

Implementation of Broad-Based Black Economic Empowerment in construction: A South African metropolitan area study

Peer reviewed and revised

Abstract

The institution of Broad-Based Black Economic Empowerment (BBBEE) has had an impact on the economy in South Africa. Due to its extensive reliance on government procurement, BBBEE has had a substantial influence on the construction industry in terms of transformation imperatives. Although much has been achieved in the transformation of the sector, its empowerment initiatives are generally deemed to be less effective. This argument can be attributed to the impediments encountered by industry stakeholders, when implementing BBBEE. The central subject examined in this study pertains to the BBBEE implementation challenges in South African construction. In order to get to the depth of the identified issues in the reviewed literature, the qualitative method was employed for primary data collection. Eleven interviews were conducted with management representatives of major construction firms in the Nelson Mandela Bay Metropolis, through the use of a brief questionnaire and an interview protocol. The empirical findings that emanated from the study show that most of the respondents were aware of the challenges associated with BBBEE implementation in the construction sector. However, very few are presently addressing the difficulties. This lack of action frequently promotes the exploitation of BBBEE by concerned parties. This exploitation leads to unethical procurement practices in the form of 'fronting'. Based on the literature reviewed and the data that were collected, it appears that deterrents must be addressed before the implementation of the BBBEE initiative can begin to yield the desired benefits for all concerned parties in South African construction.

Keywords: Construction, empowerment, ethics, transformation, South Africa

Abstrak

Die instelling van Breë Basis Swart Ekonomiese Bemagtiging (BBSEB) het 'n impak op die Suid-Afrikaanse ekonomie. As gevolg van sy uitgebreide afhanklikheid van die regering het BBSEB 'n wesentlike invloed op die konstruksiebedryf veral in terme van transformasievereistes. Alhoewel daar al baie bereik is in die transformasie van die sektor, is die bemagtigingsinisiatiewe minder effektief.

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Hierdie argument kan toegeskryf word aan die struikelblokke wat ondervind word deur belanghebbendes in die bedryf met die implementering van BBSEB. Die sentrale onderwerp wat in hierdie studie ondersoek is, handel oor implementeringsuitdagings van BBSEB in die Suid-Afrikaanse konstruksiebedryf. Om die diepte van die geïdentifiseerde sake in die literatuurstudie te kon verkry, is van die kwalitatiewe metode gebruik gemaak om primêre data te versamel. Elf onderhoude is gevoer met bestuursverteenwoordigers van groot maatskappye in die Nelson Mandela Baai-Metropool deur die gebruik van 'n kort vraelys en onderhoudvoeringprotokol. Die empiriese bevindinge uit die studie toon dat die meeste van die respondente bewus was van die uitdagings wat verband hou met die implementering van BBSEB in die konstruksiesektor. Daar is egter min aanduiding van die aanspreek van probleme. Hierdie gebrek aan optrede bevorder dikwels die uitbuiting van BBSEB deur die betrokke partye. Hierdie uitbuiting lei tot onetiese verkrygingspraktyke in die vorm van 'verenigde fronte'. Gebaseer op die literatuur wat geraadpleeg is en die data wat ingesamel is, blyk dit dat afskrikmiddels aangespreek moet word vóór die implementering van die SEB-inisiatief kan begin om die verlangde voordele vir alle die betrokke partye in Suid-Afrikaanse konstruksie te lewer.

Slutelwoorde: Konstruksie, bemagtiging, etiese, transformasie, Suid-Afrika

1. Introduction

Broad-Based Black Economic Empowerment (BBBEE), previously known as Black Economic Empowerment (BEE), is a critical variable that influences the macro business environment in which construction organisations operate in South Africa (Bosch, Tait & Venter, 2006: 62-66). The impact of BBBEE on White-owned and/or controlled firms and Non-White firms in the construction sector is notable. According to Jack (2007: 1-4), White and Non-White individuals go through different experiences when confronted with BBBEE initially. White business executives generally undergo phases of denial, anger, bargaining, depression and acceptance, whereas their Non-White counterparts go through stages of innocence, pain, knowledge, action and wisdom (Jack, 2007: 1-4). The journey still does not stop there, but continues with both races entering a chapter of improving their understanding of BBBEE and enhancing their comprehension of an array of prescribed non-sector- and sector-oriented empowerment legislation and regulations. The most challenging moment of the entire process, however, materialises once the formulation of agreements and the implementation of BBBEE commences (Jack, 2007: 1-2). This is when parties are primarily confronted with a multitude of corporate difficulties that foster the exploitation of BBBEE, and then escalate the propensity to engage in unethical procurement practices. Hence, BBBEE can be likened to the "defining business issue of our time" in the South Africa (Woolley, 2005: 11).

A brief overview of the origin of the BBBEE initiative will put the discourse in context. In 1994, the first democratically elected government in South Africa inherited an economy in distress. The country was ranked as one of the most unequal in the world with respect to income and wealth distribution. Between 1990 and 1994, the country achieved one of the highest overall population Gini coefficients of 0.67 in the world (Hofmeyer, 2008: 73). These problems predominantly stemmed from the former racially segmented economy in South Africa. Black (Non-White) participation in economic activities was limited, and their inferior skill sets restricted access to technological and professional jobs (Department of Trade and Industry [DTI], 2003: 7). The majority, therefore, had little and/or no access to participation in the economy, until the beginning of democracy. It can thus be argued that the need for economic transformation was crucial for South Africa. The imbalances of the past had to be rectified, a more equal and prosperous society for the citizenry had to be created, and economic growth had to be ensured for poverty alleviation purposes.

For these reasons, the government embarked on the enactment of a string of empowerment-aligned legislation such as the Restitution of Land Rights Act of 1994; the National Empowerment Fund Act of 1998; the Employment Equity Act of 1998; the Competition Act of 1998; the Skills Development Act of 1998; the Skills Development Levies Act of 1999; the Preferential Procurement Policy Framework Act of 2000, and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, along with numerous other acts, policies, strategies and programmes, all of which had a direct impact on the economy (DTI, 2003: 9-11). Even though the government was in the process of transforming South Africa's economic landscape, Black business became frustrated with the state's approach to, and pace of economic reform over time. They were dissatisfied with the manner in which the White-owned and/or controlled firms (which were in the majority) in the private sector were implementing economic empowerment. This ultimately resulted in the formation of the Black Economic Empowerment Commission (BEECom) in 1998.

With the release of the BEECom report in 2001, an all-encompassing national strategy with regard to transformation was suggested. It went further and called on government's increased proactive stance in the process and for empowerment to become more redistributive (Patel & Graham, 2012: 195). According to Jack (2007: 13), this may further have occurred since a perception existed that only a few Black, politically connected elitists benefited from BEE, whilst the majority of Blacks were no better off than before. This dissatisfaction

resulted in a call for a shift away from narrow BEE towards BBBEE to include everyone in the mainstream economy. The government thus continued to illustrate its commitment to transformation with the proclamation of the BBBEE Act of 2003, along with the DTI's BBBEE Codes of Good Practice published in 2007. In 2011, both the new Preferential Procurement Regulations (PPR) and the proposed BBBEE Amendment Bill were released by the National Treasury (NT) and DTI, respectively. This was followed, in 2012, by the publication of the DTI's proposed revised BBBEE Codes of Good Practice to ensure that the economy becomes more inclusive (SAPA, 2012: online). In the context of this discourse, all Non-White entities and/or individuals shall be referred to as Black entities and/or individuals.

1.1 The research objective

The purpose of the phenomenological study was to analyse perceptions of the B-BBEE framework in the construction sector. In particular, the obstacles associated with the implementation of BBBEE by construction firms formed the focal point of the study. The objectives of the study were to:

- Explore the composition of the BBBEE framework for the construction sector;
- Identify the dominant institutional impediments facing contractors when correctly implementing BBBEE;
- Determine how construction firms and related entities exploit the Generic Construction Scorecard, and
- Discover and assess the most prevalent unethical practices encountered in the course of business relative to BBBEE in the construction sector.

However, because of logistics and the level at which the study was conducted (BSc honours level), the scope of the study was confined to active contractors; of any class; whose annual turnover is greater than R35 million; who have a Construction Industry Development Board (CIDB) grading designation of between six and nine inclusive, and who have premises and operate in the Nelson Mandela Bay Metropolis. The participants were further required to be in possession of a valid Generic Construction BBBEE Status Level Certificate for the 2012/2013 financial year as issued by a South African National Accreditation System (SANAS)-accredited verification agent in accordance with the provisions of the BBBEE Codes of Good Practice.

1.2 The research problem and questions

The current literature with regard to the problem is considered deficient, as the closest research with any relation to the study addresses corporate social responsibility and public sector procurement in the construction sector (Bowen, Edwards & Root, 2009). Most of the published research related to BBBEE that could be traced was of a more generic nature and not sector specific. The studies, to mention a few, generally focused on how government utilised procurement as a tool to promote BBBEE (Bolton, 2006), the integration of employment equity and BBBEE (Horwitz & Jain, 2011, and the status of BBBEE beneficiaries (Patel & Graham, 2012).

This research is considered meaningful as it will attempt to increase awareness, create dialogue and provide a greater understanding of how the problem is anticipated in practice (Barritt, 1986 in Creswell, 2012: 133). As a current research gap relative to the problem exists, further research, specifically with a qualitative methodological approach, will essentially contribute to an already limited body of sector-specific knowledge concerning BBBEE.

To be succinct, although all sectors across corporate South Africa are affected by BBBEE, this study specifically focussed on its effect in the construction sector. The problem statement, therefore, is that: *positive exploitation of BBBEE by contracting entities suffers implementation problems*. To further examine the postulated problem in a rigorous manner, four research questions were formulated. According to Creswell (2012: 138), the aim in the development of qualitative research questions is to narrow the purpose of a study to various inquiries that will be addressed in the research. The research questions formulated for this study include:

- How did the generic framework for BBBEE affect the construction industry?
- What commercial impediments affect the implementation of BBBEE in the construction sector?
- How do construction organisations and stakeholders misrepresent BBBEE?
- What forms of improper conduct are associated with BBBEE implementation in the construction industry?

2. Literature review

2.1 Empowerment in the construction sector

The majority of firms participating in the construction industry embraced and adhered to the transformation-oriented legislation applicable to the sector. The industry went a step further with the formation of the Construction Education and Training Authority (CETA), in terms of the Skills Development Act, and more importantly, the enactment of the CIDB Act of 2000. Both interventions served as the construction sectors' first formal approach to specific industry empowerment-aligned measures. CETA's core focus is to provide unskilled human resources, most of which are Black (Non-White), with quality skills development and training. The CIDB, on the other hand, concentrates on the total transformation of the construction industry and emphasises the importance of developing Black-owned and -controlled enterprises in the sector. The CIDB Act clearly indicates that the purpose of the body with regard to empowerment is to enhance economic development; advance sustainable sector growth; grow and support the emerging sector; promote industry labour absorption; improve labour relations, and encourage human resource development (South Africa, 2000: 6-10).

Between 2007 and 2009, many construction firms engaged with the BBBEE Codes of Good Practice and had their commitment to transformation measured in terms of the non-sector-oriented Generic Scorecard. During the same period, construction-industry stakeholders showed initiative. They began the development of a transformation charter and a code of good practice for the construction sector, in compliance with sections 9.1 and 12 of the BBBEE Act (South Africa, 2003: 8-10). The industry soon became one of the first sectors to comply with the provisions of this legislation, through the ratification of the Construction Sector Charter and Code in 2007 and 2009, respectively.

The Construction Sector Code objectives are to drastically modify the racial and gender configuration of the industry in terms of ownership and management control; encourage the expansion of employment equity; stop fronting via the use of a sector-specific scorecard; promote the development of Black people, Black women and designated groups' skills; enhance affirmative procurement, as well as develop and support the growth of micro to medium Black enterprises (DTI, 2009: 7). The Code provides a framework for the construction sector to address transformation, enhance capacity

and increase the productivity of the sector to meet world best practice using elements that aim to (DTI, 2009: 5):

- Achieve a substantial change in the racial and gender composition of ownership, control, and management in the sector;
- Promote the effective advancement of employment equity in the sector and adherence to principles of non-racialism and non-sexism;
- Provide to the construction sector the first quantitative method for monitoring and evaluating the progress of an enterprise towards BBBEE and thereby contribute to ending the malpractice of fronting;
- Address skills development in a manner that accelerates the advancement of Black people, Black women and designated groups with a particular emphasis on learnerships, technical and management training;
- Increase the procurement of goods and services from BBBEE enterprises and standardise preferential procurement methodology, and
- Enhance entrepreneurial development and promote the sustainable growth of micro, medium and small BBBEE enterprises.

The Code shall apply to a measured entity that conducts any construction-related activities that form a major percentage of its annual turnover. In the event that a measured entity derives an equal percentage of its turnover from construction-related activities as well as other industry-related activities, such measured entity will have the choice as to which sector code will apply. After the policies were gazetted, both became legally binding on all organisations in the construction sector that desired to conduct business with the state (DTI, 2009: 3; Jack, 2007: 9). In addition, the Construction Sector Code called for the embodiment of the Construction Sector Charter Council as custodian of the implementation of transformation in the industry and to oversee and monitor its progress (DTI, 2009: 7). For instance, the Generic Construction Scorecard for contractors consists of three core elements and seven elements, as indicated in Table 1. A weighting is allocated to each of the elements and totals 100. The general principles for assigning the weighting for ownership allocate six points for voting rights for Black people, twelve for economic interest for Black people, and seven points for realisation concerning ownership fulfilment and net value. The general

principles for measuring management control assign five points each for board participation and senior top management for Black people. With respect to employment equity, the general measuring principles entail the employment of Black people in senior, middle and junior management levels in contracting and consulting firms (9.5 points) and people with disability that are employed gives a contractor .5 points. Skills development expenditure, learnership, bursaries and mentorship constitute the 15 points allotted to the skills development element. The twenty points allotted to preferential procurement is distributed among percentage of BBBEE spent among all suppliers to an entity (12 points), BBBEE spent on Qualifying Small Enterprises (QSE) (3 points), suppliers that are 50% Black owned and suppliers that are 30% Black women owned. Out of the fifteen points allotted to enterprise development, five is awarded for enterprise development programme and ten for enterprise development contributions. Five points is awarded for the socio-economic development element when the average annual value contributed by the entity is measured.

After the release of the Construction Sector Code, the majority of industry organisations participated in the transformation of the sector by acquiring their BBBEE Status Level Certificates as the evidence of their commitments to empowerment. In terms of the Construction Sector Code, contractors with an annual turnover in excess of R5 million and less than or equal to R35 million are considered as QSE and have to select four of the seven elements for fulfilment purposes. Firms with a turnover of greater than R35 million per annum are required to comply with all seven elements (DTI, 2009: 9). Contractors with an annual turnover of less or equal to R5 million are regarded as Exempted Micro-Enterprises (EME) and are required to obtain a letter from an auditor, accounting officer or verification agent as proof of their standing (DTI, 2007: 9).

Table 1: Generic Construction Scorecard for contractors

<i>Core element</i>	<i>Elements</i>	<i>Weightings</i>
Direct empowerment	Ownership	25
	Management control	10
Human resource development	Employment equity	10
	Skills development	15
Indirect empowerment	Preferential procurement	20
	Enterprise development	15
	Socio-economic development	5

Adapted from DTI, 2003: 14; DTI, 2009: 9

Since 2007, construction industry enterprises have utilised their BBEE Status Level Certificates when tendering for contracts from certain public and private sector organisations, which apply affirmative procurement measurements. The majority of public-sector tenders between 2001 and 2011, however, applied the historically disadvantaged individual (HDI) and other specific goal requirements with regard to transformation.

This practice ended in 2011, when BBEE Status Level Certificates replaced the former arrangement through the alignment of the PPR and BBEE (Naidoo, 2011: online). Preferential procurement points are, therefore, now awarded according to the BBEE Status Level of contributors (Table 2). Preferential procurement points earned by contractors who practise affirmative procurement in terms of the Generic Construction Scorecard, however, are dependent on the BBEE Status Levels of the suppliers and service providers their organisations utilise (Table 3). In terms of applications of the statistics on Tables 2 and 3, bidders scored a maximum of 80 or 90 points for price, and 20 or 10 points for Black ownership and for promoting specified RDP goals. The points for price have remained unchanged, while bidders can score up to 20 or 10 points for their B-BBEE status level of contribution. All bidders are required to submit BEE rating certificates, issued by either verification agencies accredited by SANAS or by registered auditors approved by the Independent Regulatory Board for Auditors (IRBA). It is notable that, previously, the threshold value for the distinction between the 80/20 and 90/10 preference point system was R500.000. This has now been increased to R1 million to stimulate the development of small enterprises.

Table 2: BBEE status versus preference points

<i>B-BBEE status level of contributor</i>	<i>Number of points in terms of preference point systems</i>	
	<i>80/20</i>	<i>90/10</i>
1	20	10
2	18	9
3	16	8
4	12	5
5	8	4
6	6	3
7	4	2
8	2	1
Non-compliant contributor	0	0

Adapted from NT, 2011: 9-10

Table 3: BBBEE Status versus procurement tendering points

<i>B-BBEE status level of suppliers/service providers</i>	<i>Generic Construction Scorecard points requirement for suppliers/service providers</i>	<i>B-BBEE preferential procurement recognition level of suppliers/service providers</i>
1	≥ 100 points	135%
2	≥ 85 < 100 points	125%
3	≥ 75 < 85 points	110%
4	≥ 65 < 75 points	100%
5	≥ 55 < 65 points	80%
6	≥ 45 < 55 points	60%
7	≥ 40 < 45 points	50%
8	≥ 30 < 40 points	10%
Non-compliant supplier/ service provider	< 30 points	0%

Source: Adapted from DTI, 2007: 5

2.2 BBBEE-related challenges in the construction sector

The execution of BBBEE by a firm in terms of the Construction Sector Code is extremely complex. The process is highly technical. Numerous factors, with regard to the growth and sustainability of a firm, need to be taken into account before empowerment commences (Jack, 2007: 115). This is generally accomplished through the development and approval of a comprehensive transformation strategy by the board and top management of a firm (Woolley, 2005: 31). These strategies should address the business impediments that generally affect the seven (7) elements of the Generic Construction Scorecard for contractors in order to establish how these barriers can be mitigated. Issues to be considered are, among others, related to ownership, management control, employment equity, skills development, preferential procurement, and enterprise development.

2.3 Ownership-related barriers

Ownership, as an element of the Generic Construction Scorecard, aims attention at the realised level of economic interest and voting rights assumed by Blacks (including women and groups), relative to the organisations in which they participate (DTI, 2009: 11). The transformation of ownership is generally regarded as the most technical and strenuous of all elements to implement. When contractors initiate addressing their shareholding, they more than often struggle to locate suitable Black participants, in order to add

value to and complement the character of their organisations. Corporations generally opt to enter into shareholding agreements with experienced, Black entrepreneurs, with some form of political clout and influence (Masondo, 2010: online). Several firms, however, decide rather to form partnerships with B-BBBE ownership structures or to establish their own employee ownership schemes, both of which are difficult to administer. When construction firms and Black participants enter into shareholding contracts, large amounts of transactional costs are incurred (Cargill, 2010: 39). Blacks generally do not have access to great sums of capital and have to obtain finance for these dealings (Foxcroft, Wood, Kew, Herrington & Segal, 2002: 32). Organisations are also typically required to sell their shares to Black parties at discounted rates, thereby foregoing value to ensure feasible transactions (Ward & Muller, 2010: 29). Whilst assisting their Black participants to source credit, contractors are mainly required to enter into high-risk agreements with financial institutions, in order to provide security and guarantees for such loans (Cargill, 2010: 38). The most frequent criticism of ownership transformation is the realisation of ownership fulfilment. Organisations have to ensure that the debt incurred by their Black shareholders is settled aggressively via measures such as the declaration of dividends. When such firms fail to adhere to the Construction Sector Code's regulations with regard to realisation, their ownership score would deteriorate. This practice is considered by many as contrary to the spirit of transformation, as contractors have very little control over economic cycles, and are penalised during periods when they are most reliant on government tenders to remain in operation (Cargill, 2010: 40-42).

2.4 Management control obstacles

The management control element of the Generic Construction Scorecard focuses on board participation and voting rights held by Black people, along with their representation at top-management level within a firm (DTI, 2009: 12). Organisations that commence with the transformation of their boards and executive management structures generally struggle to find adequately skilled and experienced Black candidates, not to mention suitable Black females (Independent Online, 2012). Those contenders that can be found, are limited in number and generally come at great expense, placing additional pressure on the management of firms' remuneration bills. Due to the high demand for these candidates, retaining them for a relatively long period of time is extremely unwieldy (Jack, 2007: 114-119). Recruiting compatible applicants, who add the required value

to an organisation, is also very challenging. Skilled Black entrants struggle to gain the relevant experience and expertise required to serve as executives. Business Unity South Africa (BUSA) has, therefore, proposed a strategy whereby directors, who are planning to retire, integrate the mentorship of suitable Black hopefuls 18 months prior to their retirement. BUSA believes that their strategy will address the under-representation of Blacks, as Black candidates will serve as 'shadow directors' to their mentors (SAPA, 2010: online).

2.5 Employment equity problems

Employment equity, as an element of the Generic Construction Scorecard, concentrates on the representation of Blacks (including black woman and Black disabled persons) along the junior-, middle- and senior-management levels of the human resources component of a firm (DTI, 2009: 13). Management control and employment equity share many of the same problems, such as attaining and retaining the right Black suitors and absorbing the high cost associated with their employment. With the introduction of employment equity in 1998, most construction organisations experienced great challenges in ensuring the transformation of their workforce. Due to the nature of the construction industry, one of the main problems was, and still is, the recruitment of females, especially Black female employees (Jack, 2007: 122). Although it is undeniable that women's involvement in the sector has increased, many of them have opted to initiate their own enterprises as entrepreneurs, instead of becoming employees of other firms. Various firms also struggle to find qualified and experienced Blacks to fill management positions. Black employees have similarly experienced countless problems when engaging with employment equity. Blacks often struggle to adapt to the culture and working environment of the firms for which they work (Jack, 2007: 128). In many instances, they also struggle to handle the pressure and stress associated with their promotion as well as the extra hours needed to fulfil the responsibilities such positions demand. Blacks have also voiced their unhappiness of being exposed to manipulation, victimisation, tokenism and marginalisation in the organisations in which they work (Atkinson, Coffey & Delamont, 2003 in Nzukuma & Bussin, 2011: 6). They were of the opinion that their contributions to organisations are seldom seen, appreciated and/or rewarded (Cruz, 2006: 24). Many of them find their positions unsatisfying, as they are not allocated interesting assignments that require higher levels of responsibility (Nzukuma & Bussin, 2011: 5).

2.6 Skills development predicaments

This Generic Construction Scorecard element focuses on the skills development of Black employees, with specific reference to females, disabled persons, learners and students through programmes, bursaries and mentorships (DTI, 2009: 15). The process of recovering money from CETA is, however, extremely technical in nature. Corporations generally opt to appoint service providers to administer these claims. In addition, few firms obtain an immediate return on the training of their employees and often struggle against great setbacks, such as losing highly trained and skilled Black employees to competitors or by having their ex-employees becoming their new competitors (Nzukuma & Bussin, 2011: 5). It is important for firms to liaise with their employees, in order to establish whether they are truly interested in attending certain training courses. This will avoid poor skills development investment (Jack, 2007: 147). Contractors should avoid expecting and pressuring Black employees to conduct miracles overnight with their new skills.

2.7 Preferential procurement complications

The preferential procurement element of the Generic Construction Scorecard concentrates on the growth of empowered and Black enterprises by motivating contractors to buy from, or make use of QSE, EME and, to a large extent, Black-owned and Black female-owned suppliers and service providers (DTI, 2009: 19). Locating Black businesses in certain monopolistic markets and convincing existing non-empowered suppliers and/or service providers to transform adds to the frustration experienced by the procurement departments in contracting firms (Jack, 2007: 165-166). In certain instances, Black enterprises struggle to stay afloat due to cash-flow problems and declining business. This generally occurs when these businesses, due to capacity problems and/or ignorance, provide firms with inferior goods and do not deliver on time and/or with excessive pricing.

2.8 Enterprise development impediments

Enterprise development, as an element of the Generic Construction Scorecard, focuses on the advancement of Black and Black female-owned businesses, using enterprise development programmes managed by established organisations (DTI, 2009: 20). Cargill (2010: 63) explains that many organisations do not have the necessary skills and/or capacity to develop emerging Black enterprises. She also states that most small to medium corporations struggle to run their own businesses and it is, therefore, impossible to expect them to

assist start-up firms. In addition, organisations are indirectly forced to outsource their obligations with regard to enterprise development, in order to continue with their own business operations. Blacks often struggle to find partners who are prepared to admit them as their developing enterprise.

2.9 BBBEE-related ethical issues in the construction sector

The 2012 Transparency International (TI) report noted the questionable practices on the rise in South Africa. The study measures the perceived levels of public sector corruption worldwide. In the report, South Africa ranked 69th out of 176 countries, with a score of 43 out of 100. This rating indicates a 14-place drop since 2009, when South Africa ranked 55th out of 180 countries, with a score of 4.7 out of 10 (TI, 2009). It was evident from the research that unethical practices in South Africa have increased substantially.

According to Stansbury (2005: 37-39), the features that make construction contracts mostly prone to corruption include the size of projects, uniqueness of projects, involvement of government, high number of contractual links, great number of phases, complexity of projects, lack of frequency of projects, concealment of work, and culture of secrecy. For example, the CIDB (2011: iii) noted that corruption is increasing rapidly in South Africa. The CIDB (2011: iii) report goes further to claim that "South Africa is reaching a tipping point beyond which it may be very difficult to reverse corruption in the public sector". The study further mentioned that barriers relative to contractor procurement in the public sector include "matching a contractor's capabilities to the requirements of the project", political interference, and cronyism (CIDB, 2011: iii).

Furthermore, the BBBEE Amendment Bill (DTI, 2012: 3) defines fronting as "a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of ... or the implementation of any of the provisions of' the BBBEE Act". This proposed piece of legislation aims to have fronting regarded as an offence, whereas it is currently considered to be fraud (Paton, 2012: online). The employment of fronting is not bound to any particular race. The notion that fronting can purely be effected by White organisations and/or persons is incorrect (Motau, 2012: online). According to Jack (2007: 203-205), fronting comes in different forms such as opportunistic intermediaries, benefit deviation (transfer pricing), window dressing and thin capitalisation. Other types of fronting include fronts on paper, company fronts, fictitious companies, and fronts in joint ventures (Moloi, 2006: 32).

In brief, the reviewed literature shows that the implementation of the BBBEE in the construction sector is subject to a number of irregularities. The misuse of BBBEE is not limited to any race, gender, ability, culture, sector, organisation or place. The exploitation of BBBEE occurs along all elements of the Construction Sector Code. Some forms of abuse are more visible than others. As an illustration, the construction industry has, for over a decade, been subjected to numerous media exposés relating to the manipulation of transformation by contractors and empowerment entrants. Problems pertain, among others, to the exploitation of ownership structures, manipulation of employment equity, incorrect use of skills development, incorrect application of preferential procurement, and improper application of enterprise development.

3. Research methodology

The selected research method for this study was qualitative. The qualitative inquiry approach employed in this research was phenomenology. This technique was specifically chosen, as it was considered the most appropriate and reliable, especially considering the inherent sensitivity surrounding the research problem. Leedy & Ormrod (2010: 141) define phenomenology as a study that endeavours to understand several individuals' perceptions and comprehension of a phenomenon. Creswell (2012: 78) noted that groups partaking in phenomenological research can vary between 3 to 4 and 10 to 15 individuals.

The research sample was made up of interviewees who represented participating construction firms. Initially, 15 qualifying construction firms were identified by utilising the CIDB online Register of Contractors. All 15 potential participants had a CIDB grading designation of between 6 and 9, were in possession of a valid Generic Construction BBBEE Status Level Certificate, and operated from premises situated in the Nelson Mandela Bay Metropolis. However, only nine of the 15 qualifying construction firms agreed to take part in the study, with a total of 11 participants as representatives. Confidentiality agreements were signed with all the interviewees due to the sensitive nature of the enquiry.

Data that were relative to demographics in the form of management levels and job titles of the interviewees were derived from section 1 of the short questionnaire. Information with regard to the CIDB grading designation and BBBEE Status Contribution Levels was deduced from Section 2 of the same questionnaire. The interviewees were three women and eight men aged between 32 and 58. None of

the participants suffered from a disability. Ten of the interviewees were White and one was Coloured in terms of race. Education levels ranged from a senior certificate to a postgraduate diploma, and construction industry experience ranged from two to thirty-seven years. The management levels of interviewees varied from junior management to board and senior top management, with job titles ranging from administrative assistant to managing director.

The information, gathered during the interviews, was scrutinised based on Moustakas' (1994 cited in Creswell, 2012: 193-194) approach to phenomenological analysis. Transcripts were examined to select major statements. These statements, all of which were treated as being of equal value, were then listed accordingly. Following this step, all repetitive and overlapping statements were removed. The remaining notable statements were then grouped into the same six themes, as in the interview protocol. Textural and structural descriptions, relative to the significant statements, were then drafted, explaining what and how participants/interviewees experienced the phenomenon. The process was finalised with the development of a composite description, incorporating the textual and structural descriptions, in order to exhibit the crux of the experience of the phenomenon. The interview protocol was dominated by themes related to the research questions of the study. The layout of the interview protocol is shown in Table 4.

Table 4: The layout of the interview protocol

<i>Number</i>	<i>Theme</i>	<i>Question</i>
1	Reasons for BEE	1-2
2	Statutory regulation of construction sector transformation	3-5
3	Transformation of the construction industry	6-7
4	Impediments affecting BBBEE in the construction sector	8-10
5	Exploitation of BBBEE in the construction industry	11-13
6	Improprieties related to BBBEE in the construction sector	14-17

3. Results and discussion

3.1 Reasons for BEE

A contract director indicated that BEE was a direct result of the "plight of the previously disadvantaged". A few suggested that the "history of the country", the "inequalities that existed" and the "exploitation of Blacks" contributed to its birth. Another stated that a "change in political power", after the end of apartheid, gave rise to a "government that saw things differently". The majority of the

participants agreed on the importance of the implementation of BEE by the state. Participant 4 attributed the need for BEE to the "inequalities" and "unequal economy" that existed prior to 1994. An additional perception was that to "correct the imbalances of the past" and to empower people, the redistribution of wealth was imperative to "create a sustainable society" and to "level the economic playing field". Most of the interviewees were of the opinion that BEE was necessary to provide Blacks with new opportunities, to create access to the corporate world, and to ensure their development, by involving them in the mainstream economy.

3.2 Statutory regulation of construction sector transformation

In this theme, respondents focused on the core characteristics of the industry and the empowerment-oriented legislation that affected it. Participant 6 stated, "I feel that government saw our industry as an easy point of entry as they are our largest client". Other respondents attributed the state's extensive emphasis on the transformation of the construction industry to the facts that the sector is the second largest employer in the economy that it is highly labour intensive and employs people with the least amount of skills. A managing director, with an honours degree, believed that the industry's relative stability and capability to "provide employment to a large number of job seekers in a short period of time" also justified the government's stance on the matter.

The introduction of empowerment-oriented legislation had an undeniable impact on the construction sector. A woman, with 25 years' experience in the sector, mentioned that, when transformation commenced, contractors had to either "sink or swim". She continued by explaining that companies had to adhere to the said laws promptly, in order to avoid being closed down. This resulted in organisations shifting their focus from production to complying with government's red tape. Three board members viewed the acts as an added "tax and cost" to the construction industry. Participant 7 claimed that employment equity has resulted in the non-deliberate employment of highly skilled, yet inexperienced, Blacks in top positions. Some were also of the opinion that employment equity brought about the correction of equity profiles at lower management level and led to the high engagement of Black women within the industry.

A respondent made it clear that his impression of the Skills Development Act was that it inherently produced meagre training programmes. The interviewee continued to argue that, prior to the promulgation

of the aforementioned Act, it generally took artisans approximately four years to qualify as tradesmen, in comparison with the current period of six months. The average age of a qualified tradesman, according to the respondent, currently stands at approximately 60 years. Both financial managers concurred and added that, although it pays for firms to train their Black employees, the majority of training available is “irrelevant”, “non-value adding” and a “waste of time and/or money”. Respondents noted that the PPR has increased the cost of tendering, as tenderers are required to “submit boxes full of documents” at the close of tenders. Participant 2 indicated that, previous to the PPR, a tender usually comprised three pages, which is “a covering letter, one stipulating the price and maybe a third with a condition or two”. The interviewee further pointed out that, under the PPR, tender documents are up to “two to three inches thick”. Two participants expressed the view that the former regulations were “easier” to work with whereas others described the previous system as “ineffective” and “ridiculous”. Another interviewee contended that the regulations ultimately made it obligatory for White construction firms to hand over large portions of their shareholding, along with its control, in order to procure contracts from government. Certain interviewees supported this outlook by revealing that the former PPR purely focused on the “enrichment of a few”, at the cost of the Black majority. A financial director implied that the said regulations brought about a situation where it “came down to choosing between Johnny and Peter to participate in the ownership and control of one’s company”. The new PPR adopted BBBEE as its new approach to preferential procurement. Nine out of the eleven respondents lauded the release of the latest regulations, as they “ensure great accountability”, resulted in “fewer companies closing up shop” and by being more “beneficial” towards Blacks.

3.3 Transformation of the construction industry

Participant 3 reported that a scorecard, more specific to the construction industry, was developed to ensure the removal of constraints experienced by contractors during the application of the Generic Scorecard. Several respondents agreed that the Generic Scorecard did the construction sector “no justice” as it is “unique” in many instances. A postgraduate diploma holder disclosed that the Generic Construction Scorecard places a greater focus on “internships and mentorships” and brought about the review of “sex representation” within the industry.

Interviewees consider the Generic Construction Scorecard as a tool to ensure the “sustainable”, “effective” and “rapid” transformation

of the sector. It was further communicated that the Generic Construction Scorecard promotes the training of employees at management level, the greater use of Black suppliers, and the involvement of a vast number of previously disadvantaged individuals. Participant 8 specified that the development of the CIDB was a "great and sensible idea", as it ensured that contracts were and are awarded to construction firms with the "ability and resources to do the work". This observation was also supported by other respondents. However, two interviewees were highly critical of CIDB officials and referred to them as "uncooperative". Apparently, no single application, relating to a specific construction firm, is ever finalised by one representative. This has resulted in delays and, at times, contractors being "forced to trade" without the necessary CIDB certification.

Criticism of construction industry-related bodies did not stop with the CIDB. An office manager indicated that dealing with CETA is "an absolute nightmare". Their company, therefore, opted to outsource the function of claiming reimbursement from CETA to an external service provider. A managing director, with 27 years' experience in the construction sector, agreed that CETA is "not functioning effectively" and is, therefore, "not fulfilling its purpose". However, three participants revealed that they were aware of the existence of the Construction Sector Charter Council. Participant 8 categorically stated that "they do not have their act together and therefore have not played a role yet".

3.4 Impediments affecting BBBEE in the construction sector

All 11 respondents concurred, with certainty, that the implementation of BBBEE in the construction industry is hindered by commercial impediments. An interviewee summed it up quite thoroughly by proclaiming that there are "major problems". In general, a small number of interviewees noted that the implementation of BBBEE is "highly expensive" and involves a "large amount of paperwork". It was further suggested that many contractors felt excluded, as they had no say in the development of BBBEE.

Participants addressed challenges associated with White-owned construction firms. They focused on six of the seven elements of the Generic Construction Scorecard, except for socio-economic development. In general, respondents perceive that White-owned construction firms find it extremely difficult to locate suitable potential Black shareholders. This was attributed to the facts that very few candidates can adequately contribute to firms, or are in possession

of the required capital for the purchase of shares. Contractors' biggest predicament, relative to ownership, is the tremendous pressure endured while attempting to ensure sustainable growth, which is essential to enable Black shareholders to repay their loans. This sentiment was supported by participant 3, who contended that Black shareholders often default on the repayment of shareholding loans granted by fellow White shareholders in the firms in which they have invested.

There is a lack of highly skilled and experienced top Black managers, especially females, who can function "correctly, properly and appropriately" at board level. An administrative assistant blamed this tendency on the fact that many Black candidates are still in the process of "working their way up" to board level. It was generally agreed that the majority of Black top management candidates come at the cost of a "fortune" and that only a few can "justify" their positions. Only a handful of these candidates were considered as adding the "necessary value" and contributing to the enhancement of company profits, in order not to be regarded as "dead weight". The demand for skilled and professional Black managers exceeds the supply. This was evident in the following responses: "We feel that it is very difficult to find and retain qualified Black talent", and "It is hard to get Blacks with the right qualifications, skills and practical experience to fulfil management positions". Participant 5 claimed that it is extremely difficult to locate "confident" Black female managers who "believe in themselves" and who "take initiative".

A man, with two years' experience in the sector, worriedly implied that the level of South Africa's education has decreased to such an extent that even university students "struggle to read and write even though they have passed grade 12". In addition, an accountant was of the opinion that the current standard of tertiary education does not adequately prepare university graduates for the workplace and that students studying construction-related courses often have very little or no "interest" in their field of study. Companies battle to find suitable Black candidates to train and develop. Respondents also regarded the major costs incurred to up-skill beginners and the scarcity of relevant training programmes as challenges. Various small Black enterprises were identified as incompetent and, due to a "lack of training", their quality standards were referred to as often being "horrendous". They were further accused of frequently charging "inflated prices" and were personified as "fly-by-nighters". A woman expressed her frustration with having to find female Black-owned suppliers. She also complained that White-owned suppliers

were often “uninformed and uneducated”, when it came to BBBEE and, in many instances, they “refused” to transform.

Participant 10 conveyed that it is extremely expensive and nearly impossible to concurrently run a construction firm and develop another small enterprise. Another interviewee added that companies find it troublesome to acquire and maintain a relationship with developing Black businesses, when partnering. The majority of the top managers agreed and stipulated that the owners and top managers of small Black enterprises generally did not have the “required capacity” and could only be assisted to a certain point, as their “mindset” and level of education served as determinants. Many small Black enterprises do not have administrative systems in place, even though they were formerly trained by their development partner. This resulted in construction firms often having to take over the “responsibilities and obligations” of small Black enterprises. Contractors were frequently compelled to “finalise financial statements” of, and to obtain the BBBEE Status Level Certificates for their partners.

Respondents addressed the challenges experienced by Black stakeholders and concentrated on five of the seven elements of the Generic Construction Scorecard, except for skills development and socio-economic development. Participants were unanimous on the notion that the predominant predicament experienced by Black shareholders, when purchasing shares in companies, is access to finance. Participant 5 stated that Blacks frequently experience great resistance when proposing to enter into partnerships with White-owned contractors, as certain firms “would rather close down before selling their shares to Blacks”. A man remarked that potential Black shareholders are repeatedly met with an attitude that White-owned firms will “rather enjoy 90% of a cupcake than 30% of a big cake”.

Participant 6 mentioned that Black directors are usually highly intimidated when appointed to the board of a company, as they feel that they must “prove themselves more than Whites”. Black candidates are often discouraged by not having the opportunity to attend university and by small White-owned organisations “refusing to employ Black people”. They are also regularly subjected to “cultural misrepresentations” and often experience “ill treatment” from their White superiors. Black employees occasionally do not receive adequate training from their White managers, as these persons are fearful of losing their positions in the future. Multiple small Black enterprises struggle to find contractors to assist them in

their development. A single participant inferred that Black suppliers ordinarily “struggle in presenting themselves as professionals”.

3.5 Exploitation of BBBEE in the construction industry

All respondents agreed that BBBEE in the construction sector is being abused. Participant 8 firmly concurred and described the mistreatment of transformation as a “two-way street as both Whites and Blacks” are exploiting it. The misuse of BBBEE by White-owned firms can be attributed to their desperate attempt to enhance their BBBEE status levels. Interviewees responded to the exploitation of BBBEE by White-owned organisations and concentrated on four of the seven elements of the Generic Construction Scorecard, excluding preferential procurement, enterprise development and socio-economic development.

A man, with 13 years’ experience in the industry, opined that many contractors enter into highly “technical shareholding agreements” with Black participants which ultimately result in the latter having “no control” over the firms in which they have invested. Two participants claimed that the aforementioned occurrence did not bring about the transference of wealth and profits to Black shareholders. Vast numbers of contractors manipulate the complement of their boards by “appointing junior managers” who add no actual value as directors. Participant 3 professed that firms regularly, as part of their practice of “window shopping”, “pay Black directors R25.000.00 per month” for attending a board meeting.

A woman, with 9 years’ experience in the construction industry, acknowledged that White-owned companies frequently promote black employees to higher positions, irrespective of whether they are the best candidate for the position. Participant 6 added that the said employees are often not appropriately remunerated and that their performance is not always recognised. A woman, with a national diploma, reported that some contractors engage in “falsifying training certificates” and “proof of payments” made to training companies. A male respondent further accused organisations of purposely sending Black candidates on “irrelevant” training programmes.

The wrongful use of BBBEE by Black-owned firms and stakeholders can be ascribed to their desperate effort to improve their position and participation within the economy. Respondents commented on the exploitation of BBBEE by Black-owned organisations, by focusing on six of the seven elements of the Generic Construction Scorecard, except for preferential procurement. Participant 7

hinted that potential Black shareholders occasionally enter the boardrooms of companies with an attitude of "I know people in high places and can sway contracts in your favour". Others condemned Black shareholders' refusal to pay for shares and not wanting to be involved in the day-to-day management of companies, but still expecting to reap benefits. A man, with 37 years' experience in the industry, noted that, in many instances, Black shareholders would only visit their companies' offices "at the end of the year to collect their R30.000.00 cheque". Another agreed by stating that the alleged shareholders "are just too happy to receive a cheque in the mail without lifting a finger".

Some participants complained of skilled and Black employees who participate in job hopping with job lengths of between "12 to 24 months" on average. They come at a "premium and demand ridiculous" remuneration packages and, when offered "more money", they move from their current employment. Participant 7 admitted that certain Black managers intimidated employers by threatening that they would leave if not provided with a salary increase. A man, with six years' experience in the construction industry, explained that numerous unskilled and inexperienced Black graduates enter the workplace with the "wrong attitude". They were accused of not wanting to "prove" themselves, expecting that, because they are Black, starting at the bottom is not applicable to them. They anticipated immediate placement in management positions. It was pointed out that Blacks, time and again, insisted on taking part in continuous training programmes, thereby failing to fulfil their official duties. Others expressed their dissatisfaction with small Black enterprises that expect their partners to take full responsibility for their businesses in terms of management and administration. Participant 10 stated that non-profit organisations (NPOs), in many instances, abused the contributions given to them by contractors. It was claimed that NPOs were "bled dry by their trustees", as funders generally do not have the time or resources to ensure that the contributions ultimately reach the intended beneficiaries.

3.6 Improprieties related to BBBEE in the construction sector

The majority of the participants agreed that unethical business practices in the industry have increased since the introduction of BBBEE, with one interviewee instantly responding, "Absolutely, there is no doubt about that!" In general, respondents regarded BBBEE as a facade behind which contractors and other stakeholders could hide their questionable conduct. It was explained that it was behind this veil that companies engaged in dubious methods, as they were

being “forced” to improve their Generic Construction Scorecards in order to obtain government tenders. Not engaging in these practices was considered, by some, as giving rise to the possible “closure” of organisations and the further repercussion of having to “retrench” employees. One male participant argued that BBBEE has turned the construction industry into a “political playing field”, where knowing someone in government signified the attainment of possible wealth.

Even though no denial existed that these practices occurred in the private sector, all of the interviewees were of the opinion that the public sector was by far subject to the highest levels of suspicious activities. Two respondents furthered this opinion by claiming that it was evident in the “daily news” and that the public sector was “more concerned” with BBBEE than corporate South Africa. Participants predominantly directed their attention to corruption, maladministration and fronting. Corruption was described as “rife” and as a “cancer” that is “deeply rooted” in the sector. Another interviewee claimed that it was by “far most visible” in the construction industry, in comparison with other sectors of the economy. Participant 3 made a profound statement by claiming that corruption was a “prerequisite for doing business with government”. A woman respondent agreed and stipulated that many contractors were of the opinion that it was nearly “impossible to survive” if they did not engage in corruption. Participant 1 went on and confidently elucidated that corruption in the sector “is not good for the industry, it is not good for contractors and it is not good for BBBEE”.

Public sector officials were accused of utilising their easy “access” to, and “control” over state tenders to ensure “jobs for pals” and of frequently appointing contractors, on condition that they utilise “people who are family or acquaintances” of theirs. One respondent alleged that certain newly elected government officials, with contracts ranging from three to five years, enter the public sector with the “attitude that it is now their turn” and that, during their stay in office, they will acquire “enough money for them to retire”. It was pointed out that many construction firms obtain contracts via their “corrupt relationships” with government officials. Some interviewees mentioned that certain construction firms suddenly became the “most experienced” contractors “in the world” by “knowing the right people in government”. The results of corruption were detailed as “unemployment”, the closure of “many companies”, keeping the sector from “going forward”, the rebuilding of RDP houses “two to three times”, increasing the “cost of construction”, and increasing “red tape”.

A general perception among respondents existed that several public-sector officials were "thrown into positions without having the necessary training and knowledge", as employment in government is considered mainly as the outcome of "who you know". This resulted in persons, "not capable of doing their job", being hired, and exacerbated the view that most government officials were "unknowledgeable", "inefficient" and "incompetent". Many believed that vast numbers of public officials lacked "financial management skills" and regularly made "budgetary errors". A procurement and chief estimating director was highly critical of the public sector when it came to tendering and complained about "tender validity periods" in excess of "90 days", the constant "delay of tender results" and tender adjudication processes employed by "procurement committees" not being "transparent". Another interviewee asserted that officials do not always evaluate tenders in terms of the PPR and often appoint contractors whom they seek to implement projects. Several participants were of the opinion that the "security of payment" by government was "never guaranteed" and exposed contractors to "business risk", "credit rating" downgrades, potential legal battles and liquidation applications, as construction companies often struggled "to pay their subcontractors" when they were paid late or, in certain instances, not paid at all. A 42-year-old woman noted that officials often went "on holiday" before ensuring payments and that the embezzlement of funds was a reality.

Maladministration was regarded as "worse" than prior to 1994 and BBEE's "biggest enemy". Participant 1 passionately stated that "government is killing" BBEE, specifically emerging black contractors, by failing them through maladministration. Another respondent indicated that contractors would rarely "blow the whistle" when engaging with unethical public officials, as this would jeopardise their chances of obtaining government contracts in the future. A few respondents were of the opinion that numerous White-owned construction firms regarded fronting as "a cost of doing business" in order to "retain control" of their organisations. One interviewee suggested that "smaller companies" opted to engage in fronting as "doing things the right way was very expensive". Another mentioned how many companies became BBEE "compliant overnight". Some participants blamed fronting for the increase in the cost of construction and concurred that it will "not disappear if it is not better policed". Participant 4, however, was of the opinion that the Construction Sector Code has made it more cumbersome for contractors to implement fronts, as their contributions to transformation have to be audited by established

and accredited verification agents. The applicant concluded by stating that "in 10 to 20 years, most front companies will close shop as fronting is not sustainable".

4. Conclusions and recommendations

The implementation of BBEE has had an incontrovertible effect on the construction industry. It affects every fragment of the sector, from the shareholding profiles of construction firms right down to the commitment of these firms to the communities in which they operate. BBEE's all-encompassing nature has presented the construction industry with numerous challenges that it has to resolve, in order to ensure its successful transformation. The challenges, in terms of the research questions of the study, were investigated by the review of related literature and semi-structured interviews. The literature, in general, most importantly focused on the main dilemmas experienced in the sector during the implementation of BBEE. Such predicaments are not limited to corporate difficulties in terms of exploitation, fronting, misrepresentation and other unethical practices.

The empirical findings show that the generic framework for BBEE affects the construction industry; that contractors often encounter commercial impediments when implementing BBEE; that BBEE is subject to various manipulations, and that fronting by construction firms, as a direct result of BBEE, is becoming an issue in the industry. Thus, the 11 interviewees that are active in the industry contend that there are impediments related to the BBEE implementation in the construction sector. They also gave instances of exploitations and unethical practices in the industry, in order to buttress their points. It is, however, important to view these findings in context, based on the limitations mentioned in earlier sections.

Nevertheless, the study has provided stakeholders with a broader understanding of how contractors perceive the development and implementation of BBEE in the construction industry. The study is important, as it sheds light on how BBEE in the construction sector has evolved, but most significantly, it focuses on some of the most predominant BBEE-related challenges that many firms have encountered. The results of the inquiry might likely serve as a catalyst for change through intensified stakeholder interest, increased awareness and enhanced informal engagements in the construction industry. This, in turn, can bring about a plethora of ideas on how to solve existing and possible future problems associated with BBEE. Such issues include fruitful policy amendments,

improved research initiatives, and the formation of construction sector-oriented transformation associations. The study should be of value to policymakers, researchers, practitioners and students in the construction sector.

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