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Black economic empowerment policy in eThekweni, Durban, South Africa: economic justice, economic fraud and 'leaving money on the table'

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Abstract

Black Economic Empowerment (BEE) policy in South Africa is intended to mitigate the economic disadvantage of Apartheid and contribute to inclusive growth and development. This article examines perspectives of BEE by economic actors and accreditation agencies in eThekweni between 2012 and 2016. The article finds that BEE policy has contributed to building a political economy of connectivity and concession embedded in localised categorical framings of race, class and gender, where some economic fraud and corruption has clearly taken place. However, BEE has also contributed to growing a black capitalist class which eschews political concession and identifies with market-based economic transformation.

Keywords: economic justice, class, economic fraud, corruption, black economic empowerment, South Africa

Introduction

“Patronage means I live a shelf life. In a politician, I’ve got only 5 years but I want to be there for 20 years” (Lwazi)

Theorising corruption and economic fraud have a long and prestigious history within ROAPE, in political economy approaches that embedded these themes within analyses of capital accumulation, class formation and state building (Allen 1995; Szeftel 1998, 2000a, 2000b; Wiegratz, 2010, Tvedten and Picardo, 2019). While the more orthodox liberal definition of corruption, as the use of public office for private gain, was referenced in some of these accounts it was interpreted within a radical political economy approach. Similarly, while early theorists used the concept of neopatrimonialism, it was not as racialised stereotype - the “convenient, all-purpose, and ubiquitous moniker for African governance” so convincingly critiqued by Mkandawire (2015, 563) - but part of a wider class analysis. This article extends this work on corruption and economic fraud, this latter theorised as corrupt behaviour in the private sector. The article is founded on the premise that corrupt exchange and resistance to it, contributes to class building processes, partly by means of gatekeeper politics (Beresford, 2015), and partly as a consequence of the economic accumulation that arises as a consequential outcome of corrupt exchange. The case study below analyses black economic empowerment (BEE) policy in South Africa initially through an evaluative methodology which tests its success in its own terms of contributing to economic justice, empowerment and historical restitution. Through this material, the article then progresses to an analysis of the opportunities for economic fraud that the policy has generated; the patterns of political corruption that the qualitative data allows us to see; and finally to the theoretical contribution this analysis can make to debates on neopatrimonialism, the character of the black bourgeoisie in South Africa, and to understanding the moral economy of neoliberal fraud (see Whyte and Wiegratz, 2016).

The article argues that while neoliberal capitalism has contributed the core moral infrastructure to the global economy and conditions the types and patterns of economic fraud that are prevalent (White and Wiegratz, 2016: 232-248), local specificities, even ideologies of resistance and decolonisation, also play an important role in shaping the particular types of economic fraud and corruption prevalent in place (see Massey, 2005). BEE policy helps shape specific types of capital accumulation, and within these, the different types and moral justifications for economic fraud. The research reported here shows that both the empirical outcomes of BEE policy, and the means by which these were morally ‘thought’ by participants, (which of course is then partly performative of a new iterative round of practices (Callon, 1998; MacKenzie et al, 2007; Bracking *et al* 2019), are produced in place by a complex mixture of neoliberal and ‘alternative’, ‘radical’ policy (c.f Felices-Luna, 2016). Economic agents in KwaZulu-Natal were able to employ a wide repertoire of ideological signifiers to explain their behaviour, whether this latter was either legal or fraudulent. These narratives borrowed variously from neoliberal discourse and normative ordering (see Carrier, 1997, Boltanski and Thevenot, 2006; Wiegratz, 2016), (around such concepts as competition, free markets, necessary growth and so forth); national and local ideas of ‘radical economic transformation’ (RET), historical restitution and economic justice; and more generic understandings of honesty and theft, many of which were filtered through ideas of race. To understand this bricolage, the neo-Marxist approach, inspired by Gramsci’s work on ideology, proves a better lens with which to understand the moral landscape of neoliberal fraud than a binary ‘neoliberal versus socialist’ or resistance praxis.

The early ROAPE radical political economy approach to corruption and fraud faded somewhat from the 2000s, under pressure from both a dominant institutionalist approach in international development, which focused on individual acts of bribery and public sector failure, and an essentialist neopatrimonialism approach which gained dominance in the Africanist political science community, with its epistemological roots in behaviouralism (Mkandawire 2015). The neopatrimonial turn encouraged commentators to view many political processes of redistribution, even when generated legally from the state, as corruption under an essentialist reading of cultural economy. Into this reading, donor policies sat surprisingly well, insisting on the dichotomous rightfulness of the market and neoliberalism to respond to the endemic African political personality that was corruption. While more recent economic fraud literature has stressed, in some contrast, the contemporary generation of opportunities for the criminalisation of economic exchange created within the conditioning environment of neoliberalism (Whyte and Wiegatz 2016) and financialisation (Bracking 2016), this earlier behaviouralist narrative has had surprising resilience, arguably even affecting the radical Left with their invective critique of an '(un)patriotic bourgeoisie' (see below).

However, the idea of being able to normatively define a good and bad capitalist from their patriotism or general behaviour when managing capital accumulation is arguably analytically incoherent. If a structuralist view is taken that 'fraud is socially constituted: an outcome of mainstream political, social, economic and cultural structures, relations and processes' (Whyte and Wiegatz, 2016: 244), then normatively analysing the scope of behaviour for the individual is limited. In this reading, fraud can be both anti-social and socially productive (citing Quiroz and Dewey, 2016), but nonetheless "functions as a 'necessary' part of current capitalist order" (Whyte and Wiegatz, 2016: 245). In this reading, the structural prerogatives of managing capital and creating a profit would allow for only small variations in behaviour when a capitalist wants to 'do the right thing'. The analysis here accepts that morality and markets are co-produced within a capitalist social order but stops short of concurring that economic fraud is inherent or necessary for accumulation. The evidence from the interviews suggests that even small variations in the moral decisions of capital-holders can be critically important for direct beneficiaries. The 're-moralising' of the neo-liberal, capitalist subject is complex, spatially varied, ideological and relative – a point these authors would probably accept – but here it is also suggested that fraud could be contingent, rather than necessary, in certain contexts, and as importantly, understood in those terms by participants.

This is not to suggest that a worthwhile epistemology for the theorist would be to search for and seek to categorise the good or bad capitalist in any of their current guises - such as 'patriotic', or BEE, 'extractive' and so forth. More fruitful is to recognise the role of wealth accumulation in class formation as first and foremost an empirical process; and then normatively as either corrupt or rightful redistribution depending on the standpoint of the actors involved. This is not an abandonment of morality to an all-encompassing relativism; rather a recognition that corruption, fraud and bribery are discrete acts of theft found in the relationships of larger systems of wealth accumulation. In this epistemology, the meaning of fraud or corruption is understood as inevitably embedded in narratives of class, state and nation building and socially situated within related concepts of empowerment, economic justice, and restitution for colonialism. Here, economic fraud and BEE more generally are interpreted from the standpoint of the participants themselves, even though theoretically the case for capitalism producing economic fraud might have been already accepted from the standpoint of the researcher.

There have been few actual empirical studies of BEE (Ntim and Soobaroyen, 2013; Chopra, 2017), and even fewer which have specifically reviewed BEE in its own avowed terms, as a vehicle for economic justice and redistribution (Olivier and Bracking, 2017). Most have instead begun from the premise that BEE costs capital, and sought to test by how much (for example, Mebratie and Bedi, 2013; Kruger, 2014; Mehta and Ward, 2016; Hiam et al, 2017), or adopted the view that BEE was produced to govern resistance and enrich the political elite (Von Holdt, 2019). This research, in contrast, contributes empirically to ameliorating this research gap using a qualitative case study in eThekweni (Durban) and transcripts from 30 long semi-structured interviews with businesspeople, including with 5 BEE accreditation agencies, from 2012-2016. It studied the growth and efficacy of the legislated public policy of BEE, designed to assist emerging black businesspeople in the private sector, from the perspective of the participants themselves. This research was directed at the more recent phase of BEE which involves accrediting firms using a certification process in order to add extra worth and preferential access to the historically disadvantaged in their procurement applications to government. It evaluates how far a project of redistributive market regulation has been possible, understood as a legitimate endeavour of a developmental state, alongside and in competition with corruption and widespread economic fraud. The questions were posed in the context of making markets fairer and the efficacy of policy to do so, and in its basic empiricism the design was intended to avoid the epistemological trap of assuming the existence of widespread economic fraud or a neo-patrimonial social order in advance of the research. Even so, as we see below, the respondents often volunteered their unhappiness with what they saw as widespread corrupt practice and economic fraud in the marketplace that was undermining the potential benefits that BEE could offer them.

Black Economic Empowerment policy

“We are coming from a broken past.....BEE began to say how do we integrate the society, how do we bring Black people into the mainstream economy. That’s the intention you know” (Andile)

From 1994, the majority black population was forced to struggle for any growth in its ownership of wealth in the new South Africa, in the context of a constitution which criminalised the redistribution of industrial assets or land without compensation. In this context, BEE was begun in aspects of the first Reconstruction and Development Plan (RDP) in 1994 and formalised in a Broad-Based Black Economic Empowerment (B-BBEE) Act, No. 53 of 2003, which was designed as a corrective policy that would advance economic transformation by improving the economic participation of black people (African, Coloured and Indian people who are South African citizens) in the South African economyⁱⁱ. The 2003 Act was then expanded by the Broad-Based Black Economic Empowerment Amendment Act 2013 (Amendment Act), which came into force in 2014, and established a Broad-Based Black Economic Empowerment Commission, and deepened reporting obligations for South African companies and those listed on the Johannesburg Stock Exchange. The 2003 Act mandated development of B-BBEE Codes of Good Practice, which emerged from February 2007 within an implementation, monitoring and accreditation framework. Accreditation agencies were set up to rate businesses in accordance with the BBBEE principles, with those scoring better ‘BEE levels’ (which start from 1 and drop to a low performing 9) gaining greater access to government contracts and tax rebates. The 2003 Act also made provision for Transformation Charters, and the establishment of the B-BBEE Advisory Council which was completed by President Zuma in 2009.

Using BEE, firms were encouraged to employ (more) historically disadvantaged people and at higher levels, to change their supply chains to buy more from black-owned firms, and to transfer part of the ownership of their businesses to black people. B-BBEE then broadened the focus to skills development, enterprise and supplier development, and socioeconomic development. Codes of Good Practice on Black Economic Empowerment (Codes), as well as various sector-specific Codes of Good Practice (Sector Codes) were developed after the 2003 Act, and then again after the BEE Amendment Act 2013. The Codes contain a scorecard (Generic Scorecard) which is used to measure an entity's BEE compliance, and the score determines an entity's BEE status and BEE Recognition Level. The 2014 Amendments to the B-BBEE Codes of Good Practice changed the measured elements of classification from 7 to 5, increased the credit for and weighting of black ownership from 20 to 25 per cent in public procurement considerations, introduced a formal definition of fronting (where black persons or firms pretend to perform economic activities in order to successfully procure work for persons of another race, usually in return for a kick-back) and criminal sanctions for it, and increased the weighting of reward in accreditation for efforts to encourage training and black representation in the supply chain in Enterprise and Supplier Development. The later Codes have also provided guidance on measuring black ownership – which still includes the contentious 'modified flow-through principle', where 100% black ownership can be assigned to an entity in a chain of ownership with only 51% black ownership – and on arrangements for multinational companies to claim exception from ownership transfer to black people by contributing to DTI-approved 'equity equivalent' programmes.

While the original BEE legislation focused on ownership transfer, most black South Africans had no capital, so with the support of some leading banks and businesses some 'BEE transactions' and Special Purpose Vehicles were created to allow a select few, politically connected blacks to become shareholders of businesses without capital, sometimes at overvalued prices (Gqubule 2006; Morris et al. 2007). These deals rapidly enriched a few well-connected persons, popularly described as a new 'black capitalist class' (see Southall 2007). However, criticism of BEE soon pointed out the close ties between the black capitalist class and the ANC government which provided an ideal environment for corruption (Malikane and Ndletyana 2006). It quickly became apparent that the recipients of 'BEE shares', later termed 'credit-based black capitalists', who were provided with finance to acquire equity stakes from 'white monopoly capital' were not efficient wealth creators, and instead used their political influence in government to secure pro-corporate policies. They were said to have behaved contrary to the model of a 'patriotic bourgeoisie' that Mbeki had envisioned and were seen to have deserted the national development project in the process (Malikane 2017; Desai 2018; von Holdt 2019). The share allocations have since been provocatively termed 'bribes' (Malikane 2017), and Desai summarises that while legal, the way BEE "was done and to whom shares and other largesse were handed had all the trappings of corrupt practice" (Desai 2019, 7).

BEE policy then developed as a mandate on state-procurement processes to include black partners in tenders, with local partners often chosen for the political influence they could provide, creating a second wave of tender-based beneficiaries. Malikane has recently suggested that the new black bourgeoisie birthed from these tender successes, could pose a threat to the oligopolistic power of white monopoly capital in a substantive way that the earlier credit-based BEE class had not (2017). Desai reviewed this debate, noting that political analysts (such as Cronin, 2013; Cronin, Mashilo and Maleka, 2017) discuss these factions of capital – white monopoly capital, the first BEE beneficiaries, or sometimes the tender-based beneficiaries – according to the positive or negative contribution they are seen to play with respect to 'radical economic transformation' (2018, 502-504). The latter is used more as a grand metaphor than a substantive programme or policy, although occasionally commentators do give illustrative

figures that are used to connote the power of each faction (cf. Southall, 2017). Arguably, white capital remains dominant, but the question remains whether either the credit-based or tender-based capitalists are contributing to radical economic transformation, and if they are, how far BEE policy is a contributing factor in the restructuring of the political economy that facilitates this. Von Holdt (2019) argues that the black capitalist class will remain in an informal system of Polanyian ‘re-embedding accumulation’, which assumes a type of structural resistance to big ‘white capital’. Meanwhile, Morris (2017) still sees a predatory bourgeoisie ‘parasitic upon the state’. These views of black capital, even though they are made by persons generally supportive of economic justice, lead to critiques of BEE, which remain weighted toward a dismal view of the potential contribution of variously conceived factions of a black capitalist class, while regularly borrowing a dose of behaviouralism in their analysis of the (lack of) worth of black capitalists.

Some also criticize BEE for its conception of who should be the target of empowerment programs, with nationalists and populists, for example, berating the inclusion of Indians and Chinese as previously disadvantaged groups. The state capture debate of 2017 also produced many illustrations of how BEE vehicles were used by the ‘shadow state’ clique to liquidate private firms for the benefit of persons connected to the political elite, some of whom were neither Black, needing empowerment, or even South African (Bhorat et al. 2017; Madonsela 2016). Much of the criticism of BEE has been of this form, that it simultaneously causes corruption while lacking the means to address structural inequalities. But these discursive associations between BEE, corruption, cronyism and state capture are most unfortunate in relation to the avowed policy objective of economic restitution and redistributive justice, the foundational objective of BEE policy: historically disadvantaged persons still require jobs and a chance for inclusive growth. More so, because the record of redistribution in the macro-economy is poor. Successive rounds of the National Income Dynamics Survey (NIDS) show that since 1994 there has been very little redistribution of income and wealth, and that the number of South Africans, who are predominantly black, who remain in acute poverty is extremely high, at around 23 million, over 56 per cent of the population (StatsSA, 2014). The context for this study reflects this national picture and historical legacy, with the site of the research - the private sector in eThekweni - characterised by typical oligopolies of large, predominantly white-owned firms, few middle-sized firms and a multitude of small and informal businesses struggling to break into historically closed procurement, contracting and land leasing and purchase systems. The extra-economic barriers to market entry are also complex and social, relying heavily on race, class, political connectivity and networks, as evidenced in the interviews below.

Evidence from the interviews: how does BEE work?

The respondents were recruited using a Chamber of Commerce contact and then snowballing, and comprise of 19 men, 13 of whom were Black African, 2 White, 3 Indian, and 1 Coloured; and 11 women, of whom 8 were Black African, 1 White, 1 Coloured and 1 Indian. All our respondents agreed that the objectives behind BEE are laudable and most agreed that it was working to some extent. However, all the interviewees pointed to implementation problems, unexpected outcomes or perverse effects, relating to either the measurement technology of the instrument itself or to the changes in markets that BEE causes. Below, these oppositional polarities or perverse effects, framed here as questions, are organised into eight thematic areas although they are inevitably entwined: 1) Measuring and encouraging real change or measuring gaming and tokenism? 2) Meaningful ownership or fronting? 3) Including new entrepreneurs or excluding the poorest? 4) Encouraging empowerment beyond the firm and in joint ventures or buying token compliance? 5) Facilitating inclusive public works or producing market rents

and distortions? 6) Increasing efficiency in service delivery or perverting the course of public administration? 7) Enabling Black, woman and disability access or reproducing categorical inequities? 8) Increasing economic justice or causing tender fraud? These themes outline the polarities of the transcripts and are not intended to indicate that these binary outcomes are mutually exclusive: the reality is a mix of all these. Also, while these binaries have been used to code the themes emerging in relation to the efficacy of BEE, the examples given by respondents include cases of audit or control fraud (see Bateman, 2019), particularly around producing accounts to ‘pass’ audit tests; and collusion and bribery in tendering (see Vilakazi and Roberts, 2018).

1) Measuring and encouraging real change or measuring gaming and tokenism?

The first polarity arises from the simple observation that ‘being BEE’ is not the same as ‘being Black’, and many disagreements arise over the fairness of scores in relation to economic ownership and skin colour, and about how the contributions of predominantly white and other minority-owned firms should be judged. The academic literature pointed to a neoliberal macroeconomic policy in the 1990s which minimized the transfer of share ownership, except for the new elite in the mining sector, in favour of indirect measures of black participation – such as firms’ efforts in training, supply-chain management, charity and community work (Morris et al. 2007). Thus BEE policy (up to the 2014 changes which made all measurement categories compulsory from 2016) placed 25% of the scorecard on black ownership, but a middle-sized entity could choose which 4 of the 7 elements to be audited on (and exclude ownership), and larger companies could pick up points for spending on community development. Many Black respondents here thought this allowed white capital to escape ownership transfer easily and they resented those firms with little or no black ownership nonetheless achieving higher BEE accreditation than themselves. Six of our respondents describe at length what they see as this inequity in the scoring system, where medium sized firms were gaining higher scores than totally black owned firms. This problem is compounded because firms in the smaller bracket, Exempt Micro Enterprises (EME) with turnover below 5 million, even if completely black owned, are capped at a level 3 unless they pay for a full evaluation, which many can’t afford. In practice they near exclusively opt for the expedited, but capped option: while it is possible for a EME to be a level 1 they would need a full audit, which cost ZAR 5,000 as opposed to ZAR 650 in 2016 according to Ayanda who is a BEE auditor. She noted that only 1 firm had ever asked for the more expensive option.

There is certainly a strong theme among the black respondents that they were unhappy that “100% white owned have got better accreditation than companies which are 100% black owned!” (Bongani). White owned firms can get better accreditation than themselves, either by having ‘spare’ money to spend on community and enterprise development; because they can pay the fees for a fuller audit to facilitate movement from a level 3 to a level 1, or because they can choose which areas to be assessed on from the 7. For example, Bongani sees the way levels and categories work in certificates as ‘disingenuous’, explaining that:

If the business is 100% black owned and black controlled, it cannot have a lower rating than an established big white firm. The current thing we are seeing which we think is a farce is that if you are a small entity and you cannot afford to pay accountants and auditors to come and do a thorough audit of your company, they give you a level 3 accreditation if you are 100% black owned: they only give you level 3!

He says white-owned companies are making a ‘farce of transformation’ in a ‘bastardisation’ of the policy which deters Black entrepreneurship, by appointing ‘25% black owners’ who have ‘no clue’ about the business: “just sitting there 4 times a year collecting Directors fees and then

they leave and collect dividends once every six months. It's cosmetic change as opposed to real change". Instead, "if you are 100% owned and controlled black business you must automatically be at the highest level and it should actually be near impossible for anyone to catch up with you if they don't meet those criteria".

Dumisani telephones a white colleague during the interview to illustrate this point and confirms with her that she has a level 2 BEE without any black ownership or employees. Meanwhile, Mandla resents that he must now show he is a black South African in his own country, because 'they' are asking for a certificate that he has to pay for, while:

you find that white people also they qualify for this thing now. It doesn't disadvantage them at all now, it's giving them more advantage because, in terms of the BEE certificate they have to do some... giving back to the community, they have to give some donation that scores you to this BEE, so they've got an advantage, they've got money so they can go to any community and build a crèche, a church or something....and it scores them.

Lwazi also bemoans the higher scores of bigger firms, where "the White man will say "my business is benefitting one thousand black people" [but] mine is only benefitting small because I am small". However, a minority view among black respondents was that it was a good thing that, even without black ownership or management, white-owned firms could contribute to BEE, sometimes also acknowledging that they knew some people for whom there was motivation 'beyond the points'. Dumisani points out that even without black ownership or black employees firms can contribute to BEE by paying for 'African enhancement', and that this might be better in any case than having a black person 'who is a window dresser': "In fact, if I had my way I would in fact not put this ownership at the top – because it doesn't mean anything"

2) *Meaningful ownership or fronting?*

This last quote illustrates an overlap to our next theme, where respondents discuss measuring ownership, its meaning and its consequences, and issues of fronting and 'window dressing'. While 6 of the respondents attribute their business success as first-generation owners of firms directly to BEE, most still see fronting as common, and as constituting illegitimate competition to them in the new moral economy that is emerging. Perhaps unsurprisingly, once respondents are successful themselves, they tend to express moral views of other new entrants' gaming strategies. Fronting, defined by a participant in 2016, is:

"a person who is a director in a company but is not part of the company. They buy people....with or without their knowledge... most of the White people, they take their gardeners, their maids and write them as directors....[but] those people are not even aware that their names are there....[or they] are willingly giving their names for a little bit of token for huge contracts as long as they get a dollar or two for them they don't care. They can be used by 10 or 20 companies and they have no idea what's happening - they are given R1000 and they are happy" (Andile)

For Sibusiso, fronting disadvantages his firm as BEE requirements are 'so open for abuse, especially by big firms'. They

"have co-opted black people into their Board of Directors. And it automatically means that they are on par with you whether you come with hundred black people or you come with only a handful of them. So at the end of the day they are already a step ahead of you"

For Sibusiso, this is also political, as he thinks these large firms deliberately co-opt Black political leaders, and “that gives them a huge advantage over emerging firms. So that’s why you’ll never see an emerging amongst us”. While the later legislation of 2013 sought to correct this type of gaming, Sanele remains highly critical of Black people doing fronting and calls them ‘lumpen tenderpreneurs’, defined as:

“People with no social consciousness, they will jump into any system.... as long as they are bought a car. .. expensive champagnes, they are full of travelling cars with all the beautiful women. For a contract of 200 million rand, they are given 10 million, they are excited....And how much that has destroyed us and Black people and betrayed the policy of government. Fronting is a disease, people are bribed.”

Lwazi even believes that the BEE system itself has been captured so that “these so-called BEE companies... it is a black man’s face on the front but owned by white people.” He says that to improve his level 3 he would have to be richer, like the white firms, as it would mean ‘buying computers for schools or some such’. In Lwazi’s reading, the BEE scoring system makes it easy for white firms to pay for small acts of philanthropy or use a frontperson to get a good score.

However, there are other respondents who are using the fact that there is pressure on firms to include black people in joint ventures to make opportunities for themselves. For example, Andile describes a type of justified income-sharing that forms part of negotiating a business deal:

“Now as an informed individual I know what is expected of me by the Act and those that I go to bed with, in terms of contracts, they are quite aware what I expect out of them. I leverage my position because the Law affirms me to be leveraged so we benefit. We’ve used the law to benefit ourselves, to benefit the community as such”.

This businessperson, who works in construction and infrastructure where ‘we prize work’, understands that BEE is about ‘equitable distribution of wealth’ and doesn’t get into a joint venture ‘when that is not going to be achieved’, but negotiates:

the fair amount in terms of the distribution of the cake based on the scale and based on what I am going to provide. If it’s equitable distribution, I claim what I’m supposed to be getting. The whole thing is that it’s [BEE] got points, it’s a score for having me and my colleagues in whatever form. Those White friends or White companies that get into business with us, they earn points which gives them an advantage to get jobs, to get the contracts. So I’m not just a passive investor. I become a critical factor in a relationship - I add value to the whole transaction. I add more value, I make the firm more attractive because of compliance with the government policy. So yah, and I get my fair share.

The problem as he sees it, is that the White engineers generally have the high-level skills so keep ‘three quarters of the cake’ while he is brought in “to do the periphery part of the work.... they only need me for empowerment. The level is not levelled” He goes on to explain that the skills gap still determines the division of labour, with the skilled part:

done by Whites, [and] your periphery is done by Blacks.... business development, non-specialised services, or Chairman.....The chairman will definitely be a Black guy who stands up and introduces the team and sits down, that’s his job. All the particulars is done by White people. What the job is about, the technical aspect of it, the commercial aspect of it, that defines where money goes because if you only stand-up and introduce people that’s what you earn

Andile was thus ‘leveraging’ into contracts by becoming the BEE partner who supplies building materials, while also ‘up-skilling’ the workers as part of the BEE requirement. In this, supplier development became the core of his work, advancing credit and training to a ‘pool of guys that tender for different aspects’, so that the lead company can comply with the legislation and earn points, since ‘points are your tax rebates’.

Fronting was the context in which most respondents discussed women and disabled peoples’ economic participation. One of the women respondents with a disability felt that her promotion had been restricted because her employer had met their target and just wanted her for points. Mbali, a Black African business owner, who was growing without help from BEE talked about other women who are put into firms merely to meet the requirements of BEE as a ‘silent partner thing’, and as ‘just a statistic’. She said that she had rejected similar approaches by White people, because there was a ‘price to pay’, it is ‘unethical’, and earning money for ‘doing nothing’ involves risks because you do not know what is happening in the firm around you. Nonetheless, she acknowledges that others “love it, I mean earning money doing nothing!” Other respondents also gave examples of women added to score points, to gain Level 1, and to access the ‘big core projects’ of Government, which required that firms “must also bring their wives because we have to comply with the aspect of women” (Andile).

For example, Mandla became a businessperson because of BEE as Transnet’s first black supplier. But he says that in construction it is highly competitive and while ‘most of the time it’s about who you know’, the scoring system can be of help. He added a woman to his ownership structure because of the benefits to his score in procurement:

So I have to put someone there as my partner so that I score some points....women especially they earn a lot of points...[laughter]...in fact I put my niece there, she’s got 80% and I’ve got 20% shareholding. But just for the purpose of scoring pointsthey call it ‘women empowerment’. So if I’m in tender with you on your own and you’re a male and I tender against you, obviously I’ll score more because I’ve got a women figure in my company.

However, this type of strategic behaviour appears to have benefitted some of the women involved, as it proves hard to distinguish, particularly as time passes and the policy matures, the difference between window dressers and empowered participants. For example, Peter, a White legal professional, argues that the legislation and practice of BEE has matured and undermined the benefits of window dressing. His jointly owned white firm was dropped from the supplier list for government procurement of legal services some time ago to make room for new enterprises, but he sees BEE as working. He recounts that initially there was some resistance from corporates who came back and asked “You may have X number of black partners, but are they doing the work?”. He uses the example of legal services to the Road Accident Fund in Durban where initially (new Black) service providers were chosen in a ‘mysterious’ way, were ‘terrible’, and relied on political connections to gain work. However, there was a ‘transition period’, where the policy matured and these rogue firms were excluded, such that more recently it was ‘quite gratifying for me’ to “acknowledge that a firm of Coloured women who in the old model would never have got the work are doing a brilliant job and I mean that without condescension... there is a BEE success story”.

The interviews also include clear examples of women benefitting from greater economic participation (see below), not least because 4 of the 5 interviews with BEE auditors were with women who owned their firms. One of these, Lindiwe, explained in 2013 how gender mattered in the calculations for the middle band of Qualifying Small Enterprises (QSEs), of between 5

to 35 million Rand per annum in revenue, where 25% of the points were allocated over 4 categories. For full points for ownership, a firm required 30% black ownership, but in

Management, you're looking at guys that are at the top of the management levels. So if you have 1 black person and 3 other white people, you're getting one out of four of the 25%. To have full points for Management you need 50% as your compliance target. [But] what also happens in Management, it's gender adjusted, so loosely speaking two males are equivalent to one female. So what happens is if there's one male director of the four of you, you're not getting recognized for the 25% but recognized by 12.5%. But if there was one female out of the four of them, they could probably be recognized up to 40-50% [meeting the overall compliance target for full points].

Overall, our five BEE accreditors were all pleased that the ownership element was being tightened up in the new 2013 Codes, with higher thresholds to be implemented and new measures to reduce 'window dressing'. Anand, another auditor, said that they ask companies to give them their organograms and payslips to prove that their black managers are actually managers, and that "we actually found a company window dressing and we informed the DTI.. they [the company] weren't very impressed with us but we had to make a noise about it."

3) Including new entrepreneurs or excluding the poorest?

Several of our interviewees began in business because of BEE. For example, Dumisani said to his friend in 1998: "My friend, you are too white...be careful, you're going to have a problem" and in 2002 that friend came looking for him to establish a joint venture. Andisa also thinks BEE has helped black people, and particularly women, in quantity surveying:

"It has gotten to a stage now where there is a lot of black, female QS and they are just creaming it, so it has definitely helped. You can't compare the two anymore, if it's a white firm compared to a black firm, the black firm definitely and immediately will be a step ahead".

Overall, most of our interviewees think BEE has helped Black people economically, with Dumisani summarising that "I have benefitted, and everyone around me has benefitted", but there were detractors from this view. Some believed that this benefit was restricted to only a small minority because the policy lacked reach and certification was problematic for some. For example, Bongani and Sanele bemoaned that the poorest, the elderly and the rural were excluded because of the costs of certification and the educational levels required to manage the lengthy bureaucratic and administrative demands of accreditation. Some also asserted that BEE was restricted to the politically connected or to those who paid bribes, while the 2 Coloured and 2 (of the 4) Indian respondents noted that it didn't help *all* 'Black' people (more below).

On logistics, Bongani and Sanele were vexed by the costs, time and effort of BEE registration. Sanele bemoaned the fees required to pay for the certificate, which included the costs of paying his accountant for financial data, which needed to be renewed each year if he wanted to be qualified to tender. Sanele concluded that the certification process acts to exclude poor blacks from rural areas, when previous processes had been 'easy' by comparison, because they lacked capital up front, computer literacy and accountants, particularly when they are new without any credentials or references:

This BEE thing ...coz it's money man...can you imagine the poor guy who can't even afford anything, because we've got people from rural areas, men who don't even know how to use internet,where do you think these other guys will get this BEE accreditation?you need to have financial data... can you imagine somebody who is entering in the industry he

doesn't have financials, management account and so forth....it is putting some barriers in the entry. Because as I said, the guys in the rural, they can't get a certificate which means they can't go and tender.

Mlungisi says that these accreditation problems are compounded because people he does business with might also not be accredited as they are 'starting from scratch' but must be assessed within his scorecard. Moreover, according to 9 of our respondents, while becoming accredited is costly, it does not directly or often lead to work, while if it does, the government often pays late which can cause cash flow problems and firm collapse. Trisha, a Coloured business-woman, notes that BEE accreditation is required to apply to be a vendor on the Sappi (South African Pulp and Paper Industries Limited) or Transnet lists, yet: "if you are a SME and you don't have 1500 [Rand] you are not going to go into the Transnet vendor list – because you can't afford the certificate". Meanwhile, for Mlungisi, BEE is encouraging market entry but not necessarily business activity once people are in the market, which suggests another type of moral hazard. In his view, people are encouraged by BEE to set up firms, get an accreditation status, speak to 'so and so', and 'get into the database or whatever the case may be', but "not because they can be there or should be there, in those positions" and "not because they are in business doing the work".

4) Encouraging empowerment beyond the firm and in joint ventures or buying token compliance?

Initially, as reported by our 5 auditors, many white owned firms saw demands for ownership transfers as illegitimate theft, and this deterred them from becoming accredited at all. Also iniquitous to white-owned firms were BEE-related issues with White staff, who become a "disadvantage to them even though those are long standing staff that they have had in place for many years" (Nomusa); they become a hindrance to point scoring (Lindiwe); and while training "makes such a difference in their scorecards, [firms] stop training the white people and only train black people" (Lindiwe). According to the auditors, firms have also stopped spending money on white community development or student scholarships, because it similarly doesn't accrue any benefit. Ntombi knows of definite benefits of BEE donations for social and economic development, for enterprise development, scholarships and bursaries, including at the University of KwaZulu-Natal for civil engineering students, but 'they get no points if they do it for white kids'. Nonetheless, one of our white respondents, Peter, does believe that there has been a significant change in the attitude of many white firms that BEE needs to be done and can be a benefit, including a recognition that Black beneficiaries should be prioritised. In some contrast, Ntombi qualifies that black-owned firms' involvement in community development also reflects the scoring structure: "they don't do as much as the white ones. They got too used to the ownership points and they stay with the ownership points".

Anand, a male Indian auditor who heads his own BEE verification agency, has a commitment to community and philanthropy and has used his agency to funnel money to social projects, despite his view that BEE has not assisted Whites, Indians, the poor, or the rural majority of Black firms directly. He's used "two specific codes' for enterprise development (ED) and social enterprise development (donations and charities) to 'provide community service' by persuading firms to increase their scorecard points by donating the requisite percentages of profit after tax (1 or 1.5% generally). In his case, he has taken a close role in this brokering, persuading:

quite a few of the companies who have managed to get the BEE score cards to invest in projects that we have pointed them to. A lot of them didn't want to do it but they had to do it because

they would get points. There's been crèches, old age homes, schools, a host of projects that were available. So if anyone came to us and said do you do funding of non-profitswe would say we can't guarantee anything, but give us your profile, give us your need, when we get a company we'll obviously point yours to them.

BEE has also had an indirect effect on making markets more inclusive of Black people and increasing their number as employees in supplier companies. Sibongile, who heads a BEE accreditation company, explains why large companies put pressure on smaller companies because of preferential procurement to improve their rating because of the 'knock-on effect' where the rating of the larger goes up if the rating of the smaller is higher:

if Corporation A spends 100,000 thousand on Corporation B, and Corporation B is a level 4, for instance, when we're doing their BEE verification of Corporation A, that full 100,000 is recognized against the sector target. Now if they are level 8 for example, 8 is only 10% of BEE recognition, so at 100,000 they are only recognized for 10% which is 10,000. So the bigger guys are putting pressure on the smaller guys that you know what? ...if you don't have a level 1-4, for example, I don't wanna do business with you. It's the sad reality.

The preferential procurement calculation is applied as a proportion of the bigger company's expenditures with the smaller company which mirrors the % achieved by the smaller on their BEE recognition.

5) Facilitating inclusive public works or producing market rents and distortions

Many respondents said that while BEE had helped black people, getting a certificate is just a first step, and that connections and who you know in government also matter to getting work in a highly competitive environment. Bongani thinks that corruption is more often found in construction, where there are relatively few prerequisites and requirements, and that because his firm is a professional service firm in engineering which requires registration with a statutory body and insurance documentation, corruption is less likely. He says that he was confronted with a "situation like that but it didn't make sense with me so I just excused myself from the arrangement". But construction appears to be a site of both poor delivery, kickbacks (or *ukwazu* in Zulu), and collusion, as evidenced from multiple cases in the local press. For Andisa kickbacks are also a result of low (relative to the contract values) public sector salaries, and that in his quantity surveying industry there is a 'lot of bribery', a 'lot of unethical activities..[that] were not there five to ten years ago'. He attributes this to certain public servants who 'feel they have got so much power' and sign off invoices of 'millions and millions of Rands each day', but who 'get a lousy R10,000' per month so think they 'should at least get a piece of the pie'.

Some of our respondents were no longer bothering to tender as they saw the system as 'rigged' (Sanele and Mbali), while others told us about strategies to get past hurdles. Andisa explains what it means to pass from certification through the tendering process to a successful tender:

It comes to a point where if I don't know Michael [uses the interviewer's name for illustration], who is a CEO of a government organization on a personal level, you know we have beer, we play golf with him on Saturdays, if I don't know him on a personal level, Michael is not going to give me work, that government department is just not going to give me work. I need to know Michael on a personal level, we need to have the same interests, I need to be paying Michael's kids school fees or something

Andisa explains further that 'first of all you need to have the right skin colour' because 'key people in the government organization, they are mostly black, so they are not going to trust a

person with another skin colour'. Then 'secondly you need to be politically connected in the right ways' and to 'the right people', so if a CEO is not taking his calls, you need to know the boss 'two levels up' who will 'instruct' that person to call. These connections matter – but also bribes:

there are people who...friends of mine, unfortunately, who have got QS [quantity surveying] firms – they're more connected with the ANC Youth League, highly, highly connected. And these guys get projects, when no one is getting projects in this town. They get huge projects and they are always busy, and I ask "how do you guys do it?" They say it's about who you know – and how much you're paying.....how much you're putting on the table

Andisa explains that "you just start off innocently", wanting to "provide for the community", but after gaining a few 'small projects' you notice that your neighbour "who's got more or less the same experience as me, who's got more or less the same resources as me, they are getting ten times more". Using a hypothetical situation, he then says that a businessperson might go to the 'right person' and say "I'm going to give you this X amount of money, what can you do for me? Because, as you deal with these government organizations you start to know the right people who push buttons.... and if I push their buttons in the right way, I would be offered so much money". The interviewer asks "what would be the way to push the right button? Just money?" and Andisa replies that "unfortunately, it's all about the money". Bribing has both positive and negative effects on a business, as it:

smoothen things up, you don't have certain struggles...you get meetings at short notice when you have put in an income, those invoices are paid on time, when you want resources, you get them without a question asked...[But] If you are going to make a profit of a R1,000,000 in a project, you are only going to walk away with 60% or 70%, because the other percentage I have to leave back on the table, so if you are going to become a millionaire in 5 years' time, you only become a millionaire in 10 years' time, but the other person who is not involved in that colluding business might become the millionaire in five years' time...a friend of mine says as black people we don't have anything to show, we don't have houses to show, no business no cars, because half of our profit we give back to the government departments – and so we have nothing to show, and it was a true statement. A lot of people who should be at a certain level are not there because they have left so much money behind.

The role of connection and 'putting in an income' is different for others. Mbali, an interior designer and furniture maker, says she is not benefitting from BEE as she can't 'break the wall', even though she is a young, black woman who is supposed to benefit, because "there is a load of internal stuff that is going on". She sees the business environment in Durban as characterised by cliques, where 'people tend to support their own', and summarises that "I used to go and tender but the minute I understood perfectly what was going on, I don't bother anymore". But worse for Mbali, is that even the process costs her in time and resources, even when it fails, a point also made by several of the other young entrepreneurs.

It is time consuming, it is financially consuming as well. You attend all these meetings and.....it's time they take out of your business that you go and attend meetings, it is time that you take out of your business that you fill out those documents, travel to all these places, buy the certain documents..... So at the end of that, to just get a letter saying 'I'm sorry' And then, obviously everybody knows each other, then you'll find that one of the people who went there got three jobs...so again, cliques".

Mbali is vexed by the injustice of the same people getting multiple tenders, while others get nothing, repeatedly.

Even when successful, BEE contracting can involve perverse effects including business failure, maladministration and low-quality service delivery. For Mlungisi, a perverse effect in government tenders is that people sometimes buy jobs by undercutting a reasonable price to get in the market, and then the things go unfinished, unbuilt or starts breaking down. Meanwhile Lwazi notes that “getting a tender does not mean you have money. You must still get supplies and the work must be carried out, and you must get paid and the bank are not willing” which gives a hint at all the post-tender hurdles of logistical misfortune and complexity that can lead to adverse outcomes, some of which are then labelled corrupt. Lwazi even sees delays in payment processing as deliberate, saying that the bank clerk will be “looking at these young black guys and asking who they think they are: I can sort of give you a sabotage”. Mbali also talks of the BEE process having perverse and negative effects for small businesses because of delayed government payments, a view articulated by a further 5 respondents. Mbali:

“sometimes you wait six months for your money to be paid. What are you doing for those six months? What are you eating? What are your kids eating?....So it becomes more financial strain than it is worth....I’ve seen a lot of my friends go down because of that. You have the job they do it, finish it and they spend money on it, and to get paid...you take months”.

Mandla spoke of failing one contract because of cash flow problems caused by government non-payment of his previous contract, which ultimately led to bankruptcy while the new partners accused him of have pilfered the finance! Fortunately, he was able to restart with a bridging loan from his partner firm, despite them being an aggrieved party.

6) Increasing efficiency in service delivery or perverting the course of public administration?

If BEE were intended to promote inclusive public works, there are several respondents who point to its undermining of administrative and government accountability and transparency instead. Sibusiso explains that political representatives deliberately appoint underqualified administrative staff, so that the latter don’t have the skills to properly negotiate with the private sector, or the capacity to interfere with flows of corrupt kick-backs. They may instead join in for a minor stake. He argues that political office holders want to ‘loot the state’, so

they are going to appoint somebody who is going to toe the line. They’re not going to appoint somebody who is an independent thinker, who’s going to do it the way it’s supposed to be done..., and then in that process when a politician says do this, that person is gonna do it definitely because he knows that he’s not capable of being in that position, but in that process of implementing what the politicians wants then he’s gonna get something himself out of the system. And...then that person too when he employs someone...[the same thing happens].... we don’t have the skills in the government.....But people who appointed them they were not stupid, they knew!

The suggestion is that an incapacitated civil service is useful for politicians planning economic fraud, as they will not know how to resist but will be motivated to become involved.

Langa argues that incompetent service delivery can also be attributed to officials fraudulently employing their cronies who are not qualified for the work. Similarly, for Yash, BEE does not contribute to economic justice or service delivery because “the black bourgeoisie is also looking to line his [sic] pocket up and stuff his pocket with all the money”. For Lwazi, it is a systemic problem of government that BEE has not arrested, such that Black people might be the heads of government, but this is a ‘cosmetic change’ as the ‘machinery is run by the minority’. The minorities have the skills and will advise the political head of what to do and:

You as the political head because you don't have the operational knowledge are going to go with what your subordinates are saying. I'll give you an example: the engineering department in the city of Durban is predominantly White controlled, the finance department is Indian controlled, is it a surprise then that Africans cannot get business in the municipality?

7) Enabling Black, woman and disability access or reproducing categorical inequities?

Trisha is a woman business owner in the steel industry and questions the efficacy of the racial basis of BEE classification while acknowledging that there are benefits as well as drawbacks for her as a 'Coloured'. Initially she paid 1500 to 2000 Rands for a certificate and it lasted a year and then she had to renew the accreditation because her customers required it. Since she didn't receive any benefit, subsidy or grant she sees the costs involved with BEE accreditation as unfair. Trisha was accredited a level 3, after her accountant applied for her, but later learned that government had passed a rule that qualifies women to be level 1:

Which is blue chip status when you are applying for government tenders at the government and private level. When I was at Sappi, they asked me why you on level 3, because all these documents show that you qualify for level 1

So Trisha reapplied through her accountant, who then paid a facilitator, and it cost her 8000 Rands, and a 3 month wait which she resented, asking rhetorically, "What if I do not have that 8000 rands? It means I have to miss out on the tender from Sappi because someone from level 1 will come in before me". At the time of the interview, Trisha was unsure whether this was a wasteful cost holding her back, or a good investment since the tender process was ongoing, but certainly thought "we should get the paper for free". She was also not convinced that bigger companies were following the spirit of the policy, despite the "points and kickbacks and tax breaks" and argued that they had to be seen to be helping Black companies, but ultimately still gave preference to White-owned firms.

Despite this, she also thought she benefitted as a Coloured, not least because white companies were prejudiced against Indians, particularly in Johannesburg:

I am lucky when it comes to racism. It is to my benefit....The top 6 companies that I chose, the doors are always open. They always prefer to speak to Coloured women at the moment compared to Indian women

Even 'white guys' from Transnet "are happy to give me business and not happy to give a black company business" because of the reputation of Coloureds as hard workers (they said, as opposed to Black Africans). She also recounts an encounter where race defined a conundrum between herself and a Black African woman, senior in the Transnet procurement department. The meeting was friendly and "she was happy to see me because I am a black woman", but the manager appears to have picked up on the reticence of Trisha to be 'Black' for the purposes of BEE, as opposed to her more usual 'Coloured' identity, saying "so you black when it suits you. For tenders and contracts. Otherwise you are Coloured?" Trisha said "it was an interesting comment". Despite her encounter at Transnet, she argues that BEE is 'more for blacks. Being Black African' and thinks that 'the coloured community is overlooked'. Because of this, Trisha thinks that BEE

has not made anything fair. I think it made things unfair. There is a shift over to blacks, so they have forgotten about the rest. They took away from the White man, which is fine. What about the Indians and Coloureds? We all black. I don't see the equality

Trisha uses the term 'black' differentially during her responses to mean a holistic group she is a part of, and a smaller group she is not, depending on the context. Similarly, Logan is also a Coloured male businessperson who talks of how gradations of 'Black' both assist and disadvantage him simultaneously. He recounts how he gets electrical installation work from Transnet in the port, which means he accesses a preference list for black suppliers, but must still accept a contract where a broker, a Black African business, successfully fronts the work, and takes between 30 and 40 % of the contact value before handing it on to him for implementation.

On the other hand, Bongani, a Black African businessman sees the notional levelling of 'Black' in BEE certification as unfair, and would support these distributional decisions that our Coloured participants see as unfair:

if the intention is to create indigenous black owned businesses, you cannot then allow for a bastardisation.....I run an entity which 100% black owned as in Black African. Because we have an issue in this country about the definition of "black" ...[it] is a very unfair definition which puts certain groupings which are actually more disadvantaged than other groupings at the same level as others, you are now going to have to compete with people who have actually had a head-start and you are set to be the same with them.

Bongani does not agree "that indigenous people or the natives are on the same level as the Indians and people of mixed races". He says that since the Apartheid laws were 'hierarchical', his generation are 'the pioneers' while other non-White groups had intergenerational experience in some industries and privileges relative to Black Africans. BEE is thus unfair as:

you cannot then in your efforts to address historical imbalances to then trivialise that and say no no no, all these guys were at a disadvantage relative to the whites and group them together as one.

Similarly, Mlungisi says that he doesn't agree with 'this BEE thing' because 'even the Indians...they are not Black, and they benefit.... this BEE scoring especially this BEE certificate that's the one that's giving us a problem. Because someone can just pull up Level 1'. Lwazi, also a Black African small businessperson, concurs that Blacks and Indians should not be 'on the same level today', while 'White women are benefitting on the same score as black women, which is not fair....So you can be grouped as disadvantaged today, but you were never disadvantaged'. Mlungisi also states that 'being black is not enough', and that triple BEE demands more, since "Chinese are considered black, so you need to have them..[but] unfortunately even if you are black if you're coming from outside of South Africa, you are considered white". In contrast, Bongani does not see the treatment of "a black person who comes from somewhere else" as unfortunate and wants them to be distinguished in BEE from South Africans since they didn't suffer under Apartheid.

8) increasing economic justice or causing tender fraud?

Generally the respondents were conservative in their assessment of the efficacy of BEE, with for example Sibusiso sighing "Eish man, it's a drop in the ocean" and Dumisani emphasising that it is a 'good intention' as 'you have to start somewhere' but that "I don't even think BEE

has reached 10% unlike how much has been spent on it". Meanwhile, Lwazi thinks it has opened government slightly, but not affected the wider private sector and is adamant that BEE 'is not assistance' it is [just] policy. Andisa concurs that in quantity surveying, the people with finance to develop projects are still "99% of the time white" and they employ white surveyors. Black firms get government work, while white firms work in the private sector and "That's basically how it unfolds in this town". The respondents most often explain the lack of reach of BEE within the context of what they see as continued racialised markets and discrimination. A full five respondents gave detailed examples of how they thought accessing finance or licenses, or renting offices, factories or industrial units, were made difficult by racism, as they were owned or managed by Indians or Whites who excluded Black people by price discrimination or fiat.

Nevertheless, Dumisani summarises that complying with BEE is 'business sense' and 'highly profitable', crucial since

You screwed if you don't have it. It's simple. If you want to....compete in these limited resources that government is providing, you must have all the papers, all your accreditations. If you don't have it, you lose points, competitively you are thrown.

He continues that "if you are level one you chose the big jobs because it's the level that is fully compliant and jobs are all over, and you get the ones with better yield". Ntombe, a black female auditor who works for the accreditation agency SANAS gives further confirmation that BEE can pay on an individual firm level. When asked what the value of the BEE certificate might be to a business she replies with an example of a client of hers in KwZulu-Natal (KZN), who:

got a level 2 BEE certificate from us a few months ago.... He went up for a tender with a very big boy (company)...My client is big but went up against somebody that's bigger than him, four times his size. For a R52 million contract. They tendered much higher than other companies. In actual fact they shouldn't have gotten the tender because of their higher price. But because of their high BEE level than the other companies that tendered they got the R52 Million contract. So what is that certificate worth to them? R52 million. Now they just informed me that they are going to get the second phase of it. So it's a building project, they tendered for the first phase; the second phase has just been given them. So the advantages are great.

But as we saw above, while Ntombe attributes tender success with accreditation scores, several respondents suggested that the process is a necessary start but not material to contract success, which is instead conditional on connections and corruption. For example, Sibusiso, a Black African businessman in construction says that most tenders are negotiated before being made public, and many are not open tenders to avoid scrutiny since kickbacks are being paid in a 'business deal'. He describes the range of deals that might be possible, ranging from a 20% cut of the value of the contract, to 'favours' such as holidays or cars:

Eish, man, I need to change my car. This time I want a Ferrari, I was on an R8 so I want to upgrade... I want a Gucci bag, I want Luis Vuitton bag. And there are those who would want you to pay for their kids' school fees, so it differs from one person to the other.

Open tender is avoided, or only advertised on an impossibly small lead time, after the deal has been agreed, and the 'preferred bidder' has already completed their planning and negotiation:

we sit around a table and say...What will be required? OK, eish! We need to close on the black empowerment? Do you have a certificate? Yes, I have it! OK tick. How many Engineers do you have, I've got 5, I still can get 20..... tick tick! All those requirements. ...And then you wait until that person is very ready, and thereafter then you call four other firms, and say

guys here is the tender – and it is closing in 2 weeks’ time, when that thing is supposed to be 3 months

When asked if kickbacks or connections are the most important to successfully acquiring a tender, Sibusiso says that it is both. The kickbacks are built into the relationships, and even when tenders are not made public, groups of people are nonetheless negotiating the deal together in their networks. A person would approach the Minister and ask him not to issue an open tender as they might not be successful, but instead

start negotiating the terms and conditions of the tender..... Because it’s not that they are just giving you, it’s because them too they want to benefit out of it. So now it’s a business deal for all of you. As much as for you to get to them, it was because you were politically connected to them, it’s because socially you are connected to them, and ethnically you are connected to them. You will... buy a Johnny Walker Blue... and get him a very nice Luis Vuitton bag and take him on a holiday...you know to Miami and do some things and come back with a deal.

Sibusiso also explains that if a tender is open someone from Cape Town might come and compete and there might be ‘issues’ with the ‘big boy’ in Durban as they are not part of the same cartel, but in a closed tender:

the boys from KZN, from Durban they’re gonna call each other and then they’ll decide I’m gonna bid with you on this one, not because I want it, but just to give you company. And when it’s the 2nd round then you’ll do the same for me... First it benefits that cartel, secondly it benefits people like us who’ve got friends politically, socially and ethnically. So if it goes to closed tender, there is one conclusion that everyone should have, it’s that it’s for someone. That’s a definite conclusion. Someone has been identified and then they don’t want that person to be disturbed in any way... it just depends, the person that is sitting on top, who does he want to give it to? That’s an advantage of a closed tender.

Lwazi agrees that “if you are connected politically, then that’s it!... It means that you’ve got it all” Unfortunately, connections “haven’t worked for our firm”, but “if we could get those networks, then we would grab them with our hands”. As it stands, he says that if his firm sees an advertisement from certain Municipalities:

we don’t bother, because we know that procurement policies are disregarded. They know the guy that must get the job, the tender is out there but already the guy is known....has already gotten the job secretly but just waiting to get it publicly. Like I sat down with this guy from one of these municipalities on Saturday, and he told me this is the amount that I must pay if I want to be considered for this job. The job is currently in the papers.

Lwazi was unwilling to pay, despite that the Man:

said he has never failed any guy who came to him for a job.....but this is what you have to do. In the future why should I bother myself if I’m not prepared to go the road he is pointing?

Given the high value of government contracts, it is unsurprising that BEE can generate economic fraud, and for several of our respondents this is seen as its main consequence. Yash asserts that BEE has generated a few rich people who can be held up to the majority as a pretence of what is possible, a false promise of how “you can also be rich like them”, while the majority stay as “onlookers in the economy”. For Yash, “you have to be politically connected to benefit and you must be able to have a big handshake at the back”, while the “biggest problem with the whole BEE system is that it has allowed a looting of the coffers”. While respondents

like Peter report meeting 'strict' BEE compliance officers with a 'careful adherence to policies', and our auditors gave extensive detail of meticulous calculations, it seems that accreditation processes, while a necessary first step, remain at a distance from procurement processes where the negotiations over fraudulent payments often occur. In short, the rules may be followed for accreditation and in procurement applications, but the evidence here suggests that most fraud and corruption occurs outside the formal committees, in order to shape and change the realities presented in the formal documents. This can include, but is not limited to, changing the first placed applicant, even though others will do the work, preventing others from applying by withholding documents or intimidation, and using insider information, collusion, bribery and price setting. Direct bribes are either financial or non-pecuniary and are paid to either political parties or influential individuals in order to affect the outcomes of procurement processes.

BEE and marketisation processes

BEE has clearly changed the marketplace for government contracts to the benefit of some Black people. However, the process is also generating costs in terms of registration and accreditation that are resented in the many cases where earning the right to do business doesn't mean there are any opportunities to do so. In sum, BEE is necessary for market entry, but actual access to public sector contracts remains selective and politicised, such that the efficacy of the certificate is not entirely related to the accreditation score obtained but depends also on the localized context of relationships, and willingness to 'leave money on the table'. Accreditation, connection and 'putting in an income' together conditioned the selection of beneficiaries. There were also many examples of economic fraud that were mentioned as respondents talked about BEE, which are not all recorded here for pressures of space. These included non-payment, diversion of funds, under-payment, mispricing, collusion, price-fixing, facilitation payments, bribery, kickbacks and control fraud. Some of the examples were explained as unintended or accidental, which I would term 'hapless', in that they were brought about by bureaucratic and administrative problems, larger firms' late payments, contract complexity, cashflow problems and social network breakdown which all contributed to accidental bankruptcies and permanently delayed or diverted payments that subsequently became known, by others, as fraud. These are reported in complex situations where the intention to deceive or defraud is not easily identifiable within failing business administration and confounding bureaucratic complexity. There is also a sense in which some extra-legal transfers are a compensation for a legal arrangement that failed *a priori* and how the sheer weight of bureaucracy in government and the private sector makes corrupt payments a last resort for the frustrated and desperate.

Strategic behaviour has perhaps inevitably occurred to meet BEE requirements. Some of the businesspeople interviewed had successfully negotiated remuneration from other large firms for their 'mandated-for' participation. Meanwhile, the gaming behaviour of large capital owners sometimes sought minimalist, or 'cost-effective' routes to meeting certification requirements, including the onboarding of the former previously excluded group. It can't be established from this data whether the value of this participation is bought cheap, at 'market rates', or inflated, although epistemologically, it might be the case that no measurement of 'fair' price can yet be established for these new experiments in partnership. Respondents also claim that points in the BEE compliance system could be earned by relatively small acts of philanthropic gesture, with firms acquiring the coveted better ratings without having to share ownership or control with black investors or personnel. There is also evidence of placements of women and disabled persons on boards for cynical purposes of points collection, and of those persons recording their frustration at being the 'fronting' employee, systematically denied real influence, power or

promotion. In aggregate, the evidence suggests that the BEE certification process is moving the market in the correct direction in relation to increased inclusion of previously disadvantaged individuals. However, many of the perverse outcomes recounted suggest also that beneficiaries are those who can best employ strategic behaviour and/or are those prepared to engage in fraud.

Overall, the difference between those who are adept at gaming the system and those who are more crudely paying bribes is a normatively fuzzy one. Each is faced with a situation where personal and firm behaviour are shaped by the overall financialisation of the decision-making powers of those in public office and their administrative officers (see Bracking, 2016). Each decision to allow market entry or award a contract can be financialised to award a gatekeeper, office holder, or administrative officer with a form or license to sign. Power pays, and this appears to be the learned hegemonic view of market makers and participants. This aligns with overall signifiers found in a rampant neoliberalized capitalism: that the market rewards the ‘go-getter’, the machismo of extra-market coercion and the utilisation of social network pressure and bribing; and that this is acceptable in the class and race struggle to correct the past and build prosperity in the future. Ideologically, there is arguably a ‘state of exception’ (Agamben 2005) in play in the BEE space of market making, where fewer questions are asked about compliance or regulation if the chosen recipient is communicated through the party structures in advance. This market is similar in important ways to that studied by Wiegratz in Uganda, where neoliberal norms were entrained to build ‘special freedoms’ and a ‘criminal sovereignty’ (Wiegratz, 2016, 294; citing Hall, 2012) where particular entitlements and class location made ‘personality types’ who are ‘open for the business of fraud’ within the process of the intensification of market society (Wiegratz, 2016, 294). Neoliberalism in South Africa has also provided ideological positions which are expedient and fluid for those justifying potentially fraudulent practices who can dissemble the moral critique of others and advance aggressively. Within this ideological framing, money buys both market influence and cultural signifiers of achievement and belonging (such as cars and luxury assets), and with them, both the opportunity to engage in economic fraud and the respect and admiration of others who desire the spectacular culture of capitalist consumption. What is perhaps different between the Ugandan and South Africa case, is the role played by Left discourses in the latter, which creates a bricolage of justification. In the South African context, as illustrated here, there is a justificatory mix of Leftism, ‘radical economic transformation’, and ideas of historical and race restitution mixed with tropes of competitiveness, individualism, entrepreneurship and neoliberal marketization which can together justify expedited wealth accumulation.

Whyte and Wiegratz argue that much of the academic literature on private sector fraud erroneously assumes that marketisation processes under neoliberalism will reduce the incidence of fraud over time (2016, 3), whereas in fact liberalisation opens up new forms and opportunities for fraud and corruption (2016, 3; see also Bracking, 2016). The evidence here is not systematic or quantitative in this respect, but it does point to a permissiveness attitude to types of fraud that have been documented empirically elsewhere (Bhorat et al 2017, Madonsela, 2016; Bracking, 2018; Desai, 2018). Theoretically, the material here also confirms the overall scepticism of other authors in regard to the analytical utility of the Polanyian ‘double movement’ for understanding normative political economy processes where “‘good’ outcomes are a sign that the economy is embedded in society, while ‘bad’ outcomes are a sign that the economy is dis-embedded from society” (Wiegratz 2016, 295; also Konings, 2015). The ‘bad’ outcomes here, and their protagonists, are certainly highly embedded in society – in fact, it is this embeddedness which largely gives them the ability to act in fraudulent, and/or market-leading ways. Wiegratz noted that if a market is regressive because of its embeddedness in a particular social order, then “the conventional argument that the way forward is re-embedding

the 'bad' market (or bad bankers) into 'good' society (the famous 'double movement') looks flawed" (Wiegratz, 2016, 296), and he rejects it as of 'little help' to his work on Uganda. But as we saw above, Von Holdt (2019) used the Polanyian 'double movement' concept to analyse South African political economy, describing a group of 'unpatriotic' capitalists and state capture beneficiaries dis-embedded from the organic economy of embedded accumulation and resistance movements (Von Holdt, 2019). But the evidence here belies such an easy dualism and confirms co-production of power and economy, where "the market is a continuation of or arena of politics, including but not only class politics. A problem of economy, say fraud, is a problem of polity and society and vice versa" (Wiegratz, 2016, 296).

However, neo-Gramscians looking for class factions, and behaviouralists looking for a 'good' or 'patriotic' bourgeoisie, can also take some succour from the evidence in the interviews, since the structural conditions of accumulation were shaping incentives, but not entirely determining agency. There was instead replete evidence of persons choosing to avoid corruption for moral, ethical or logistical reasons (see also Wiegratz 2016: 311-30); of persons who were invested in the BEE process for its avowed moral purpose; of persons who resented the extra costs of corruption that were occurring alongside and despite of BEE; and of persons becoming unwittingly involved in corruption because of market and bureaucratic failures. Certification auditors were annoyed that others were abusing BEE and its intended objectives, while variously 'putting in income' or 'leaving money on the table' were resented as cutting into potential profits, notwithstanding that the contract might not have been won without them. Some businesspeople were trying to do their jobs 'properly' but were frustrated by the inability of market infrastructure to perform, and thus unwittingly made extra-legal payments or committed 'hapless fraud' as an unavoidable way of keeping their business on track.

Some might deem this analysis naive, no doubt pointing out that deniability is a key ingredient in a successful heist, and that of course the hapless fraudsters knew what they were doing. However, this view represents the normal reversion to an essentialist culturalism which just assumes that things are 'neopatrimonial'. Instead, this work suggests that the concept of the '(un)patriotic' bourgeoisie and its notion of neopatrimonial behaviour explains little of contemporary class and economization processes in Africa as elsewhere, because these concepts both deny, *a priori*, the varied agency of actors. It is also not an accident of history that in the near exclusive application of these concepts, that it is the agency of Black people that is standardised and predicted. But this agency was illustrated here as participants strategically engaged with BEE, and in the process, differentiated between the criminally greedy, the bureaucratically challenged and desperate, and different localised contexts of economic justice according to class, gender and race identities. These complex beliefs, different choices made, and the varied pattern of empirical outcomes described shows that BEE is changing people's understanding of fairness and equity, which is performative of further economic redistribution. Thus, insofar as BEE substitutes for more radical economic transformation, it succeeds as a post-political, neoliberal distraction with minor beneficial effects. Meanwhile, its effects on fraud cannot be simply deduced from a facilitating neoliberalism since they are also shaped by (sometimes unflattering and illiberal) processes of local class formation.

Conclusion

In sum, there is evidence that it is analytically difficult, but possible, to isolate the contours of economic fraud from legitimate economic redistribution by using the standpoints of the respondents, even though opinion is contested between them. For economic justice to be

enhanced in the context of social democratic development, there needs to be both an increase in the standard of empirical analysis in the public domain, particularly around the loopholes and perverse effects of current BEE, as well as an uncomfortable continuation of the debate on the conditioning roles of race and class to economic prospects in South Africa. Policy measures to enhance economic justice need to engage better with the underlying political economy of South Africa and its marketisation processes.

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ⁱⁱ I will follow the current convention of using Black African, Coloured, Indian and White for the main race categories of South Africa while recognising the significant problems with this.