (ten) days.
- 1.5 In terms section 13J (7) (a) of the B-BBEE Act read with regulation 15 (12) (a)-(c) of the B-BBEE Regulations, the finding(s) or recommendation(s) made by the B-BBEE Commission must be in writing, communicated to the complainant and published in a manner it may deem fit or appropriate, subject to section 13J (7) (b) of the B-BBEE Act.
- 1.6 This publication is therefore issued in line with these provisions of the B-BBEE Act and in the interest of the public.

2. *Brief description of the complaint*

- 2.1 The B-BBEE Commission received a complaint lodged by Mr Phephe Elias Khekhe against Africa Tuna Traders CC, a close corporation registered in terms of close corporations laws of the Republic of South Africa with registration number 1998/059520/23, Umbhalo Trading (Pty) Ltd, a company registered in terms of company laws of the Republic of South Africa under registration number 2003/031218/07 and Homotsego Trading (Pty) Ltd, a company registered in terms of company laws of the Republic of South Africa under registration number 2003/031218/07, alleging conduct/practice that appeared to be contrary to the objectives of the B-BBEE Act.

- 2.2 The nature of the allegations is summarised for the purposes of this publication as follows:
- 2.2.1 that on or about the year 2001, the complainant was employed as a driver of Africa Tuna Traders CC, an entity which had two members namely: Christopher Fergus Hamel (also referred to as Mr Chris Hamel or CF Hamel) having a shareholding of 50% and Jonathan Ronald van Breda (also referred to as Mr van Breda) with a shareholding of 50%;
 - 2.2.2 that Mr Christopher Fergus Hamel and Jonathan Ronald van Breda approached the complainant to help with the completion of his house in 2005, and since then until 2008 he did not receive the commission that was due to him in terms of his employment contract;
 - 2.2.3 that the reason for depriving him the said commission was that they have built him a house, and the commission was equivalent to the financial assistance that Mr Christopher Fergus Hamel and Mr Jonathan Ronald van Breda had provided;
 - 2.2.4 that he was approached on or about 2003 to assist Mr Christopher Fergus Hamel in obtaining a fishing licence as he needed a BEE partner;
 - 2.2.5 that the two entities were formed namely; Umbhalo Trading (Pty) Ltd, Homotsego Trading (Pty) Ltd and it was the complainant's understanding that he had 60% shares in Homotsego Trading (Pty) Ltd which owned 60% of Umbhalo Trading (Pty) Ltd;
 - 2.2.6 that he was appointed as a director of both entities on 01 August 2004. Eventually in 2010, he was promised that African Tuna Traders CC would invest money in Allan Gray for him from 2001 until 2011 to serve as his provident fund in case he wants to retire; and
 - 2.2.7 that he resigned as director of Umbhalo (Pty) Ltd on the 14 April 2010 and Homotsego Trading (Pty) Ltd on the 24 November 2014 and he has not received what was promised to him and that his employment was also terminated in 2010.

- 2.3 The B-BBEE Commission noted that some of the allegations made by the complainant are labour related matters that fall outside the mandate of the B-BBEE Commission. The assessment of merit determined that an investigation is warranted into the allegations relating to the use credentials of black persons in Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd for the fishing rights.
- 2.4 The B-BBEE Commission followed due process to notify the parties of the complaint in terms of regulation 15 (4) (d) of the B-BBEE Regulations and afforded them an opportunity to respond to the allegations in line with the *audi alteram partem rule*, and to submit documentation required in the investigation of the complaint.
- 2.5 Upon investigation, the B-BBEE Commission afforded the respondents an opportunity to respond to adverse findings that were issued to them in writing as required by regulation 15 (13) of the B-BBEE Regulations. After consideration of the response, the B-BBEE Commission issued its final findings which have been communicated in writing both to the complainant and the respondents.

3 Findings of the B-BBEE Commission

- 3.1 Having investigated the allegations in terms of the mandate under section 13F (1) (d) and section 13J (1) of the B-BBEE Act, read with regulation 15 of the B-BBEE Regulations, after considering the response to the adverse findings by the respondents, the B-BBEE Commission has in terms of section 13J (3) read with regulation 15 (4) (g) of the B-BBEE Regulations, made the following final findings:
- 3.1.1 The records of CIPC for African Tuna Traders CC reflect Jonathan Ronald van Breda and Christopher Fergus Hamel as members with 50% members interest each. The historical records do not reflect Mr Phephe Elias Khekhe as one of the members of the close corporation at any time, which confirms his version that he was an employee of African Tuna Traders CC from 2001. African Tuna Traders CC also confirmed in its letter of 22 August 2018 that Mr Phephe Elias Khekhe was employed as a driver since 2 April 2001. Therefore, African Tuna Traders CC is a wholly white owned close corporation.

3.1.2 The records of CIPC for Umbhalo Trading (Pty) Ltd reflect the current director of the company as Hamel Christopher Fergus effective from 01 August 2004, while the historical records confirm that Mr Phephe Elias Khekhe was a director from 02 November 2004 and resigned effective 16 April 2010. According to the letter from Greenwoods Accountants dated 3 September 2005, the shareholders of Umbhalo Trading (Pty) Ltd are Homotsego Trading (Pty) Ltd which holds 80% of the issued share capital, and Walter Bell, who holds 20% of the issued share capital. According to the letter dated 22 August 2018 from African Tuna Traders CC, Umbhalo Trading (Pty) Ltd is 80% black owned.

3.1.3 The records of CIPC for Homotsego Trading (Pty) Ltd depict Nicholas Phumlane Mphili as the current director of the company effective from 01 September 2013 while the historical records reflect that Mr Phephe Elias Khekhe was a director from 02 November 2004 and resigned effective from 22 January 2015. According to the letter from Greenwoods Accountants dated 6 September 2005, the shareholders of Homotsego Trading (Pty) Ltd are as follows with Mr Phephe Elias Khekhe holding 14.29% shareholding:

NAME	I.D NUMBERS	GENDER	NUMBER OF SHARES
Fillemon Amateta	Confidential	Male	20 ordinary shares
Theodore Claassen	Confidential	Male	20 ordinary shares
Faustinu Nakunda	Confidential	Male	20 ordinary shares
Fillypus Titus	Confidential	Male	20 ordinary shares
Moses Hishekwa	Confidential	Male	20 ordinary shares
Robert Stevens	Confidential	Male	20 ordinary shares
Phephe Elias Khekhe	Confidential	Male	20 ordinary shares

3.1.4 The records of CIPC for Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd confirm the allegations made by Mr Phephe Khekhe Elias that he resigned as a director of both entities on the 16 April 2010 and 22 January 2015 respectively, which resignations did not have any effect on his employment, as confirmed by African Tuna Traders CC, and consequently had no effect on his ownership rights arising from the 20 ordinary shares in Homotsego Trading (Pty) Ltd which in turn held 80% shareholding in Umbhalo Trading (Pty) Ltd.

- 3.1.5 According to the letter from Greenwoods Accountants dated 18 November 2013 and Baker Tilly Greenwoods Services (Pty) Ltd dated 9 November 2015, Homotsego Trading (Pty) Ltd had 80% shareholding in Umbhalo Trading (Pty) Ltd. There is no record of a sale of shares agreement relating to the shares of Mr Phephe Elias Khekhe in Homotsego Trading (Pty) Ltd and therefore the 20 ordinary shares he held directly in Homotsego Trading (Pty) Ltd make him the indirect shareholder in Umbhalo Trading (Pty) Ltd. According to the letter of Baker Tilly Greenwoods Services (Pty) Ltd dated 9 November 2015, the shareholding of Umbhalo Trading (Pty) Ltd was to change post licence award to 20% of the issued share capital held by African Tuna Traders CC and 80% of the issued share capital by Umbhalo Empowerment Trust.
- 3.1.6 According to the letter of African Tuna Traders CC of 22 August 2018, Umbhalo Trading (Pty) Ltd is deemed a Level 4 B-BBEE Contributor, and Homotsego Trading (Pty) Ltd which holds 80% of the issued share capital, from which Umbhalo Trading (Pty) Ltd derived its black ownership, is dormant and does not have any financial statements and that African Tuna Traders CC has 0% black ownership and no B-BBEE certificate. Both Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd did not have any employees and the administrative functions for Umbhalo Trading (Pty) Ltd are performed by African Tuna Traders CC, with emphasis made also that Umbhalo Trading (Pty) Ltd did not have any trading operations that necessitated employees and that its revenue is generated only from license fees charged to other related companies.
- 3.1.7 Based on the B-BBEE certificate of Umbhalo Trading (Pty) Ltd for the period of 2013/2014 and 2015/2016, the entity operates in the Agricultural Sector in which the Agriculture-Sector Code is applicable. The B-BBEE certificate of Umbhalo Trading (Pty) Ltd, for the 2013/2014 illustrates that the entity did not have any black ownership while the 2015/2016 B-BBEE certificate reflects 80% black ownership. The information regarding black ownership of Umbhalo Trading (Pty) Ltd on the 2013/2014 B-BBEE certificate is inconsistent with the confirmation letters of its accountants/auditors Greenwoods Accountants dated 3 September 2005 and 18 November 2013 regarding its black ownership.
- 3.1.8 The records received from the Department of Agriculture, Forestry & Fisheries on 26 April 2018 following the B-BBEE Commission's letter of 14 February 2018 indicate that during 2005/2006 Long Term Fishing Rights Allocation Process, Umbhalo "Fishing

(Pty) Ltd” was allocated fishing rights for a period of 8 years, the right allocated during long term rights allocation process expired on 31 December 2013, and further that in the 2013 Fishing Rights Allocation Process, African Tuna Traders CC and Umbhalo Trading (Pty) Ltd were both allocated fishing rights on 30th December 2013 for a period of 7 years in the Tuna Pole Fishing Sector. The Rights allocated to African Traders CC and Umbhalo Trading (Pty) Ltd will expire on 31 December 2020. Also, during the 2015/2016 Fishing Rights allocation process, Umbhalo Trading (Pty) Ltd was allocated a right in the Large Pelagic Fishing Sector on 06 February 2017 for a period of 15 years. The Fishing Rights allocated to Umbhalo Trading (Pty) Ltd will expire on 31 January 2032.

- 3.1.9 The documents from the Department of Agriculture, Forestry & Fisheries regarding Umbhalo Trading (Pty) Ltd indicated in a letter which was submitted in support of their application that the shareholding of Umbhalo Trading (Pty) Ltd will be 20% African Tuna Traders CC and 80% Umbhalo Empowerment Trust pending approval of section 21 application and Homotsego Trading (Pty) Ltd’s 80% shareholding will be transferred to Umbhalo Empowerment Trust and that the beneficiaries of the Umbhalo Empowerment Trust are black persons as set out in the trust deed. Section 21 of Marine Living Resources Act No.18 of 1998 provides that subject to the provisions of the Act, a commercial Fishing Right may be leased, divided or otherwise transferred. African Tuna Traders CC submitted a copy of the Trust Deed for Umbhalo Empowerment Trust signed on 20 October 2015.
- 3.1.10 The black ownership credentials used in the 2005, 2013 and 2015 above for the rights applications to Department of Agriculture, Forestry & Fisheries for Umbhalo Trading (Pty) Ltd included 80% shareholding of Homotsego Trading (Pty) Ltd, in which 20 ordinary shares amounting to 14.29% shareholding were held by Mr Phephe Elias Khekhe, and these credentials were used for purposes of acquiring Fishing Rights for Umbhalo Trading (Pty) Ltd in that in 2013 Fishing Rights Allocation Process, African Tuna Traders CC and Umbhalo Trading (Pty) Ltd were both allocated rights on 30th December 2013 for a period of 7 years in the Tuna Pole Fishing Sector, which will expire on 31 December 2020. Furthermore, the allocation of Fishing Rights to Umbhalo Trading (Pty) Ltd on the 30th December 2013, considered 80% shareholding of Homotsego Trading (Pty) Ltd, which included the 14.29% shareholding of Mr Phephe Elias Khekhe.

- 3.1.11 According to the letter of African Tuna Traders CC, in 2015 Umbhalo Trading (Pty) Ltd changed its ownership structure by creating Umbhalo Empowerment Trust which acquired 80% shareholding of Homotsego Trading (Pty) Ltd, this as stated in the letter of 22 August 2018 unsolicited by Mr Chris Hamel, however, there is no record of the transfer of shares from Homotsego Trading (Pty) Ltd to Umbhalo Empowerment Trust also reflecting consent by Mr Phephe Elias Khekhe for the sale of his 20 ordinary shares or 14.29% shareholding in Homotsego Trading (Pty) Ltd. Effectively this means the 14.29% black shareholding of Mr Phephe Elias Khekhe in Homotsego Trading (Pty) Ltd was unilaterally transferred to Umbhalo Empowerment Trust, evidently with no authorisation by Mr Phephe Elias Khekhe and with no compensation for such shareholding based on fair valuation and appraisal. Respondents submitted a copy of Securities Transfer Form purported to be signed by Mr Phephe Elias Khekhe transferring his 20 ordinary shares for nominal amount of R20.00, however, the signature on the Securities Transfer Form differ significantly from the signature of Mr Phephe Elias Khekhe which appears on the B-BBEE7 Form for the filing of this complaint.
- 3.1.12 The ownership structure of Umbhalo Trading (Pty) Ltd allegedly consists of Umbhalo Empowerment Trust with 80% shareholding and Africa Tuna Traders CC with 20% shareholding, as also indicated in the letter of 22 August 2018 signed by Mr Chris Hamel, although there is no record or proof of sale of shares and consent by Mr Phephe Elias Khekhe as a shareholder of Homotsego Trading (Pty) Ltd. Umbhalo Empowerment Trust was recognised as a shareholder in Umbhalo Trading (Pty) Ltd by Department of Agriculture, Forestry and Fisheries during 2015/2016 Fishing Rights allocation process, wherein Umbhalo Trading (Pty) Ltd was allocated a Right in the Large Pelagic Fishing Sector on 06 February 2017 for a period of 15 years, which will expire on 31 January 2032. The Department of Agriculture, Forestry & Fisheries recognised the B-BBEE Certificate that was issued for verification period of 2015/2016 which reflects 80% black ownership emanating from Umbhalo Empowerment Trust.
- 3.1.13 According to the submission of African Tuna Traders CC to **the dti** on 14 May 2010, African Tuna Traders CC has various companies within the group with the main operating entity being African Tuna Traders CC and they also set up two other empowerment companies, Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty)

Ltd. African Tuna Traders CC performs the administrative work for the group of companies, which includes Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd. It is therefore evident that African Tuna Traders CC and/or its members established Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd and operated the entities without participation by the black shareholders whose black ownership credentials were used in these entities.

- 3.1.14 African Tuna Traders CC did not have any black ownership or B-BBEE credentials and Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd were facilitated for purposes of achieving the B-BBEE compliance and/or black ownership that is required in applications for licences or any other authorisation for which B-BBEE compliance is a requirement.
- 3.1.15 Whereas it cannot be said that the awarding of rights to Umbhalo (Pty) Ltd on the 30th December 2013 was solely based on Mr Phephe Khekhe Elias's 14.29% indirect shareholding in Umbhalo Trading (Pty) Ltd as part of the 80% shareholders of Homotsego Trading (Pty) Ltd, his credentials were part of the black ownership presented for the purpose of this application. This is clear and confirmed by supporting letters issued by the accountants/auditors of Umbhalo Trading (Pty) Ltd Greenwoods Accountants.
- 3.1.16 Whereas black ownership of Mr Phephe Elias Khekhe was recognised in the ownership structure of Homotsego Trading (Pty) Ltd and indirectly in Umbhalo Trading (Pty) Ltd, there is no evidence that Mr Phephe Elias Khekhe was afforded any economic interest, which is defined as a claim against an entity representing a return on ownership of an entity similar in nature to a dividend right measured using a flow through, and where applicable, a modified flow through principle.
- 3.1.17 African Tuna Traders CC and/or its members failed to provide financial statements for Homotsego Trading (Pty) Ltd and minutes of the meetings of the board and the shareholders, despite having created the entity and being responsible for its administration, and merely indicated that the entity is dormant. This contradicts the fact that African Tuna Traders CC and/or its members continued to present as part of its rights applications credentials of Homotsego Trading (Pty) Ltd as the 80% shareholders of Umbhalo Trading (Pty) Ltd, without stating that the entity is dormant and has no real operations or shareholder activity. The financial statements of

Umbhalo Trading (Pty) Ltd as submitted for 2015 to 2017 reflect Homotsego Trading (Pty) Ltd as the shareholder with no reference to its dormancy.

- 3.1.18 Contrary to the letter of African Tuna Traders CC dated 22 August 2018 as supported by the letters of Greenwoods Accountants and Baker Tilly Greenwoods Services (Pty) Ltd regarding the shareholding of Umbhalo Trading (Pty) Ltd, and as submitted to the Department of Agriculture, Forestry & Fisheries for the 2005, 2013 and 2015 rights allocation processes, the financial statements submitted for 2015-2017 reflect the shareholders of Umbhalo Trading (Pty) Ltd as African Tuna Traders CC with 40% and Homotsego Trading (Pty) Ltd with 60%, it being noted that African Tuna Traders CC stated that the change of ownership in Umbhalo Trading (Pty) Ltd occurred in 2015 in terms of which the 80% stake held by Homotsego Trading (Pty) Ltd was transferred to Umbhalo Empowerment Trust which owns 80% with African Tuna Traders CC owning 20% shareholding. It is only in the 2017 financial statements of Umbhalo Trading (Pty) Ltd that any reference is made to Umbhalo Empowerment Trust as a related party, not as a shareholder in Umbhalo Trading (Pty) Ltd. Therefore, the black ownership credentials and the ownership structure of Umbhalo Trading (Pty) Ltd submitted to Department of Agriculture, Forestry & Fisheries are completely different from the ownership reflected in the financial statements of Umbhalo Trading (Pty) Ltd for 2015, 2016 and 2017 and these were approved and signed off by Mr CF Hamel.
- 3.1.19 It is clear from all records relating to Umbhalo Trading (Pty) Ltd that Mr CF Hamel as the sole director controls the affairs of the entity as there are no other directors representing the majority shareholder, Homotsego Trading (Pty) Ltd or Umbhalo Empowerment Trust, as the case may be, given the glaring inconsistencies in the documents and information submitted by African Tuna Traders CC and/or its members. There are clearly no black shareholders exercising rights of ownership as majority shareholders in Umbhalo Trading (Pty) Ltd, and none of the black shareholders, if they exist, have derived any economic interest from Umbhalo Trading (Pty) Ltd. Instead, any transaction in reference to any other entity in the financial statements of Umbhalo Trading (Pty) Ltd is in respect of African Tuna Traders CC and ADR Fishing (Pty) Ltd, an entity that African Tuna Traders CC stated is 100% owned by African Tuna Traders CC, both of which are wholly white owned entities.

- 3.1.20 There is no record that indicates that Mr Phephe Elias Khekhe derived any economic interest emanating from his 14.29% shareholding in Homotsego Trading (Pty) Ltd, nor that he derived any capital gains from the purported sale or transfer of his 14.29% shareholding in Homotsego Trading (Pty) Ltd to any other entity, and further Mr CF Hamel failed to provide any record of participation by black shareholders in both Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd, which is indicative of a fronting practice.
- 3.1.21 African Tuna Traders CC and/or its members and Umbhalo Trading (Pty) Ltd have presented the credentials of Homotsego Trading (Pty) Ltd in respect of the shareholding in Umbhalo Trading (Pty) Ltd in a manner that misrepresented the actual black ownership status of Umbhalo Trading (Pty) Ltd, which is indicative of misrepresentation of the B-BBEE status of Umbhalo Trading (Pty) Ltd. Further, the contradiction in the information submitted for the rights allocation processes at Department of Agriculture, Forestry & Fisheries, and the information on the financial statements of Umbhalo Trading (Pty) Ltd is also indicative of false information provided to an organ of state for purposes of determining the black economic empowerment status of an entity.
- 3.1.22 Even if it were to be argued successfully that Umbhalo Empowerment Trust is the black majority shareholder of Umbhalo Trading (Pty) Ltd, the Trust Deed of Umbhalo Empowerment Trust does not meet the test for black ownership within the meaning of the B-BBEE Act in that there is no evidence of it being represented to exercise its voting rights on the board of Umbhalo Trading (Pty) Ltd, there is no record of economic interest that accrued to the trust commensurate with the 80% shareholding it is purported to hold, and further there is no record of whether real ownership would vest in the hands of the beneficiaries behind the trust in accordance with the time based graduation factor.
- 3.1.23 Further, as an Employee Share Ownership Programme and a Trust, Umbhalo Empowerment Trust is required to comply with the rules in Statement 100 Annexe 100 (C) – ESOPS RULES and (D) – TRUST RULES and on assessment, the Trust deed fails to meet the requirements for basic aspects such as, more than 50% of the trustees are appointed by ADR Fishing (Pty) Ltd when the rules require the employees as beneficiaries to appoint 50% of the trustees, the trustees have absolute discretion including on when and if they should make any distributions, decisions on the board

of trustees are on majority when ADR Fishing (Pty) Ltd has the majority of the trustees, all of which place ADR Fishing (Pty) Ltd and African Tuna Traders CC effectively in control of the Trust that is purported to be a shareholder. The principles applied for testing ownership in respect of this aspect are consistent in both the AgriBEE sector Code and the generic codes.

3.1.24 Mr Phephe Elias Khekhe was indeed employed as a driver by African Tuna Traders CC from 2001 until his dismissal, and he was made a shareholder in Homotsego Trading (Pty) Ltd with 14.29% shareholding, which in turn held 80% shareholding in Umbhalo Trading (Pty) Ltd, both of which are companies that were established by African Tuna Traders CC and/or its members as empowerment companies, and it is true that Mr Phephe Elias Khekhe held directorship but resigned in Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd in 2010 and 2015 respectively, however, the resignation as a director did not affect his status as the owner of the shares directly in Homotsego Trading (Pty) Ltd and indirectly in Umbhalo Trading (Pty) Ltd.

3.2 Having said the above, African Tuna Traders CC, Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd engaged in conduct that is contrary to the B-BBEE Act and would amount to a fronting practice which is an offence in terms of section 13O (1) (d) of the B-BBEE Act and misrepresentation of the B-BBEE status, which is an offence in terms of section 13O (1) (a) of the B-BBEE Act, and provision of false information relevant for assessing black economic empowerment status to an organ of state, in this case Department of Agriculture, Forestry & Fisheries, which is an offence in terms of section 13O (1) (c) of the B-BBEE Act.

3.3 African Tuna Traders CC, Homotsego Trading (Pty) Ltd and Umbhalo Trading (Pty) Ltd were controlled by the same person, Mr CF Hamel, to the detriment of Mr Phephe Elias Khekhe, who was denied economic interest commensurate with the shareholding he held in Umbhalo Trading (Pty) Ltd indirectly through his 14.29% shareholding in Homotsego Trading (Pty) Ltd which owned 80% of Umbhalo Trading (Pty) Ltd. The members of African Tuna Traders, by their own admission, operated the entities as part of their group and controlled both operations and finances, and the manner in which Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd were run presents a typical opportunistic intermediary arrangement that goes against the objectives of the B-BBEE Act in that Mr CF Hamel used Umbhalo Trading (Pty) Ltd to

secure rights to operate in the fishing industry in terms of which B-BBEE compliance is required.

- 3.4 Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd were not operated in a manner that adheres to basic corporate governance in that no records of meetings were found and financial statements of the entities were not prepared at required intervals in a manner that may be inconsistent with the Companies Act, as amended. The manner in which information regarding the ownership of Umbhalo Trading (Pty) Ltd is reflected is different depending on the document assessed, an indication that the information regarding the ownership of the entity may be manipulated to suit the circumstances of its sole director, Mr CF Hamel and or African Tuna Traders CC. It being noted that the information relating to the shareholders' agreement purported to be concluded reflect Homotsego Trading (Pty) Ltd as having 60% shareholding in Umbhalo Trading (Pty) Ltd contrary to what was submitted to the Department of Agriculture, Forestry & Fisheries.
- 3.5 The B-BBEE Commission also found that the current B-BBEE credentials of Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd do not meet the ownership requirements for B-BBEE compliance.
- 3.6 Further, it is not clear what verification or due diligence was conducted by the Department of Agriculture, Forestry & Fisheries in assessing the black ownership credentials of Umbhalo Trading (Pty) Ltd when allocating the rights to determine compliance with section 10 of the B-BBEE Act, which requires the organ of state to apply the codes of good practice in awarding a licence, or any other authorisations.
- 3.7 Further, the B-BBEE Commission could not determine benefit diversion from operations of Umbhalo Trading (Pty) Ltd to African Tuna Traders CC as African Tuna Traders CC declined to provide its financial statements for this assessment to be performed, thus obstructing and limiting the investigation.
- 3.8 The allegations relating to non-payment of a commission that was due to Mr Phephe Elias Khekhe in terms of his employment contract and the promise allegedly made regarding investment in the Allan Gray Fund for his provident fund are matters that fall outside the mandate of the B-BBEE Commission, and have therefore not been considered.

- 3.9 The B-BBEE Commission may, if it deems it appropriate, resolve a complaint lodged with it through alternative dispute resolution mechanism as permitted in terms of regulation 15 (11) of the B-BBEE Regulations.
- 3.10 The B-BBEE Commission is required in terms of section 13J (5) of the B-BBEE Act to refer a matter that it has investigated to the National Prosecuting Authority or the appropriate division of the South African Police Service, if it is of the view that it involves the commission of a criminal offence in terms of the B-BBEE Act or any other law.
- 3.11 The B-BBEE Commission is concerned about the use of black people's credentials to secure the fishing rights without the corresponding participation and economic benefits in the entities, Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd, which were clearly created to facilitate the benefits of the fishing rights in question to African Tuna Traders CC, a wholly white owned entity.

4 Recommendations of the B-BBEE Commission

- 4.1 Based on the findings outlined above, following consideration of responses received from the respondents, the B-BBEE Commission may take any or all of the actions below in accordance with the provisions of the B-BBEE Act:
- 4.1.1 Initiate criminal charges against Umbhalo Trading (Pty) Ltd, Mr CF Hamel and JR van Breda on the basis of B-BBEE fronting and misrepresentation of the entity's B-BBEE status through the creation and/or operation of Umbhalo Trading (Pty) Ltd and Homotsego Trading (Pty) Ltd by referring this matter to the appropriate division of the South African Police Service and/or the National Prosecuting Authority, in terms of section 13J (5) of the B-BBEE Act, in their respective capacity as natural person and juristic person for contravention of section 13O(1)(a) and (c)- (d) of the B-BBEE Act, and any other law;
- 4.1.2 institute proceedings in court for an order to restrain the apparent breach of the B-BBEE Act, including fronting and misrepresentation of the B-BBEE status and/ or to obtain appropriate remedial relief, as provided for in section 13J (4);

- 4.1.3 refer findings to the Department of Agriculture, Forestry & Fisheries to consider initiating the withdrawal of the rights issued to African Tuna Traders CC and/or Umbhalo Trading (Pty) Ltd in terms of section 13A of the B-BBEE Act, without prejudice to any other remedy they have in law;
- 4.1.4 refer findings to National Treasury for the purposes of invoking the processes in the Preferential Procurement Policy Framework Regulations, as amended, relating to submission of false or misrepresented information in respect of B-BBEE status and fronting practice to consider listing African Tuna Traders CC and Umbhalo Trading (Pty) Ltd as restricted suppliers, and further for purposes of entering, Mr Hamel Christopher Fergus and African Tuna Traders CC and Umbhalo Trading (Pty) Ltd in to the register of tender defaulters in terms of the provisions of section 13P of the B-BBEE Regulations so that they are barred from contracting or transacting any business with an organ of state or public entity for a period of 10 (ten) years upon conviction thereof;
- 4.1.5 refer the matter to the Companies and Intellectual Property Commission to consider whether an investigation is warranted into the affairs of African Tuna Traders CC, Umbhalo Trading (Pty) Ltd, Homotsego Trading (Pty) Ltd, and ADR Fishing (Pty) Ltd, as well as the conduct of Mr CF Hamel and Mr JR van Breda as the members and/or directors in the respective entities for compliance with the Companies Act, as amended, and the Close Corporations Act, as amended; and
- 4.1.6 in light of the inconsistency in the financial information and the absence of financial statements in regard to the entities, refer the matter to South African Revenue Services for possible investigation of the tax affairs of African Tuna Traders CC, Umbhalo Trading (Pty) Ltd, Homotsego Trading (Pty) Ltd and ADR Fishing (Pty) Ltd and Mr CF Hamel and Mr JR van Breda for compliance with the tax laws.
- 4.2 Given that the matter relates to fishing rights allocated by the Minister of Agriculture, Forestry & Fisheries, the B-BBEE Commission must refer the report and its findings to Minister of Agriculture, Forestry & Fisheries and the relevant Portfolio Committee to consider this matter and other rights allocated in the fishing industry and determine if any steps should be taken in accordance with the laws governing the allocation fishing rights to prevent similar occurrences in the future.

4.3 Therefore, the B-BBEE Commission has communicated its final findings to the respondents and complainant in writing in terms of regulation 15 (12) (a)-(b) of the B-BBEE Regulations and thus resolved to proceed to publish the findings in a manner that it deems appropriate, which includes its website, in line with section 13J (7) (a) of the B-BBEE Act in the interest of the public.

5. *Implementation of recommendations*

5.1 Reference to 'days' in the recommendations above means calendar days unless stated otherwise. The B-BBEE Commission may adjust timelines as may be necessary to give effect to the recommendations. No remedial recommendations were included given the nature of this matter.

6. *Status of this publication*

6.1 This publication is prepared only for the purpose of publishing the findings and recommendations of the B-BBEE Commission on this matter in the interest of the public, but does not constitute an investigation report in regard to this matter.

7. *Conclusion*

7.1 The B-BBEE Commission has taken all due care in preparing this publication, and should there be any errors you wish to highlight or should you require any clarity regarding the contents of this publication, please do not hesitate to contact us immediately.

7.2 This publication will also be available on the website of the B-BBEE Commission from the date of its release and it will be circulated to the public through channels that the B-BBEE Commission deems fit.

7.3 For any queries or further clarity on this publication, kindly feel free to contact us at the following contact details:

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