

INVESTIGATION OF MISREPRESENTATION IN TENDER DOCUMENTS

by

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A Dissertation

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PREFACE

The goal of this research was to identify what black economic empowerment (BEE) is, what BEE fronting is, how facts are misrepresented in tender documents during the procurement process, and how these misrepresentations can be investigated and proved. A further intent was to share and introduce a number of important concepts – namely, the role of corruption in the procurement process, verification agencies, fronting risk indicators, preferential procurement, the preference point system and the codes.

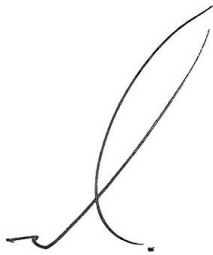
The research explains that BEE was initiated by Government in an attempt to redress the racial imbalances of the past. Fronting, which can be regarded as a form of fraud, is one method used to circumvent the objectives of BEE. Fronting takes on many forms, and is referred to as “fronting practices” (such as where a domestic worker is registered as a director with a certain company, and the BEE status of the company is used to secure large contracts), which mainly occur during the procurement process, where misrepresentations are made in tender documents. It is explained how fraud is committed during the procurement process, and the elements of fraud – which have to be present to ensure convictions – are also identified.

The relation between corruption and fraud (BEE fronting) is explained. Corruption commonly occurs during the tender/procurement process, between a particular public servant and a particular service provider. The preference point system, which forms part of Government’s initiative to redress the imbalances of the past, and the point allocation system, are discussed. The codes were introduced to standardise the definition of BEE and to provide uniform regulations to indicate empowerment transactions. The codes ensure the implementation of verification agencies, which facilitate, standardise and validate the BEE transactions. The legislation which is discussed in this research includes the PCCA Act, B-BBEE Act, the Constitution and the PPPF Act.

The method of how facts are misrepresented during the tender process/procurement process, is discussed and illustrated by the personal experience of the researcher, and supported by relevant case law. The importance of red flag fraud indicators, and the fraud investigation process, are also discussed.

DECLARATION

I, Armand Johann Mynhardt, student number 36 7907 45, declare that this research dissertation, *Investigation of misrepresentation in tender documents*, is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Magister Technologiae in the subject Forensic Investigation at the School of Criminal Justice, University of South Africa. It has not been submitted before for any degree or examination at any other university.



Armand Johann Mynhardt

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I also acknowledge with sincere appreciation the family time sacrificed by my wife Linda and my two boys, Troy and Logan. I could not have completed this research without your constant support and encouragement.

ABSTRACT

INVESTIGATION OF MISREPRESENTATION IN TENDER DOCUMENTS

Construction companies, in particular, abuse the objectives of BEE in order to secure multimillion-rand contracts. Misrepresentations, specifically to the Department of Public Works, are made in various forms and stages during the submission of tender documentation by contractors. The status of BEE company owners is abused in order to secure contracts. Apartheid in South Africa prevented black citizens from entering the corporate world and thereby attaining a quality education. The South African government has, since 1994, adopted the BEE policy in order to redress racial and economic imbalances of the past. Fronting (which is regarded as fraud) is detrimental to the objectives of BEE, which are governed by legislation. Fronting further negatively affects the transformation of the South African economy which could be globally competitive. Fraud detection and its investigation are two concepts which are closely linked to each other and are vitally important to any fraud investigator.

KEY TERMS

Black economic empowerment (BEE)

BEE fronting

Financial investigation

Forensic investigation

Fraud

Procurement fraud

Misrepresentation

Tender document

Legislation

Fronting practices

GLOSSARY OF TERMS

AFU	Asset Forfeiture Unit
AG	Auditor General
ANC	African National Congress
B-BBEE Act	Broad-based Black Economic Empowerment Act 53 of 2003
B-BBEE	Broad-based Black Economic Empowerment
BEE	Black Economic Empowerment
CC	Close Corporation
Cipro	Companies and Intellectual Property Registration Office
Codes	Codes of Good Practice
Constitution	Constitution of the Republic of South Africa Act 108 of 1996
CPA	Criminal Procedure Act 51 of 1977
CPG	Contract Participation Goal
Department	Government Department
DPW	Department of Public Works
DSO	Directorate of Special Operations
HDI	Historically Disadvantaged Individual
JV	Joint Venture
NPA	National Prosecuting Authority
PCCA Act	Prevention and Combating of Corrupt Activities Act 12 of 2004
PDI	Previously Disadvantaged Individual
PFM Act	Public Finance Management Act 1 of 1999
PPPF Act	Preferential Procurement Policy Framework Act 5 of 2000
PPP	Public Private Partnerships
QSE	Qualifying Small Enterprise

SAACE	South African Association of Consulting Engineers
SAFLII	South African Legal Information Institute
SAPS	South African Police Service
SCM	Supply Chain Management
SIU	Special Investigating Unit
SME	Small Medium Enterprise
SMME	Small, Medium and Micro Enterprises
VAT	Value-added Tax

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CERTIFICATE OF EDITING

21 January 2012

I, Marlette van der Merwe, ID 4802060118085, hereby declare that the master's dissertation, "Investigation of Misrepresentation in Tender Documents", by Armand Johann Mynhardt, has been edited by me, according to the Harvard method and style as used by Unisa.



M van der Merwe

BA (English), HDipLib (UCT)

Member: Professional Editors' Group

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CHAPTER 1

GENERAL ORIENTATION

1.1 PROBLEM STATEMENT

Research into a certain field of study starts with a research idea. This research idea can be regarded as the notion as to what to investigate. One of the challenges for most students is that the research idea has to be transformed into a research problem (Mouton, 2001:49). Before research can be conducted on a specific topic, it is important for the researcher to know what the problem is, firstly, and secondly, to know which is the best way to solve the problem (Welman, Kruger & Mitchell, 2005:15).

The researcher has had previous experience in the investigation of fronting-related matters which have involved the Department of Public Works (DPW). The researcher's personal experience as Chief Forensic Investigator in the Special Investigating Unit, identified the fact that companies (construction companies in particular) abuse the objectives of Black Economic Empowerment (BEE) in order to secure multimillion-rand contracts. Misrepresentations are made to the DPW during the submission of tender documentation by the contractors in question. Information contained in these documents reflects that they (the principal contractors) intend using certain BEE subcontractors during the performance of the contract, should it be awarded to them. Once the tender is awarded to the contractor, "front" BEE subcontractors are employed, but are paid as ordinary labourers of the main contractor. It would therefore appear as if the contractor never had the intention to uplift and empower BEE company owners, and the status of these individuals (BEE company owners) was therefore abused in order to secure contracts.

A national investigation was conducted by the National Prosecuting Authority (NPA) (Ntuli, 2005), focusing on contracts worth more than R10 million and which were utilised for capital and maintenance projects. These particular contracts accounted for more than 70% of the DPW's construction spending during the 2003/4 and 2004/5 financial years. In certain cases, the principal construction company would perform the relevant work, with the skeleton company issuing the invoices. The profits would later be channelled back to the principal company (Ntuli, 2005).

Due to the fact that the investigation of these matters is complex, and requires investigators to have sound knowledge of all aspects of the tender process, tender documents, procedures, the law, and the elements of the crime, it is the researcher's experience that law enforcement agencies do not have adequate investigative components to identify and investigate such cases. Problem areas have been addressed by making recommendations to improve the efficiency of law enforcement agencies and the NPA, in the successful prosecution of these offenders.

1.2 RESEARCH AIMS

The aim of a particular research study will determine which research method will be used during the research project (Welman, Kruger & Mitchell, 2005:2). The aim of this particular research was to determine what BEE and fronting is, how certain facts are misrepresented during the commission of the alleged offence, and how the State could investigate and prove fronting allegations.

1.3 PURPOSE OF THE RESEARCH

Denscombe (2002:25) is of the opinion that the researcher must have a reason for conducting the research. If there is no particular reason, the researcher will spend unnecessary money, time and effort during the research. The purpose of the research could be regarded as threefold – firstly, to describe how things are, thereby defining the nature of the study object; secondly, to explain why things are the way they are; and thirdly, to predict a phenomenon (Welman & Kruger, 2001:18). The purpose of research can also be to find a solution to a problem or to identify a cause-and-effect relationship (Schloss & Smith, 1999:2).

This research was conducted in terms of exploratory research. By conducting exploratory research, a researcher will determine whether or not a particular phenomenon exists. The purpose of such research is, further, to obtain knowledge and familiarity with the phenomenon, and not to compare it to other phenomena (Welman, Kruger & Mitchell, 2005:23). The researcher determined how much knowledge the relevant investigative components had in fronting investigations. By conducting the research, weak areas needing attention, as well as strong areas, were identified.

During exploratory research, a researcher will report back on his findings. The focus of this research was to report on how certain things are, rather than how they will or even should be (Denscombe, 2002:27). In this particular research, the researcher determined what BEE fronting is, how certain facts are being misrepresented during the commission of the alleged offence, and how the State can investigate and prove such allegations.

1.4 RESEARCH QUESTIONS

During research, a researcher has to phrase the topic into a question format (Schloss & Smith, 1999:50). According to Noaks and Wincup (2004:122), a researcher should think ahead from the start of the research. A researcher should identify key themes to address, and design the project accordingly. The researcher focused on the following two research questions during this research:

- What is BEE and fronting?
- How can a misrepresentation be established and proved in fronting investigations?

1.5 KEY THEORETICAL CONCEPTS

A theory can be regarded as the system in which concepts are ordered. Theories thereby create understanding of, and insight into, concepts. Normally, a theory will consist of more than one concept, and will, in fact, link various concepts together (Welman, Kruger & Mitchell, 2005:2). The following concepts need to be clarified:

1.5.1 Black economic empowerment (BEE)

BEE is a strategy adopted by Government to address numerous development challenges which were facing the country (*Black economic empowerment ...*, 2007:5).

1.5.2 BEE fronting

BEE fronting can be defined as –

“any practices or initiatives which are in contravention of or against the spirit of any law, provision, rule, procedure, process, system policy, practice, directive, or

any other term or condition pertaining to black economic empowerment under the codes” (*BEE: What exactly counts?*, [s.a.]).

1.5.3 Financial investigations

Mackenzie (1998:24) states that financial investigations are “investigations in which – on behalf of law enforcement – financial expertise is used in order to gather, check, refine, process and analyze (financial) information”.

1.5.4 Forensic investigation

Forensics can be described as the process of applying scientific knowledge for the collection, analysis and presentation of evidence in court. The word ‘forensic’ means “to bring to court” (*Computer forensics*, 2008).

Forensic investigation can therefore be regarded as the collection of facts which could serve as evidence in a court of law. The association of an accused person in the commission of an offence is also determined (Gardner, 2005:1–2).

1.5.5 Fraud

Snyman (2008:531) describes fraud as “the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another”.

1.5.6 Misrepresentation

Snyman (2008:253) is of the opinion that a misrepresentation is a “perversion or distortion of the truth”. Joubert (2001:153) regards a misrepresentation as a “distortion of the truth, since the truth cannot be a misrepresentation”.

1.5.7 Tender

According to the *Concise Oxford Dictionary* (2002:1476), a tender is to “make a formal written offer to carry out work, supply goods, etc. for a standard fixed price”.

1.6 RESEARCH DESIGN AND APPROACH

A research design illustrates the plan which is used to obtain information from research participants or subjects (Welman & Kruger, 2001:46). Maxfield and Babbie (1995:4) regard empirical research as research that is based on personal experience, and

also on what is observed. In this research, the researcher chose to use an empirical design, with the emphasis on ethnographic studies. According to Welman, Kruger and Mitchell (2005:193),

“Ethnography can be described as an essentially descriptive design which is used in investigations amongst individuals or groups within a given community, group, or organization. An empirical research design answered the research questions best.”

The researcher combined the interviews of the sample and experts with literature and relevant case law.

The research approach is regarded as a plan on how the researcher intends conducting the research (Mouton, 2001:55). The researcher used a qualitative approach in the research, thereby studying things in their natural environment (Creswell, 1998:15). The researcher further decided to use a qualitative research approach because it can be used very successfully in the description of groups and small communities, while researching a variety of cases that do not fit into a specific theory (Welman Kruger, 2001:191). During this research, the sample and experts were interviewed, with the goal of obtaining new information on the topic, an understanding of their ideas, and to gather insight into their personal experience (Creswell, 1994:21). According to Mouton (2001:195), a qualitative approach would have the potential to supplement and reorient the current understanding of BEE fronting. The research design of this study (ethnographic study on misrepresentations in BEE fronting) is therefore presented in broad terms, at this stage.

1.7 TARGET POPULATION AND SAMPLING

A population consists of the total collection of all units of analysis, about which a researcher wants to arrive at specific conclusions (Welman, Kruger & Mitchell, 2005:52). Bailey (1987:81) refers to the sum of all units of analysis as being the “population” or “universe”. Sampling methods can be classified into those that yield probability samples and those that yield non-probability samples. In probability samples the probability of selection of each respondent is known. In non-probability samples, the probability of selection is not known (Bailey, 1987:87). A population can be described as a group of individuals that share at least one common feature

(Schloss & Smith, 1999:98). A population can also be described as the “totality of persons, events, organization units, case records or other sampling units with which the research problem is concerned” (De Vos, Strydom, Fouché & Delport, 2002:199).

Therefore, the population is all investigators attached to the Special Investigating Unit (SIU) in South Africa. A target population is representative of the population, and in this particular research study, the target population was regarded as “all investigators attached to the SIU in East London”. Due to the fact that it was impractical, costly and time consuming to use the population as the research sample, it was decided to draw a sample consisting of 30 members from the target population. With the exception of the experts, the whole target population was attached to the investigation component of the SIU. The researcher applied and received permission from the SIU to conduct the research (see Annexure 1).

A common feature attached to the target population was the fact that they were all members from the SIU, and all were involved in conducting forensic investigations. The whole target population indicated that they specialised in the investigation of fraud, corruption and maladministration of State funds. In this particular research, the researcher identified the investigation components of all the government institutions, such as the SIU, the South African Police Service (SAPS), the NPA, the Directorate of Special Operations (DSO) and the Auditor General (AG). The target population which was interviewed, consisted of SIU members and former SAPS, NPA, DSO and AG members who are now permanently employed with the SIU. These members are represented in the target population which was interviewed.

The SIU is mandated to investigate fraud, corruption and maladministration, and to institute civil litigation to recover losses suffered by the State, or to prevent further losses. The target population comprised 85 investigators attached to the East London office. The researcher had access to all their names, and also to certain personal information.

Thirty-one per cent of the target population consisted of chief forensic investigators, 50% of the members consisted of forensic investigators, and 19% of the target population consisted of management (SIU).

The sample were regarded as large enough, because it is suggested that a sample should consist of no less than 15 but more than 25 units of analysis (Welman, Kruger & Mitchell, 2005:71). It was important for the sample to be representative of the population – meaning that the sample had to have the exact same properties as the population. In probability sampling, the researcher can specify in advance that each segment of the population will be represented in the sample. This is the distinguishing characteristic that sets it apart from non-probability sampling (Leedy & Ormrod, 2001:211).

The researcher decided to make use of the simple random sample method, which falls under the probability sampling category. In probability sampling, the probability exists that any element of the population could be included in the sample (Welman & Kruger, 2001:47). In a random sample, each person in the universe has an equal probability of being chosen for the sample, and every collection of persons of the same size has an equal probability of becoming the actual sample, as long as they are members of the same universe. All that is required to conduct a random sample, after an adequate sampling frame is constructed, is to select persons without showing bias for any personal characteristics (Bailey, 1987:87).

The resulting sample is likely to provide a representative cross-section of the whole. The researcher might use a random set of digits to choose the page, and the line on the page, to select a person for inclusion in the sample. The list of random digits ensures the choice is genuinely 'random' (Denscombe, 1998:12). A sample of 30 individuals was selected from the target population, to participate in the research. During this research, a blind draw was conducted. The names of all individuals who formed part of the target population were printed (all these names were captured on an Excel spreadsheet) and cut to equal-sized slips of paper. These slips of paper were then mixed and placed into a container. Without looking, the researcher selected 30 pieces of paper, as indicated by the sample size (Schloss & Smith, 1999:100). This method was used to select the 30 participants attached to the investigation component of the SIU.

Feedback which the participants provided after specific questions were posed to them, was captured and analysed. These results have been illustrated by means of percentages (%) throughout the dissertation.

In addition to utilising the abovementioned members, the researcher included two experts with procurement and civil engineering backgrounds, to ensure a more comprehensive research with views from various role-players.

1.8 DATA COLLECTION

In conducting research, various data collection methods (besides that used in this research) are available to obtain data from samples. Some of these methods include observation – which is experimental recordings, and testing – used in psychological or psychometric testing (Mouton, 2001:105). A survey research approach can also be used (Schloss & Smith, 1999:67). Primary data was used in this research, and the researcher (who was also responsible for the design of the study, the collection analysis and reporting of data) generated the data. Specific research questions were answered by the use of new data.

During primary data collection there is direct contact between the researcher and the source. In this case, primary data was generated by the application of particular methods by the researcher (Blaikie, 2003:18). By using triangulation, conclusions can be confirmed by means of more than one source/method (Schloss & Smith, 1999:93). The following methods were, however, used during this research study to collect relevant data:

1.8.1 Literature

The importance of conducting research is to contribute new information to a problem. According to Schloss and Smith (1999:39), the extensive review of “the body of research information related to the research problem” can be regarded as best practice. The revision of the body of a literature review will expose a wide range of research products that have been produced by other researchers. According to Mouton (2001:87), reasons for the review of existing literature reviews are –

- to avoid duplication of previous reviews.
- to determine the most recent and authoritative theorising about a particular subject.
- to determine which empirical findings are most widely accepted in the field of study.

- to determine which available instrumentation is reliable and valid.
- to identify the most widely accepted definitions in the particular field of study.

The researcher discovered relevant literature, in the field of law and criminology, from various sources such as library books, magazines from the Association of Certified Fraud Examiners, journals in the field of civil engineering, and the internet. The literature which was gathered included information ranging from financial crime investigation, fraud, financial management, and criminal law and procedure. The researcher could not find any literature on the exact topic, as BEE fraud/fronting is a fairly new concept in South Africa. The topic was therefore divided into different concepts. The researcher further consulted Jutastat, South African law reports, LexisNexis and SAFLII websites, respectively, but could find no decided cases specifically dealing with BEE fronting.

All applicable literature used in this research is recorded on the list of references.

Numerous literature sources were obtained from libraries, by requesting relevant BEE- and fraud-related material. Data was also obtained from certain sources on the internet, training material from the SIU, literature from the Association of Certified Fraud Examiners, and journals in civil engineering and related fields. Statutory legislation relevant to this research was accessed and perused. This included the Criminal Procedure Act 51 of 1977 (CPA), the Preferential Procurement Policy Framework Act 5 of 2000 (PPPF) and the Public Finance Management Act 1 of 1999 (PFM). The research was guided by the research questions, and, thereby, all literature was examined equally. The researcher benefitted from studying these literature sources, as more knowledge was gained about this particular form of fraud. To find literature relevant to the topic, the following concepts (consisting of the topic and research questions) were created:

- fraud
- misrepresentation
- BEE fronting
- evidence

The data collected was analysed to determine the relationships between concepts, constructs and variables. The researcher also identified any patterns, trends or themes in the data (Mouton, 2001:108).

1.8.2 Structured interviews with investigators

According to the suggestion of Welman, Kruger and Mitchell (2005:165), the interviewer presented a previously compiled interview schedule to the interviewees. The interviews were done face-to-face, and the participants' answers were recorded in writing accordingly.

During structured interviews, an interviewer is restricted to particular questions (as they appear on the schedule) and the wording thereof (Welman & Kruger, 2001:160). Welman and Kruger (1999:166) state that an interviewer has little room to deviate from the pre-compiled interview schedule during structured interviews. One of the reasons for conducting structured interviews is to obtain comparable data across different questions (Schloss & Smith, 1999:90). According to Welman, Kruger and Mitchell (2005:174),

“The concepts and variables involved and the relationships being investigated – possibly in the form of hypothesis, theories, models or evaluative frameworks – should be clear and should guide the questionnaire design process.”

In this particular research, the same process was followed in compiling an interview schedule with open-ended questions. The sample were asked to comment on aspects relating to the following headings, during this research:

- Historical background of each participant
- BEE and fronting
- Fraud and tenders
- Fraud investigation processes

The importance of conducting a pilot study is discussed in Welman and Kruger (2005:148). By randomly selecting and interviewing five SIU investigators who were part of the researcher's investigation team (and therefore also part of the target population), the measuring instrument was tested before it was applied to the actual sample. During this test the researcher detected flaws and ambiguous questions.

The relevant amendments were made according to the outcome of the pretest, and the supervisor perused the interview schedule to make sure that it was correct and that it measured what it was supposed to measure.

The interviews were conducted in terms of the following prescription, as outlined in Leedy and Ormrod (2005:147):

- *Identify some questions in advance* – An interview schedule was prepared prior to the actual interviews, and the researcher did not use any leading questions.
- *Make sure your interviewees are representative of the group* – Individuals should give you typical perceptions and perspectives. In this particular research, members of the investigation component of the SIU were subjected to the interviews.
- *Find a suitable location* – The interviews were conducted in a quiet place where it was unlikely that they would be disturbed or interrupted.
- *Get written permission* – The researcher explained why the research was being conducted, and also what he intended doing with the results. The interviewees were requested to sign a consent form.
- *Establish and maintain rapport* – The researcher was courteous and respectful at all times. Trust was gained by showing interest and compassion towards the interviewee.
- *Focus on the actual rather than on the abstract or hypothetical* – The researcher focused questions on the actual circumstances of the interviewee, promoting the use of practical situations/examples. These were recorded by typing the response into the interview schedule.

1.8.3 Interviews with experts

The researcher was of the opinion that the results of the research could be enhanced by conducting structured interviews with experts in the civil engineering and procurement areas. Due to the fact that there were a limited number of individuals available with expertise in this particular field of research, it was decided to interview these experts.

The selection was done by judgmental or purposive sampling. Purposive sampling allows a researcher to choose a case because it illustrates some features or process in which the researcher is interested (Silvermand, 2000:104).

“In purposive sampling, people or other units are chosen, as the name implies, for a particular purpose. For instance, one might choose people who, one has decided, are “typical” of a group, or those who respect diverse perspectives on an issue. Purposive sampling may be very appropriate for certain research problems. However, the researcher should always provide a rationale explaining the selection of the particular sample of participants” (Leedy & Ormrod, 2005:206).

These interviews were conducted on a personal basis and recorded in writing, in accordance with a pre-designed interview schedule. The questions asked differed from the questions posed to the main sample. The questions posed to the experts related to their experience in their particular field of work, and the sample were asked to answer questions which focused on investigative issues. A pilot study (on Bartlett and Burger) was also conducted on the schedule for experts, before the interviews were done, to ensure that there were no flaws. The experts were asked to comment on aspects relating to the following headings in this research:

- The historical background of each expert
- BEE and fronting
- Fraud and corruption
- Public sector procurement
- Supply chain management (SCM)

The following two experts were interviewed:

- **C. Bartlett:** At the time of the interview, the expert was an independent consultant at Usquebaugh Consulting, dealing with the following: development facilitation, land tenure and regularisation of rights, local government matters, housing development, capacitating and training, legal drafting and interpretation, policy development and implementation, integrated development and strategic planning, performance management and implementation, procurement and SCM, and ministerial advisory services. The expert had professional body involvement, such as being chairperson of the Eastern Cape Land Use Planning Board (1996–2003), chairperson of the Eastern Cape Township Board (1996–2003) and chairperson of the Department of Housing Local Government and Traditional Affairs Policy Secretariat (2000–2002). This expert had, further, eighteen years’ experi-

ence in national, provincial and local spheres of government, whereof twelve years were at senior management level. The expert was not familiar with white-collar investigative methods.

- **C. Burger:** The expert was, at the time of the interview, self-employed at Ingqondi Consulting CC, as a professional civil engineer. Previously, until November 2004, the expert had been employed as Director Technical Services in the Department of Housing, Local Government and Traditional Affairs, in the Eastern Cape Province. This expert had twenty-six years' relevant experience, had extensive knowledge in SCM and Public Sector Procurement, belonged to the Engineering Council of South Africa (PrEng 860143) and the SA Institute of Civil Engineers, and he served on the Eastern Cape Development Tribunal. This expert was also not familiar with white-collar investigative methods.

1.8.4 Personal experience

The researcher has had sixteen years of practical investigation experience, has worked as a detective from 1993 onwards, and was a former captain of the Organised Crime Unit of the SAPS until 2005. During his career in the SAPS, the researcher investigated mainly drug and financial crime related matters. The researcher is currently a chief forensic investigator attached to the SIU, and investigates white-collar crimes where particular attention is paid to the misrepresentation of facts in the procurement process. The researcher has a National Diploma in Police Administration, a Diploma in Criminal Justice and Forensic Auditing, and a BTech degree in Forensic Investigation.

1.9 DATA ANALYSIS

The analysis of data involves the breaking up of data into manageable relationships, trends, patterns and themes (Mouton, 2001:108). The researcher used the eight-step data analysis process explained by Tesch (1990:142–145). This process was conducted as follows:

- All the transcripts were read to get a sense of the whole. Specific ideas were written down that came to mind.

- The researcher focused on one interview schedule and determined the underlying factors. The relevant thoughts were noted in a separate margin.
- This task was completed for several participants, and a list of all the topics was compiled. Similar topics were clustered and placed in columns.
- The topics were abbreviated as codes next to the appropriate segments of the text. The researcher attempted to identify new codes or categories.
- After the correct wording was determined, the researcher turned the topics into categories, and topics which related to each other were grouped. Interrelationships between categories were exposed.
- A final decision was made on the abbreviation of each category, and the codes were placed in alphabetical order.
- Data material belonging to each category was grouped, and a preliminary analysis was performed.
- Existing data was recorded, if required.

Three per cent of the sample (excluding experts) indicated that they had never received any training in the investigation of crime. Although 97% of the sample indicated that they had received training in the investigation of crime, only 80% had received training in financial crime investigation.

1.10 METHODS TAKEN TO ENSURE VALIDITY

The extent to which an instrument measures what it purports to measure, is addressed in validity (Schloss & Smith, 1999:93). The researcher introduced the measuring instruments to the population, which were used to conduct the research. The simple random sampling (probability sampling) method, which was used during this research, allows all units of analysis to have an equal chance of being included in the research, thereby adding to the validity of the research. This sample (units of analysis) was representative of the population – they were all attached to the investigation component of the SIU, which is a forensic investigation agency with a high level of expertise among its employees.

Two interview schedules (one of which was used for the experts) were drawn up, respectively, and the various individuals who formed part of the sample were interviewed accordingly. The interview schedule design was decided on after considering

the concepts and variables involved with the relationships being investigated (Welman, Kruger & Mitchell, 2005:174). All the questions posed to these individuals were relevant to the aims and research questions, ensuring validity. The literature used in the research was also considered to be valid, because it consisted of subject-specific books, journals, articles and other sources, ensuring reliability and validity (Mouton, 2001:101).

Denscombe (2002:100) is of the opinion that one should have confidence that the data obtained will be of high quality. Further, the data should be true and real. All the questions asked, the data collected, and explanations received from the sample and experts, were related to the topic, specifically to ensure that the research would be valid. Due to the fact that the researcher attempted to measure perceptions and events in a natural environment, disruptions had to be minimised. The researcher was present, and in the setting, for a period of time before the actual collection of data commenced. Members of the sample acclimatised to the researcher's presence, and soon resumed their normal pattern of behaviour. The participants were encouraged to act naturally as far as possible. The use of any obstructive methods, such as technological recording devices to collect data, was avoided (Schloss & Smith, 1999:93).

It is important that instruments used to measure a specific variable, actually measure what they are supposed to measure. This requirement is referred to as the 'construct validity' of the scores obtained on the measuring instrument. Using more than one measure of the same construct is often compared with the term 'triangulation', in the navigation sphere. "This is a procedure to determine the correct position of a ship or plane by comparing its position with those of two navigation points" (Welman, Kruger & Mitchell, 2005:143). In this particular research, more than one measuring instrument was used to ensure validity.

1.11 METHODS TAKEN TO ENSURE RELIABILITY

Reliability relates to the credibility of the findings of a particular research study (Welman, Kruger & Mitchell, 2005:145). The researcher needed to determine whether the evidence gathered would stand up to the closest scrutiny. The literature used in this research relates to the research questions, and is therefore reliable. The literature

would further be reliable, because of the fact that it was obtained from academic institutions in South Africa, training manuals for members of the SIU, literature from the Association of Certified Fraud Examiners, libraries, civil engineering journals, and others. The sample were selected by using the simple random sampling method, and the sample represented the target – and, ultimately, the total population of the investigation component of the SIU, which is a forensic investigation agency with a high level of expertise among its employees. A uniformed, structured interview schedule was presented to all the individuals from the sample. A different interview schedule was used when the researcher conducted interviews with experts who did not form part of the sample. These interviews were viewed as a contributing factor to the reliability of the research.

If a research finding can be repeated by another researcher and achieve the same results, the research can be considered reliable (Welman, Kruger & Mitchell, 2005:145). The researcher kept finely detailed field notes of the interviews.

1.12 ETHICAL CONSIDERATIONS

Leedy and Ormrod (2001:101–103) provide four ethical considerations which are very important while conducting research. These can be defined as follows:

- *Informed consent* – The researcher obtained the necessary permission from the participants after they were truthfully informed about the purpose of the interview and investigation.
- *Right to privacy* – The researcher assured the participants that their identity would remain anonymous, by explaining this to them before the interviews commenced. With the exclusion of the experts, no names of the sample were used in the dissertation. The researcher only referred to percentages relating to specific topics.
- *Protection from harm* – Before the interview, the researcher assured the participants that they would be protected against any physical or emotional harm, during the course of the investigation.
- *Honesty with professional colleagues* – The researcher ensured that he acknowledged all his sources. The sources were cited and, in places, quoted, throughout the research process and also in the list of references. Findings were

reported in a complete and honest manner by the researcher. The researcher did not fabricate any information, and refrained from plagiarism.

1.13 RESEARCH STRUCTURE

To address the research questions, the report is presented in four chapters:

- **Chapter 1:** This chapter describes the research topic and the methodology used to conduct the research.
- **Chapter 2:** BEE and fronting: The researcher identifies and discusses the meaning of the terms 'BEE' and 'fronting'.
- **Chapter 3:** Proof of misrepresentations in fronting investigations: The researcher identifies the nature of misrepresentations, how these misrepresentations are used in BEE fronting, how these misrepresentations can be proved/investigated in BEE fronting related cases, and how investigative authorities could benefit from the research.
- **Chapter 4:** Findings and recommendations.

CHAPTER 2

BLACK ECONOMIC EMPOWERMENT AND FRONTING

2.1 INTRODUCTION

Khatleli and Root (2008) explain that apartheid in South Africa prevented black citizens from entering the corporate world and attaining a quality education. They were, further, prevented from playing a meaningful, self-benefitting role in the economy of the country.

The South African government has, since 1994, adopted the BEE policy in order to redress racial and economic imbalances of the past. BEE is intended to regulate the allocation of scarce opportunities in areas such as education and employment. BEE further increases the representation of individuals who belong to certain previously disadvantaged groups. When speaking about BEE, it refers to women and black citizens, including black Africans, Indians and coloureds (Khatleli & Root, 2008).

It was indicated that drastic measures had to be adopted by Government to support the “previously disadvantaged”. The South African government procurement system, prior to 1994, favoured certain large, established businesses, making it very difficult for newly established businesses to enter the procurement system (Bolton, 2006). The South African government established Public Private Partnerships (PPP) as a means of addressing BEE in the country. In South Africa, the PPPs are governed by the codes for BEE in PPPs.

In this chapter, the researcher discusses BEE fronting and its association with fraud and corruption, preferential procurement (including the preference point system), the codes and relevant legislation.

2.2 BLACK ECONOMIC EMPOWERMENT (BEE)

BEE can be defined as an integrated and coherent socioeconomic process which is aimed at redressing imbalances of the past (Maphanga, 2003:5–6). BEE can also be described as an initiative which is designed to spread economic benefits to a broad base of individuals who were previously disadvantaged (Kalula & M'Paradzi, 2008). Bartlett (2010) agrees and states that BEE is the economic empowerment

initiated by the South African government in response to criticism against narrow-based empowerment instituted in the country during 2003/2004. Narrow-based empowerment measures only equity ownership and management representation.

Burger (2010) argues that BEE is the economic empowerment of black people – which includes women, workers, the youth, disabled persons and rural dwellers, to enable increased management, control or ownership of enterprises and assets, by black persons, through human resource and skills development, achieving equitable representation in all categories and levels of employment, by means of preferential procurement policies. To the question: What is BEE?, the portion of the sample (97%) who could respond were all in accordance with the fact that BEE is a programme launched by the South African government to redress the inequalities caused by the apartheid era, by giving previously disadvantaged groups economic opportunities previously not available to them.

This strategy is aimed at empowering the vast majority of South Africans who are black, and who were previously excluded from meaningful participation in the economy. According to Bartlett (2010), the objective of BEE is to distribute wealth across as broad a spectrum of South African society as possible. Burger (2010) supports this statement, and states further that the objective of BEE is to transform the economy to be fully representative of the demographic make-up of the country. BEE allows for a meaningful contribution to the economy by black people, thereby ensuring economic growth and a decrease in income differences in race groups. The sample were also asked to explain the objectives of BEE. Ninety-six per cent of the participants explained that economic empowerment and transformation are the two most important focus areas in BEE. The remaining 4% could not provide any explanation to this question. The researcher was satisfied that the sample knew what BEE is, and its objectives.

The BEE programme is focused on the transformation of the South African economic landscape, thereby ensuring the participation of the majority of the population in the economy (Kalula & M'Paradzi, 2008).

By applying BEE, the control of the country's economic resources will be redistributed. Government's actions, in terms of the Constitution, have initiated an attempt to rectify

gross economic disempowerment of non-white individuals during apartheid. BEE is mainly governed by the Constitution, the Broad-Based Black Economic Empowerment Act 53 of 2003 (B-BBEE Act), the codes, the Sector Transformation Charters and the BEE Strategy Document (Kalula & M'Paradzi, 2008). The codes can be regarded as the first steps towards the implementation of general coordinated national BEE regulatory measures, and according to Kalula and M'Paradzi (2008), the framework can be illustrated as follows:

TABLE 1: BEE regulatory framework

NO.	REGULATION
1	Constitution of South Africa Act 108 of 1996
2	Broad- Based Black Economic Empowerment Act 53 of 2003
3	Codes of Good Practice
4	Sector Transformation Charters
5	Strategy Documents

(Source: Kalula & M'Paradzi, 2008).

The B-BBEE Act provides for community development of people who live in rural areas, as Government views BEE in its broadest way possible. In addition thereto, business empowerment quotas and government tendering requirements for historically disadvantaged individuals (HDI) are viewed differently (*BEE: What Exactly Counts?*, [s.a]). The B-BBEE Act includes Africans, Indians and coloureds in its definition of “black people”. With the emphasis on “broad-based”, the B-BBEE Act refers to the economic empowerment of all black people, including women, workers, people living in rural areas, people living with disabilities, and the youth (*BEE: What Exactly Counts?*, [s.a]).

By analysing all the information contained in this section, it can be seen that Government has made it very clear as to what BEE is and who will reap the benefits of the implementation of the B-BBEE Act. Although it was found that 72% of the sample had more than ten years’ – and 62% more than fifteen years’ – investigative experience, only 27% had been exposed to BEE fronting investigations, as the SIU has conducted very limited fronting investigations to date – hence, the poor response.

Of the sample, 3% did not know at all what BEE is, and did not provide an acceptable definition for it.

The sample were asked who would benefit from BEE. Ninety per cent of the participants said that black South African citizens such as women, disabled individuals, the youth and individuals living in rural areas, would benefit. The remaining 10% of the sample could not say who would benefit from BEE. When the sample were asked why BEE is implemented, 6% could not provide any reason. The remaining 94% of the participants were all in agreement that BEE is implemented as an initiative by Government to redress the inequalities of the past by creating economic opportunities for the previously disadvantaged.

2.3 FRONTING

“Fronting means a deliberate circumvention or attempted circumvention of the B-BBEE Act and the codes” (*Guidelines on complex structures ...*, [s.a.]). The codes on BEE are issued by the Minister of Trade and Industry in terms of Section 9 of the B-BBEE Act (Kalula & M’Paradzi, 2008). Fronting can be defined as “an entity, mechanism or structure established to circumvent black economic empowerment” (*Business Unity South Africa*, [s.a.]). Bartlett (2010) describes fronting as “where black people signed up as fictitious shareholders in essentially white companies and/or inaccurate disclosure in the submission of tenders”. Burger (2010) is in agreement, and is of the opinion that fronting is an entity, mechanism or structure established to circumvent black economic empowerment.

Although only 3% of the sample indicated that they had received training in fronting, and only 19% had experience in fronting investigations (relating to tender fraud matters), the researcher found that 73% of the sample interviewed supported these views and were of the opinion that fronting is the superficial inclusion of HDIs to comply with BEE requirements in order to secure economic benefits in the form of payments. The researcher was satisfied that the abovementioned answers were satisfactory. The balance (27%) of the sample defined fronting as follows:

- pretending to be something you are not
- the controlling interest which reflects genuine participation in decision-making at board, executive management and operations levels, and the assumption of real risk
- there is no crime such as fronting
- where someone purports to be the owner of a company but is, in fact, someone else

The researcher was not convinced that this portion of the sample knew what fronting is. These individuals had heard of fronting, but had no relevant practical investigative experience, nor could they supply a clear definition of fronting. Fronting can also be defined as “the practice of white owned companies window dressing their shareholding, boards, management structures or sub-contractual relationships in order to score preference points that would secure them government tenders” (Pienaar, 2008).

According to the *SIU Training Manual on Procurement Fraud* (2010:135), the draft codes, issued in terms of the B-BBEE Act in December 1995, attempted to address the risks of fraud and fronting, and made provision for several definitions and formulae to try and calculate the risks of fronting. However, the final approved codes, promulgated in February 2007, contained none of the 2005 attempts to describe or define fronting. The legislator has not yet defined “fronting”, nor has the legislator criminalised the unlawful practice which has become known as “fronting” in the B-BBEE Act, thereby also rendering it a statutory offence. Fronting is none other than fraud in disguise. However, any entity which engages in any fronting activity “stands to be prosecuted, because fronting amounts to fraud and as such it is a criminal offence” (Kalula & M’Paradzi, 2008). This view is supported by Rumney (2008), and it is stated that fronting can be seen as fraud in disguise, and, according to the NPA, fronting should be addressed as fraud.

Fronting commonly involves reliance on data, or claims of compliance based on misrepresentation of facts, whether made by the party claiming compliance or by another person. As soon as BEE was to be considered in government procurement, possibilities of fraudulent and/or unethical practices became a reality, as renderers and prospective tenderers were expected to comply with complicated legislation (*Guidelines on complex structures ...*, [s.a]). A combination of complex legislation,

adopting and applying the legislation, uncertainty of how to interpret the legislation, non-uniform application of the legislation by public sector institutions, and the opportunity of exploitation of the previously disadvantaged “status”, created the possibility of misrepresentation (Rumney, 2008).

There are fairly simple methods to circumvent Government’s procurement policies as contained in the PPPF Act and the B-BBEE Act (Pienaar, 2008). One such example is when a genuinely black-owned company is awarded a tender legitimately, and then subcontracts the tender to a white-owned company at a discounted rate. Such scenarios are referred to as “renting”, and provide for the HDIs to play a far more distinct role. The aims of the BEE are defeated, and the government is defrauded by this cynical manipulation of regulatory requirements. One of the most common forms of fronting is called “window dressing”, which is discussed in the following chapter.

Kalula and M’Paradzi (2008) state that it is found that BEE fronting often occurs in the construction industry, where contracts are awarded to BEE companies and later subcontracted to white-owned companies. In these cases one would normally find that the white minority shareholders in the BEE companies are, in fact, majority shareholders in the white companies (Kalula & M’Paradzi, 2008). The Department of Public Works minister stated that their department had been defrauded by more than R414 million by companies with inadequate or no BEE status (Ntuli, 2005). Due to the complex nature of the legislation associated with the promotion of HDIs in the procurement process, facts are often misrepresented to benefit the wrong individuals.

The sample were further asked to give the elements of fronting. Only 46% explained that these would be similar to that of fraud, and is misrepresentation, prejudice, unlawfulness and intent. The remaining 54% of the sample could not provide any explanation to this question. The sample were asked to provide their opinion on whether fronting affects the objectives of BEE. Fifty-two per cent said that it does, because BEE companies who legally qualify to be awarded contracts, are deprived thereof. The remaining 48% could not comment on this question. It is therefore evident that fronting is used by perpetrators to defeat the objectives of BEE.

2.3.1 Fronting risk indicators

In an attempt to curb tender fraud, verification agencies were established to assist with the identification of “fronting risk indicators”, determining fronting scores and reporting on their findings. To emphasise the seriousness of this offence, provision is also made for the blacklisting of companies and their directors in cases where fraud was committed (Kalula & M’Paradzi, 2008). When the experts were asked to explain the function and importance of verification agencies, Burger (2010) states that vetting or verification agencies are established to determine the BEE component of a company, which is important to verify the details and points claimed by a company during procurement. Because of the fact that it is imperative to expose and eliminate fraudulent companies and individuals from industry, in order for BEE to be implemented correctly, the researcher is of the opinion that the role of verification agencies is crucial. Bartlett (2010) agrees, and is of the opinion that fronting and other forms of BEE circumvention are further discouraged by reporting fronting practices to the Minister of Trade and Industry; such companies are then blacklisted.

The following fronting risk indicators have been identified (*Business Unity South Africa*, [s.a.]):

- An enterprise would indicate their black shareholders, executives or management, and it is found that individuals are uncertain of their role within the enterprise.
- The roles and functions of black shareholders, executives and management are vastly different from those of their non-black peers.
- It is found that significantly lower salaries than the norm are awarded to black executives/management of an enterprise.
- Black people in top management positions have no active participation at a strategic decision-making level.
- An enterprise performs functions at a lower level than that which is expected of enterprises on a similar level.
- An enterprise relies on a third party to perform certain functions normally performed by an enterprise of its nature.
- An enterprise cannot function without the support of a third party, because of contractual obligations or lack of technical or operational competence.
- There is evidence of circumvention or attempted circumvention by the enterprise.

- The enterprise purchases goods from related persons or shareholders at significantly different rates than market prices.
- Loans are obtained, which are not linked to the good faith share purchases or enterprise initiative, from related persons at excessive rates.
- An enterprise shares the same office/premises as shareholders without BEE status.
- A third party from a similar industry utilises premises and infrastructure at rates which are disproportionate to market-related costs.

Bartlett (2010) supports this, and provides examples of her version of fronting risk indicators. The importance of these risk indicators is highlighted, and could be high risk or moderate risk in nature.

High-risk indicators are as follows:

- The black people whom an enterprise claims are its shareholders, executives, or Department of Trade and Industry management, are unaware or uncertain of their role or participation within an enterprise. The black people who serve in executive or management positions in an enterprise are paid significantly lower salaries than the market norm, unless all executives or management of an enterprise are paid at a similar level.
- An enterprise only performs peripheral or marketing functions, and performs no other significant operational functions as would be reasonably expected from such an enterprise.
- An enterprise relies on a third party to conduct the majority of core functions normally conducted by similar enterprises.
- An enterprise cannot operate independently without a third party, as a result of contractual obligations or the lack of technical or operational competence.
- Any practice which circumvents or attempts to circumvent codes.

Bartlett (2010) explains further that moderate-risk indicators are that –

- the black people identified by an enterprise as its shareholders, executives or management, have limited knowledge of an enterprise.
- there is no significant indication of active participation by black people identified as top management at strategic decision-making level.

- enterprise pays management or administration fees to a related person or shareholder with no BEE status.
- an enterprise acquires goods and/or services at a significantly different rate than market prices, from a related person or shareholder.
- an enterprise obtains loans, not linked to the share acquisition, from a related person at an excessive rate.
- an enterprise shares all premises and infrastructure with a related person, or with a shareholder with no BEE status, or with a third party operating in the same industry, where the cost of such premises and infrastructure is disproportionate to market-related costs.

Burger (2010) agrees with the previous examples, and provides further examples demonstrating the importance of fronting risk indicators:

- In certain instances, black partners are actually unaware of their role or participation in the company.
- Black people in management positions earn lower salaries than the market norm.
- Companies rely on third parties to conduct core functions.
- Companies cannot function without the involvement of a third party.
- Black shareholders or partners have limited knowledge about the company.
- There is no significant participation of black people at management level.
- Goods are acquired at significantly lower rates than market related rates.

In the researcher's experience, fronting offenders commonly claim to be black-owned companies. They also often claim to have black economic empowerment ownership in the company, and have black staff occupying top management positions. The reason for this misrepresentation is to win government business, and to attain a higher price for certain goods and services (Rumney, 2008).

2.4 FRAUD

It has been determined that fronting is none other than fraud. In the researcher's experience, fraud is often committed in the actual tender documents which are submitted for a particular contract. Bartlett (2010) describes a tender document as:

“all documents whether containing words, figures or drawings which are, before the delivery of the contractors tender and for the purposes of his tender, issued to him by or on behalf of the employer or embodied by reference in such delivered documents or specified therein as being available for inspection by the contractor.”

Burger (2010) adds, and explains, that a tender document is a document which includes all the contract documentation that would form the basis of the contract between the service provider and the client. It includes, among others, the scope of work, site conditions, contract specifications applicable to the specific project, and schedule of quantities. The document normally comprises various sections – namely the section with returnable documents that needs to be completed and signed by the tenderer, the section that provides the information regarding to the projects, and the section detailing all the specifications applicable. Tender drawings accompany construction-related tenders. The sample were asked to provide an explanation of a “tender document”. Ninety-six per cent of the sample argued that a tender document comprising words, figures and/or drawings, is a specific document containing specifications, parameters and compliance issues, with which the respective bidder is to comply to submit a tender submission document (tender) for consideration before a specific cut off date. The other 4% of the sample could not provide a description of a tender document.

Bartlett (2010) claims that fraud is “the unlawful and intentional making of a misrepresentation which results in actual or potential prejudice”. Burger (2010) agrees, and describes fraud as “the unlawful and intentional making of a misrepresentation to another person with the intention to cause actual or potential prejudice to the other person”. Fraud can also be described as “the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another” (Snyman, 2008: 531).

Although the whole sample could define fraud, and were in agreement that fraud is an unlawful and intentional misrepresentation, made with the intent to deceive, and causes actual or potential prejudice to another, 27% did not know what fronting is. It could be problematic if investigators were unable to distinguish between the two concepts, as it could negatively affect the outcome/result of any investigation where allegations of fronting are made.

However, due to the fact that at present there is no statutory definition for “fronting”, and combined with the lack of an appropriate statutory provision in the B-BBEE Act, which criminalises the unlawful practice of “fronting”, such a statutory offence does not yet exist. According to the *SIU Training Manual* (2010:118) fraud is often encountered during the procurement process, and during this process, misrepresentations are made in various aspects, such as the following:

- In the content of bidding documents submitted during the tender or bidding process, facts are misrepresented by, for example, deliberately misrepresenting the bidder’s HDI ownership levels, experience, qualifications and capacity.
- Verbal misrepresentations are made at tender or short-listed bidders’ meetings.
- The true nature of quality and quantity of goods or services to be rendered is misrepresented.
- Deliberately not disclosing conflict of interest, or failure to perform on previous contracts, which is information that could result in disqualification.
- Submission of forged tax clearance certificates, thereby disguising the true nature of the bidder’s status with the Receiver of Revenue.
- The misrepresentation of the bidder’s BEE contribution level.
- Deliberately not declaring (or withholding) the extent and true nature of any outsourced service provider or subcontractor’s involvement in the performance of the contract.
- Intentionally making excessive or duplicate payments for goods or services.

In the researcher’s experience, misrepresentations are normally made in tender documents during the procurement process. The *SIU Training Manual* (2010:119) confirms this statement, and states further that misrepresentations in the procurement process lend themselves to various appearances, such as

- collusive bidding.
- unbalanced bidding.
- rigged specifications.
- excluding qualified bidders.
- leaking of bid data.
- manipulation of bids.

This view is supported by Hayton (2000), and it is argued that during the procurement process, facts are normally misrepresented in the following ways:

- *Specification manipulation* – In a technical purchase the engineer will deliberately submit design specifications which favour certain suppliers.
- *Final look arrangement* – The favoured supplier is given the opportunity to have a final look at all tenders received, to see if he can beat the price.
- *Breakpoint* – Orders are split to ensure they do not break the authorisation limit, thereby creating a cluster of orders around the limit.
- *Comfort bids and cartels* – Suppliers work together, rather than bidding against each other. Inflated bids are submitted, creating the impression that the lesser bid is the better option. Once the contract is awarded, it is subcontracted to the other contractors.
- *Back-to-back deals* – Facilities managers will set up companies, using nominees, and enter the company into a supplier master file. All the work is routed through the company and subcontracted to a genuine supplier firm. Subcontractor invoices are inflated and the profits are pocketed.

Burger (2010) agrees, and is of the opinion that facts are also misrepresented and tender fraud committed by –

- tenderers using information such as company registration numbers, past experience and VAT numbers, to open a new bank account and tender for projects.
- providing names of “directors” and “associates” who do not form part of the tender, and rely on the reluctance of Government to check up on details.

For the purposes of this research, the intentional misrepresentation by a contractor to a government department, in order to secure a contract, will constitute fraud, as other legitimate BEE companies – and Government – will/could be prejudiced. Bartlett (2010) explains that facts are misrepresented in tender fraud (normally associated with the procurement process) in the following ways:

- Misrepresentations are made in bidding documents submitted during the tender process.
- Incorrect verbal information is supplied during the tender meetings.

- Misrepresentations of the true nature of the quality and quantity of a service to be rendered, are made.
- There is deliberate non-disclosure of conflict of interest.
- Misrepresentations are made concerning the companies' status with the Receiver of Revenue.
- Misrepresentations are made of the companies' BEE contribution levels.
- There are intentional duplicate and excess payments made for services and goods.

During this research, the sample were asked to provide examples of the various forms of misrepresentations they had encountered during the investigation of BEE fronting cases. Only 48% of the sample could provide examples of misrepresentations made during fronting. The answers provided ranged from window dressing, benefit diversion and opportunistic intermediaries, to using a BEE "sleeping partner" to obtain work, where the "sleeping partner" has no idea of the business at hand. The other 52% of the sample could not provide any examples, as they indicated that they had never dealt with a fronting investigation.

2.4.1 The elements of fraud

According to Minnaar (2000), the elements of fraud can be regarded as follows:

- The first element is that there must be a distortion of the truth – also referred to as a misrepresentation. Normally, a misrepresentation is made in written or verbal form, but can also be made by remaining silent.
- The second element, the causal link, is established once it is determined that the misrepresentation has a consequence in the form of actual prejudice or potential prejudice.
- The third element, in the form of unlawfulness, occurs when an act committed is in conflict with legal conventions of the community,
- If it is determined that a misrepresentation made has caused prejudice or potential prejudice, the fourth element has been established.
- The perpetrator has to direct his intention to the misrepresentation, thereby causing a specific consequence in the form of prejudice or potential prejudice – the last element.

Joubert (2001:152–155) agrees, and is of the opinion that the following aspects must be considered before one can prove fraud:

- *Misrepresentation* – The perpetrator must have made a misrepresentation to the prejudiced party. The misrepresentation can be made orally, in writing, by means of conduct, and by remaining silent.
- *Made to a person* – In *S v Myeza* 1985 (4) SA 30 T, the court rejected Myeza’s allegation that by inserting the metal ring of a beer can into a parking meter and activating it, that the misrepresentation was not made to a person but to a parking meter. The court found that the misrepresentation was, in fact, made to the local authorities and therefore constituted fraud.
- *Prejudice* – can be actual or potential.
- *Unlawfulness* – One has to prove that the act was, in fact, unlawful, and not merely a misrepresentation. A misrepresentation seen in isolation does not automatically constitute fraud.
- *Specific intention* – The perpetrator must have had the specific intention to mislead the prejudiced party, and only to mislead them.
- *Attempt* – This will refer to potential prejudice; for example, if any letter, email, etc. which contains a misrepresentation, is sent to the prejudiced party, but is lost along the way. In these cases, the intention to defraud will also be present.

When asked to provide the elements of fraud, it was established that 88% of the sample were of the opinion that in order to prove fraud, the investigator has to ensure that there was an unlawful intention, made to another party, being a misrepresentation, and causing actual or potential prejudice. A total of 12% of the sample indicated that the only elements needed to prove fraud were benefit and misrepresentation. The researcher is of the opinion that this is insufficient and incomplete.

Based on the fact that fronting is widely regarded as a misrepresentation or distortion of facts, in order to receive a benefit, as discussed in Section 2.3, the researcher is of the opinion that fronting can also be recognised as a form of fraud, as it conforms to all the elements of fraud.

2.5 CORRUPTION

According to the SIU Training Manual (2010:111):

“Corruption is widely perceived as being endemic in the procurement of goods and services in the public sector. The term “corruption” is often used to cover a wide range of offences or undesirable conduct including the common law offence of bribery, nepotism, conflicts of personal and business interests, improper use of powers, maladministration and sometimes just plain incompetence.”

According to the PCCA Act, corruption is described as:

“party doing any act in relation to the exercise, carrying out or performance of that party's powers, duties or functions within the scope of that party's employment relationship, is guilty of the offence of receiving or offering an unauthorised gratification”.

The “new” PCCA Act was legislated in order to provide for the strengthening of measures to prevent and combat corruption.

It is further argued that corruption can be defined as “the use of public office for private gain” (Guwa-Ngamlana, 2009). The researcher has personally experienced a close relation between corruption and fraud, in the procurement process. Normally, one would find that, for example, a contractor may submit fraudulent claims to a department, for payment. These claims are then paid out in full in a corrupt manner, whereafter the government official who authorised payment will receive a cash amount or other benefit from the contractor, at a later stage.

The *SIU Training Manual* (2010:2) states:

“Corruption on the part of public officials, on the other hand, may take the form of, inter alia, the preparation of slanted tender specifications; the approval of inappropriate tenders; tampering with tenders; breaching confidentiality; the taking of bribes; the use of position to obtain a private benefit; and/or lax administration of a contract after its conclusion”.

According to the Public Service Anti-Corruption Strategy (2002), the definition of corruption is described as:

“any conduct or behaviour in relation to persons entrusted with responsibilities in public office which violates their duties as public officials and which is aimed at obtaining undue gratification of any kind for themselves or for others”.

Bartlett (2010) describes corruption as the lack of integrity or honesty, and the use of a position of trust for dishonest gain. Burger (2010) supports this, and states that corruption can be regarded as the corrupt offering or accepting of any benefit which is not legally due in the commission or omission of an act in relation to the exercise of duties.

The experts were asked to comment on whether they believed that there is a relation between corruption and fraud. Bartlett (2010) and Burger (2010) both agreed, and said that they do believe so. The two offences are directly linked to each other, because the “service provider”, who normally misrepresents the facts in tender documents, is often in collusion with the relevant procurement official, to ensure that the contract is awarded.

2.5.1 Dimensions of corruption

According to Geis and Meier (1977:40), white-collar criminality in business is exposed in the form of commercial bribery, bribery of public officials directly or indirectly to secure large contracts, and in various other instances. In practice, corruption takes on various forms, and can be illustrated as follows:

- *Bribery* – when an offering or giving of a benefit, or promise thereof, improperly affects the decisions and actions of a public servant.
- *Embezzlement* – when a person entrusted with authority and control of resources commits theft thereof.
- *Fraud* – when the actions and behaviour of a public servant (or other person) deceives other individuals to provide a benefit that would not normally have accrued to the public servant or other person/entity.
- *Extortion* – when the public servant coerces with another individual to receive a benefit by acting or failing to act in a particular manner.
- *Abuse of power* – when a public servant uses their authority to improperly provide a benefit to another public servant, individual or entity.

- *Conflict of interest* – when a public servant acts or fails to act in a certain manner, where the public servant has an interest, or another individual or entity who is in a relationship with the public servant, has an interest.
- *Abuse of privileged information* – when a public servant utilises privileged information that they possess, due to the nature of work, which provides an unfair advantage to another individual, entity or themselves.
- *Favouritism* – when a public servant provides services/resources according to personal affiliation.
- *Nepotism* – when a public servant ensures that family members are appointed or receive government contracts (*Blow the whistle on fraud and corruption*, [s.a.]).

This view is supported, and it is argued that fraud is a dimension of corruption and it “involves actions or behaviour by a staff member or other person or entity that fools others into providing a benefit that would not normally accrue to the staff member, or other person or entity” (*Francis Baard ...*, 2006). In the context of corruption, fraud is committed when “a public servant ... registers a fictitious employee in order to collect the salary of that fictitious employee” (*Public Service Anti-Corruption Strategy*, 2002). Although the sample and experts were not asked for their comments on whether fraud can be regarded as a dimension of corruption, it has been established that this statement is, in fact, correct.

2.6 PREFERENTIAL PROCUREMENT AND RELATED LEGISLATION

Because of the fact that the objectives of BEE are abused, the view of Government is to use procurement as a method to rectify past imbalances. The objective of using procurement as a policy tool is to ensure the right to equality and the right to the attainment of value for money (Bolton, 2006). Businesses are incentivised by preferential procurement laws. These laws encourage companies to restructure themselves on a permanent basis, in order to place themselves in a more favourable position to secure lucrative state tenders (Pienaar, 2008). Burger (2010) is of the opinion that preferential procurement is where certain groups of people are given preference during the awarding of tenders, which has to be done in terms of the PPPF Act.

As part of this “empowerment” and “restructuring” exercise, large share options are offered to black “empowerment partners”. Allegedly, in certain instances, these “partners” offer little expertise; however, they have significant access to government business, due to their acquaintance with influential public servants (Pienaar, 2008). Bartlett (2010) states that preferential procurement is the way in which small to medium enterprises (SME) can enter the market as suppliers to larger companies. The conscious focus by large private and public sector companies on procuring goods and services from smaller companies with a certain demographic profile, ensures that "preferential procurement" can be a significant tool in increasing the number of sustainable small businesses. Closely aligned to the concept of preferential procurement is that of "enterprise development".

The experts were also asked to define the concept “public sector procurement”. Bartlett (2010) states that:

“[t]he Government of South Africa is committed to good governance and the elevation of previously marginalised communities. Total procurement by the different organs of State is estimated at R56 billion. This amount calls for strict control through good financial governance”.

Bartlett (2010) states further that the Constitution prescribes that procurement for any organ of state should be dealt with through a system that is fair, competitive, transparent and cost effective. The Constitution also allows for the implementation of procurement policies providing for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. It is therefore clear that the public sector procurement system can be used to attain certain socioeconomic objectives. This will not, however, be achieved without adhering to sound financial management principles, which, inter alia, include the principles of value for money, good financial control, eliminating and countering corruption, and ensuring that all contractors have a "good standing" insofar as their tax and service charge obligations are concerned (Bartlett, 2010).

The government realises the importance of the small, medium and micro enterprises (SMME) as part of the macroeconomic development of South Africa. In the past,

the tendering system favoured the larger and more established businesses, and it was very difficult for any new and upcoming tenderer to enter into the public sector procurement system. The ministries of Finance and Public Works embarked on the reform of the public sector procurement system, to make the tendering system easily accessible to the SMMEs. The emphasis is on the development and stimulation of the SMME sector, and on using the procurement system as an instrument to achieve certain socioeconomic objectives without forfeiting the principles of good financial management (Bartlett, 2010).

Burger (2010) confirms the explanation of Bartlett, and adds that public sector procurement “is undertaken by a government department, municipality or any other public entity, to procure the services of consultants, contractors or suppliers”. Burger explains further that the objective of public sector procurement is to procure a service or material in a way that is fair, transparent, equitable and cost effective.

Bartlett (2010) claims that the objectives of public sector procurement can be described as follows:

“objectives through the procurement system include access to tendering information and the simplification of tender documents, breakout procurement, awarding of tenders in terms of a development objective mechanism, drafting of an affirmative SMME participation programme, promoting employment-intensive practices, affirming marginalised sectors of society in construction projects and the development of an affirmative procurement policy”.

The experts were asked to provide examples of problem areas within the public sector procurement, and Burger (2010) identifies problem areas in the public sector procurement system as follows:

- Different interpretations by various authorities of the Acts and regulations
- Non-alignment of the PPPF Act and the relevant regulations
- Officials with ownership/profit sharing in companies, tendering on public tenders

Burger (2010) further indicates that these problem areas could be addressed effectively in various ways:

- Through the publication of clear and concise regulations.
- By applying the same legislation to all spheres of government.
- Best practices and guidelines should become enforceable and not just guidelines.

Bartlett (2010) agrees with the above statement by Burger, and is of the opinion that problem areas in public sector procurement can be addressed in the following manner:

“Proposals on good governance include aspects such as value for money, good financial control, countering corruption, meeting tax and service charge obligations and adhering to prescribed labour practices. A National Procurement Framework needs to be drafted to establish uniformity in tender procedures, policies and control measures. Such a framework should be administered by a Procurement Compliance Office. It is the intention of the Procurement Compliance Office to be proactive in nature and to establish preventative and control measures on a regular basis”.

By conducting a literature study, as well as interviews with experts, it has been established that public sector procurement was implemented to guide the preferential procurement process. Again, fraud and corruption play a significant role in the implementation of this process – which should be a system that is fair, competitive, transparent and cost effective.

2.6.1 The preference point system

The PPPF Act has designed the point system to assist with the allocation of contracts, and it is in place to address certain past discriminatory policies and procedures. Bolton (2007:280) says that the procurement regulations state that an organ of state must record in their tender documents which preference point system will be applied in the adjudication of a particular tender. This system allows for a maximum of 100 points which may be awarded to a contractor. More preference points will be attained for contracts with a lower price than contracts with a higher price (Bolton, 2006).

If a contract is worth between R30 000,00 and R500 000,00, a maximum of 20 preferential points may be awarded to a contractor, once specific goals have been reached. Regulation 5 of the PPPF Act therefore stipulates that 80 points must be awarded for price, and 20 points for achieving certain goals (Bolton, 2006). When a contract is worth more than R500 000,00, a maximum of only 10 points may be awarded for achieving certain goals, and 90 points for price. Bartlett (2010) states that the PPPF Act introduced the preference point system to evaluate tenders in terms of a package of adjudication criteria with a maximum total of 100 points. Each bid is evaluated according to how much it scores in terms of each criterion, and the highest scoring bid in terms of all the criteria combined, wins the appointment.

For the two examples below, only two factors will be considered: price and HDI status:

- Tenders of less than R500 000,00 in value are adjudicated according to the 80/20 preference point system. According to the 80/20 formula, a bid of R120 000,00 from a bidder with a maximum of HDI points will beat a bid of R100 000,00 with no HDI points.
- Tenders of over R500 000,00 in value are adjudicated according to the 90/10 preference point system. According to the 90/10 formula, a bid of R1,1 million with maximum HDI points will beat a bid of R1 million with no HDI points.

What this means is that in a tender where the variation in bid prices is wide, the preference points do not have an overwhelming influence on who wins the tender. According to Bolton (2006), there are formulae which need to be used (in terms of regulations 3 and 4 of the PPPF Act) when the calculations for the 80 or 90 points are allocated for the price of services and goods provided.

The 80/20 preference point system can be calculated and applied as follows, and is illustrated as follows:

Example A:

$$P_s = 80 \left(1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

The 90/10 preference point system can be calculated as follows, and is illustrated accordingly:

Example B:

$$P_s = 90 \left(1 - \frac{P_t - P_{\min}}{P_{\min}} \right)$$

P_s = Points scored for price of tender under consideration

P_t = Rand value of offer tender under consideration

P_{\min} = Rand value of lowest acceptable tender

The *SIU Training Manual* (2010:31) confirms the above, and states that the 80/20 or the 90/10 goals in the preference point system are the two applicable socioeconomic goals to which maximum points (weight) are allocated. Each of these goals has to be indicated in the bid documents.

TABLE 2: Preference point system

PURCHASE AMOUNT	TOTAL POINTS		MAXIMUM FOR PRICE AND FUNCTIONALITY		MAXIMUM POINTS FOR SET SOCIOECONOMIC OBJECTIVES
Purchases less than R500 000	100	=	80	+	20
Purchases more than R500 000	100	=	90	+	10

(Source: *SIU Training Manual*, 2010:31).

The *SIU Training Manual* (2010:31) further illustrates how the preferential points system is applied in the table above.

Burger (2010) is also in agreement, and is of the opinion that the preference point system is described in the regulations of the PPPF Act and is known as the 80/20 or 90/10 points depending on the contract value. The 80/90 points are to be given to price during awarding, while the 20/10 points are awarded for equity, in terms of the definition, and include PDIs, women, youth and disabled people, and can also include aspects as located within the area of the jurisdiction of the public entity asking for the tenders. The non-alignment between the PPPF Act and regulation is that the PPPF Act specifies that the 80/90 points must be awarded for price, while the regulation specifies that the 80/90 can be allocated to functionality and price.

The incorrect practice in all spheres of government is to allocate points – say, 80% to functionality and 20% to price. This practice is, however, challengeable, as it is in conflict with the PPPF Act.

Bartlett (2010) adds to the above, and states (in relation to the preference point system) that:

“With regard to tendering, the most important law passed is the PPPF Act and the accompanying Preferential Procurement Regulations, 2001. This law (the PPPF Act) introduced a system of evaluating tenders in terms of a package of adjudication criteria with a maximum total of 100 points. Each bid is evaluated according to how much it scores in terms of each criterion, and the highest scoring bid in terms of all the criteria combined wins the appointment. The preference point system introduced by the PPPF Act is based on the definition of an HDI (any South African citizen who had no franchise in national elections prior to 1994), who is female, or who has a disability. What makes the system fairly complicated is the fact that not all kinds of disadvantages receive the same number of points, and at present there is a proposal to remove HDI points from white females.

How much preference does an HDI receive? In order to explain how the preference point system works, it is necessary to oversimplify two examples. It is very rare that price is the only consideration in a tender. Commonly, price is simply one factor among many others – such as experience in the work being considered, capital backing, number of staff located locally, etc. For the two examples below, only two factors will be considered: price and HDI status:

- Tenders of less than R500 000,00 in value are adjudicated according to the 80/20 preference point system. According to the 80/20 formula, a bid of R120 000,00 from a bidder with maximum HDI points will beat a bid of R100 000,00 with no HDI points.
- Tenders of over R500 000,00 in value are adjudicated according to the 90/10 preference point system. According to the 90/10 formula, a bid of R1,1 million with maximum HDI points will beat a bid of R1 million with no HDI points (Bartlett, 2010).

What this means is that in a tender where the variation in bid prices is wide, the preference points do not have an overwhelming influence on who wins the tender”.

The researcher believes that the preference point system assists the HDIs to be more competitive, and to have a fair chance of securing contracts.

2.6.2 Phases 1 and 2 of the Codes of Good Practice

According to *Black economic empowerment...* (2007:1–37), a number of draft codes were published during 2004, for comment. Due to extensive comment received, these codes were redrafted and are now known as the Phase 1 Codes. Subsequent to the Phase 1 Codes, more codes were published, which are referred to as the Phase 2 Codes. The Minister of Trade and Industry was empowered by Section 9 of the B-BBEE Act to issue the codes on BEE, thereby ensuring that the final codes were gazetted in February 2007 (Kalula & M’Paradzi, 2008).

Kalula and M’Paradzi (2008) state further that the purpose of the codes can be seen as an attempt to standardise the definition of BEE, and also to benchmark measurement principles in the interests of certainty and clarity. The codes were also introduced to provide uniform regulations and methods to indicate empowerment transactions which are concluded in every sector. The codes provide the structures for the implementation thereof and the appraisal for the initiative. The codes further make provision for the implementation of accreditation and verification agencies to facilitate, standardise and validate BEE transactions (Kalula & M’Paradzi, 2008). The codes make provision for each company to determine the way in which it will contribute and support BEE within the broad parameters and legislation outlined.

Burger (2010) believes that the codes can be applied by splitting the 80/90 into functionality and price. A best practice will be to call for qualifying tenders. Only the tenderers that qualify are then invited to submit a price proposal. Alternatively, a two-envelope tender procedure can be used.

Bartlett (2010) argues that the codes are to be applied in the development, evaluation and monitoring of BEE charters, initiatives, transactions and other implementation mechanisms. The codes contain basic principles and essential considerations, and provide guidance in the form of explanatory material.

Thereby, the codes were designed to ensure real empowerment by giving content to the regulatory framework and unifying the system (Kalula & M'Paradzi, 2008). A company's BEE compliance, in terms of the codes, will be determined in respect of seven specific BEE elements (*Business Unity South Africa*, [s.a.]). This view is supported, and according to *Black economic empowerment ...* (2007:1–38), there are seven elements of B-BBEE, and each element contributes towards the overall BEE score of the enterprise. Specific codes address specific elements. The generic scorecard (Code 000, Statement 000) must therefore be read with the seven codes (Code 100 to Code 700) which deal with the measurement of each element.

According to *Black economic empowerment... (2007:1–38)*, there are seven elements of the codes which contribute towards an enterprise's black economic empowerment score. These codes are illustrated as follows:

TABLE 3: The seven elements of B-BBEE

ELEMENT OF SCORECARD	CODE NO.
Ownership	100
Management control	200
Employment equity	300
Skills development	400
Preferential procurement	500
Enterprise development	600
Residual	700

(Source: *Black economic empowerment ...*, 2007:38).

Black economic empowerment ... (2007:38) explains further that Phase 2 of the codes addresses –

- fronting practices and other misrepresentations of BEE status (Code 000, Statement 001).
- specific verification matters relating to complex structures (Code 000, Statement 2).
- the measurement of BEE empowerment for QSE's (Codes 1000–1700).

Regulation 7 of the PPPF Act stipulates that the relevant preference point system to be used during the adjudication of tenders must be stipulated in the tender documents. The codes can be regarded as driving regulatory instruments which contain directives of the BEE (Kalula & M'Paradzi, 2008):

TABLE 4: BEE framework

DIRECT EMPOWERMENT	HUMAN RESOURCE DEVELOPMENT	INDIRECT EMPOWERMENT
Ownership	Employment equity	Preferential procurement
Management control	Skills development	Enterprise development
		Socioeconomic development and sector-specific contributions

(Source: Kalula & M'Paradzi, 2008)

The BEE framework can be illustrated as above (Kalula & M'Paradzi, 2008).

TABLE 5: The generic and QSE scorecards

ELEMENT	QSE SCORECARD WEIGHTING	GENERIC SCORECARD WEIGHTING
Ownership	20 points	20 points
Management control	20 points	10 points
Employment equity	20 points	10 points
Skills development	20 points	20 points
Preferential procurement	20 points	20 points
Enterprise development	20 points	10 points
Residual	20 points	10 points

(Source: *Business Unity South Africa*, [s.a.])

These seven elements, which are illustrated in table 3, are measured in accordance with two BEE scorecards: the QSE scorecard and the generic scorecard (*Business Unity South Africa*, [s.a]).

According to *Business Unity South Africa*, ([s.a.]), entities subject to the generic scorecard will be scored out of a possible 100 points. Scoring in terms of the QSE is always out of 100 points. A QSE may elect to be measured in respect of five of the seven elements and be scored out of 100 points, or be measured in respect of all seven elements and be scored out of 125 points and then adjusted to 100 points. Once these functions have been performed, the overall performance, in terms of these scorecards, is determined according to the following matrix which indicates the entity's BEE compliance level.

TABLE 6: Generic scorecard – BEE status

BEE STATUS	QUALIFICATION	BEE RECOGNITION LEVEL
Level one contributor	= 100 points	135%
Level two contributor	= 85 but <100 points	125%
Level three contributor	= 75 but < 85 points	110%
Level four contributor	= 65 but < 75 points	100%
Level five contributor	= 55 but < 65 points	80%
Level six contributor	= 45 but < 55 points	60%
Level seven contributor	= 40 but < 45 points	50%
Level eight contributor	= 30 but < 40 points	10%
Non-compliant contributor	< 30 points	0%

(Source: *Black economic empowerment ...*, 2007:44)

According to *Black economic empowerment* (2007:44), the generic scorecard could be illustrated in table 6.

Should an entity be in excess of 50% black owned, the entity is automatically evaluated to the compliance level immediately above their actual compliance level. Further, a QSE which indicates ownership in their QSE scorecard, will receive a 25% bonus on their ownership score (*Business Unity South Africa*, [s.a.]). The researcher has concluded that Code 500 of the codes appears to be most important for the purpose of the discussion, as it deals directly with preferential procurement.

TABLE 7: Code 500 – Key principles

ELEMENTS	KEY PRINCIPLES	IMPLICATION
Preferential procurement	Promote BEE compliance by all entities	Transformation encouraged throughout economy
	Specific targets for procurement from Micro's and QSEs	New and sustainable entities created
	Specific targets for procurement from black woman owned enterprises	Create black woman owned and black owned enterprises
	Enhances recognition of procurement from value adding suppliers	Locally produced goods and services are promoted
	Procurement from ED beneficiaries are enhanced	Encourages sustainable income streams to new entities ensuring their sustainability

(Source: *Business Unity South Africa*, [s.a.]

The key principles of Code 500 can be illustrated in table 7 (*Business Unity South Africa*, [s.a.]).

2.7 LEGISLATION WHICH GOVERNS BEE

Specific legislation has been introduced to govern BEE, corruption and procurement. Burger (2010) and Bartlett (2010) are in agreement (and are of the opinion) that the B-BBEE Act, the Constitution, the Draft Codes and the Balanced Scorecard are some of the most important legislation which governs BEE.

The researcher agrees, and in this section discusses the PCCA Act, the B-BBEE Act, the Constitution, and the PPPF Act, which can be regarded (according to research conducted) as some of the most important legislation which govern BEE.

2.7.1 Prevention and Combating of Corrupt Activities Act 12 of 2004

For the purpose of this research, Section 13 of the PCCA Act makes provision for offences in respect of corrupt activities relating to procuring and withdrawal of tenders, and can be described as follows:

- 13 (1) “Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person, as –
- (a) an inducement to, personally or by influencing any other person so to act –
 - (i) award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or
 - (ii) upon an invitation to tender for such contract, make a tender for that contract which has as its aim to cause the tenderee to accept a particular tender; or
 - (iii) withdraw a tender made by him or her for such contract; or
 - (b) a reward for acting as contemplated in paragraph (a) (i), (ii) or (iii) is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders
- (2) Any person who, directly or indirectly –
- (a) gives or agrees or offers to give any gratification to any other person, whether for the benefit of that other person or the benefit of another person, as –
 - (i) an inducement to, personally or by influencing any other person so to act, award a tender, in relation to a contract, for performing any work, providing any service, supplying any article, material or substance or performing any other act, to a particular person; or
 - (ii) a reward for acting as contemplated in subparagraph (i); or
 - (b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract, whether for the benefit of that tenderer or for the benefit of any other person, as –
 - (i) an inducement to withdraw the tender; or
 - (ii) a reward for withdrawing or having withdrawn the tender, is guilty of the offence of corrupt activities relating to procuring and withdrawal of tenders.”

To summarise: this Act prohibits any person from accepting, or agreeing to accept, any form of gratitude for themselves or someone else, or giving, agreeing or offering any form of gratification to benefit that person or anyone else, while procuring or withdrawing tenders.

2.7.2 Broad-Based Black Economic Empowerment Act 53 of 2003

The B-BBEE Act was introduced to

“establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice and to publish transformation charters; to establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith” (Hale, 2009).

B-BBEE addresses the economic empowerment of all black people, including women, workers, youth, people living in rural areas and people with disabilities (Hale, 2009). Diverse socioeconomic strategies are applied to redress certain imbalances of the past. Some of these are as follows:

- Management and control of black people in productive organisations is increased.
- Management and ownership of productive enterprises by communities, workers and cooperatives is established.
- Skills and human resources are developed.
- Achieving equitable representation in all occupational categories and levels in the workforce.
- Preferential procurement.
- There is investment in enterprises which are owned and managed by black people.

According to Hale (2009), the B-BBEE Act objectives are to facilitate black economic empowerment by the following:

- Economic transformation is promoted, thereby enabling meaningful participation of black people in the economy.
- Substantially changing the racial composition of ownership and managerial functions in skilled occupations of existing organisations.

- Increasing the extent to which workers, communities and cooperatives own and manage existing organisations.
- Increasing their access to economic activities, infrastructure and skills development.
- Increasing the extent to which black women own and manage existing organisations.
- Increasing their access to economic activities, infrastructure and skills development.
- Promotion of investment programmes which could lead to broad-based and meaningful participation by black people in the economy.
- The achievement of sustainable development and general prosperity by black people.
- Providing local communities with access to economic activities, infrastructure, land, skills and ownership.
- Enabling access to finance for black economic empowerment.

This Act provides a legislative framework, created by Government, whereby previous socioeconomic imbalances from the past are redressed, and the economic empowerment of all black people is ensured.

2.7.3 The Constitution of the Republic of South Africa Act 108 of 1996

Procurement-related matters are dealt with in Section 217 of the Constitution. Sub-sections (1) to (3) are applicable, and state:

- (1) “When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- (2) Sub-section (1) does not prevent the organs of state or institutions referred to in that sub-section from implementing a procurement policy providing for –
 - (a) Categories of preference in the allocation of contracts; and
 - (b) The protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in sub-section (2) must be implemented.”

Many South Africans were deprived of a meaningful contribution to the economy, prior to 1994. This section of the Constitution ensures that no more previously disadvantaged individuals are prejudiced in the procurement process.

2.7.4 Preferential Procurement Policy Framework Act 5 of 2000

The purpose of this Act is to

“give effect to section 217(3) of the Constitution by providing a framework for the implementation of the procurement policy contemplated in section 217(2) of the Constitution; and to provide for matters connected therewith”.

The Minister of Finance regulated a framework for implementation of preferential procurement policy: organs of state have to determine their preferential procurement policies which must be implemented within the following framework:

- A preference point system must be followed:
 - With contracts above a certain prescribed rand value amount, a maximum of 10 points may be allocated for specific goods, provided that 90 points are scored for the lowest acceptable tender.
 - With contracts above a certain prescribed rand value amount, a maximum of 20 points may be allocated for specific goods, provided that 80 points are scored for the lowest acceptable tender.
- Should any other tenders be received at a higher price, fewer points must be scored. A pro-rata basis must be used to calculate the tender price in relation to the lowest acceptable tender, in accordance with a prescribed formula.
- Certain specific goals may include –
 - contracting with categories of persons or persons who are historically disadvantaged on the basis of race, gender or disability.
 - implementation of the programmes of the Reconstruction and Development Programme (RDP) as published in the Government Gazette 16085 dated 23 November 2004.
- Should there be a specific for which a point may be awarded, it must be clearly specified in the invitation to submit a tender.

- The contractor who scores the highest points should be awarded the contract, unless objective criteria in addition to those contemplated in paragraphs above justifies the award to another tenderer.
- Should it be determined that false information was furnished in order to secure a tender in terms of preference in accordance with the Act, it may be cancelled at the sole discretion of the organ of the State.

This Act provides the framework which allows for the actual implementation of Section 217(3) of the Constitution. The Act ensures that a preference point system is applied, which allows HDIs who were discriminated against because of race, gender and disability, to receive contracts which are tendered for.

2.8 SUMMARY

Prior to 1994, black South African citizens were prevented from entering the corporate environment, due to apartheid. The new ANC government has since then embarked on a BEE drive to redress previous imbalances. It has been established that BEE is mainly governed by the Constitution, the B-BBEE Act, the PCCA Act and the PPPF Act. Although fronting as a criminal offence does not yet exist, it can be regarded as, and be prosecuted as, fraud. Fronting is nothing else but a misrepresentation of the truth, causing prejudice to the party/entity to which this misrepresentation is made. Many former white companies are being excluded from government tenders as a result of the BEE legislation. By circumventing the process, they commit fronting, in order to still secure tenders from Government. In order to score points on the HDI point scoring systems, they register females, blacks or even disabled persons as members/directors of their respective companies.

It was revealed that corruption is commonly found in the procurement process, and is therefore closely related to fraud. Fraud is, in fact, a dimension of corruption. Preferential procurement is used by Government as another method to address previous imbalances. The PPPF Act provides a preference point system, whereby the price for goods and services are calculated before a contract is awarded. The codes play a significant role in standardising the definition of BEE and the promotion of black empowerment.

CHAPTER 3

PROOF OF MISREPRESENTATIONS IN FRONTING INVESTIGATIONS

3.1 INTRODUCTION

According to Ndabezitha and Zilwa (2005:3), businesses and social partners play a vital role in combining forces with authorities to expose incidents of fronting. Fronting (which is regarded as fraud) is regarded as being detrimental to the objectives of BEE, and also to the transformation of the South African economy which could be globally competitive. Maphanga (2003:21) explains that individuals who are committing fronting are working in contradiction to the objectives of BEE.

As indicated in the previous chapter, fronting is regarded as being fraud, and in South Africa the victims of fraud are often overlooked (De Koker, Rider & Henning, 1999:6). The researcher has previously experienced that, during fronting practices, black people are merely used as bait to secure large government contracts, and they do not play any meaningful role in the company operations, nor is their participation at levels of real ownership, control or management. By doing so, initiatives such as employment equity, preferential procurement, ownership, management and socioeconomic development, would be created.

This chapter presents a brief explanation of how facts are misrepresented during fronting in the tender process, including the detection of this offence, the significance of red flag indicators and the investigation of fraud.

3.2 MISREPRESENTATION OF FACTS

The researcher has personally investigated a fronting-related matter, where the board of all-white directors of a well-established construction company (principal company) approached certain black labourers within the principal company to register their own CC's, with them (the labourers) as the owners of these companies. These black individuals were all poorly educated, so the CC's were registered by the principal company. The new owners were "kept in the dark" regarding actual reasons for registering the CC's, benefits, training, etc. At the same time, these

owners of the companies remained employed as normal labourers for the principal company.

The new owners were told that the office address, office telephone numbers, vehicles, etc. of the principal company would be shared with their “companies”. The new owners were further told that the principal company would appoint their own accounting firm to handle their company records, and all records were to be held by the principal company. They were also told that the CC’s cash flow would be administered by the principal company, and that they would only be required to sign already completed cheques from time to time. Their companies only consisted of them as owners, and no other employees.

The principal company would then tender for multi-million rand contracts, and indicate in their tender documents that, should the contract be awarded to them, they would subcontract 40% of the contract value to an black-empowered company (abovementioned CC’s), thereby achieving their required contract participation goal (CPG). Once the contract was awarded, the principal company completed the work themselves. Their financial records, however, indicated that 40% of the contract value was subcontracted as indicated in the tender application.

The problem is that the new “company owners” are not always aware of the fact that their company name has been used to secure contracts. Although their financial records reveal large amounts of money being transferred in and out of these accounts, they are not aware of it, as all documents are held and controlled by the principal company. Due to the fact that the new “company owners” have no signing rights on their own business accounts, they cannot monitor any financial activity. These black empowered companies exist only on paper, and are used purely to misrepresent facts to government departments in order to secure contracts.

The abovementioned example can be supported in the Supreme Court of Appeal of South Africa judgment in *Viking Pony Africa Pumps v Hidro-Tech Systems* (175/09) [2010] ZASCA 23 (25 March 2010). During this appeal, the tender process, PPPF Act regulations, the duty of the organ of state to act when it detects that preference has been obtained on a fraudulent basis, when duty arises, the nature of action

contemplated, and whether the organ of state was in breach of duty, had to be considered.

During this case, the court ruled that a contract should be awarded to the tender which scores the highest points. Such points are earned by being an HDI, for subcontracting with an HDI, for achieving specific goals, and for equity ownership by HDIs. Tenderers who claim preference points have to declare that all information provided in the tender is correct. The court further ruled that corruption in the tender process is endemic.

Vikings (appellant) was a company which supplied and installed mechanical equipment for water and sewerage works. Hidro-Tech (respondent) conducted similar business, and was a competitor of the appellant. The origin of this dispute lay in the respondent's repeated lack of securing contracts, despite the fact that lower tender prices than the appellant were submitted. It was alleged by the respondent that the success of the appellant was due to preference points derived from its HDI status. The respondent was concerned about the appellant's true representivity. These doubts were confirmed, once two former directors of the appellant joined the respondent. The legal representatives of the respondent set out the facts as follows:

- Despite having tendered the lowest prices, their client could not procure certain contracts from the City of Cape Town.
- The HDI status of the respondent was measured at 30% while the HDI status of the appellant was measured at 70%.

It was suspected that the appellant was committing fronting in the following way:

- HDIs were being appointed as shareholders and directors on a basis of tokenism, and were discouraged in any participation in any core activities and any management decisions of the appellant.
- Economic benefits received by the appellant did not flow to the HDIs in the ratio as specified per their shareholding with the appellant.
- The appellant was used as an opportunistic intermediary, as the benefits received by the appellant were routed to a sister company which was wholly white owned.

The appeal was subsequently dismissed with costs. When asked why criminals misrepresent, all the participants agreed that greed for financial gain could be regarded as the main reason.

3.2.1 Fronting practices

This section illustrates various fronting practices commonly used by perpetrators. Fronting is by no means limited to these examples, however. Moloi (2006:32) believes that there are four kinds of fronting:

- *Fronts on paper* – Company documents appear to be legitimate, where, in actual fact, the “owners” of the company are not unaware of the fact that they are shareholders, do not perform a management function within the company, and nor do they have control over any aspect within the company.
- *Company fronts* – The contractors would pretend to be black owned or black empowered. Once the contract is received, a large portion thereof is then sub-contracted to a white-owned company. The majority of the shareholders in the black company are black, and the whites own minimal shares. One would find that the minority white shareholders in the black company are major shareholders in the white company.
- *Fictitious companies* – These companies are established, and when awarded a contract, a white-owned company undertakes to do the actual work. All payments towards the contract are transferred into the white-owned company account.
- *Fronts in a joint venture (JV)* – A non-BEE contractor forms a JV with a BEE-compliant contractor, for a specific contract. In instances like these, the BEE partner is normally not a signatory on the JV documents, and has no responsibilities or control within the company. Often, the BEE partner will only provide the labour required. Bartlett (2010) and Burger (2010) support this point.

According to the *Guidelines on complex structures...* ([s.a.]), a further two fronting practices were identified, as follows:

- *Benefit diversion* – is where the benefits which are received as a result of a certain BEE status of an entity, are not transferred to the relevant black people as stipulated in the contract.

- *Opportunistic intermediaries* – entities conclude agreements with other entities, with a view to leveraging the opportunistic intermediary’s favourable BEE status where –
 - (a) there are significant limitations or restrictions upon the identity of an opportunistic intermediary’s service providers, suppliers, customers or clients.
 - (b) there is maintenance of a business operation in a context reasonably considered to be improbable, regarding resources.
 - (c) certain terms and conditions may not be negotiated in detail on a fair and reasonable basis.

Bartlett (2010) and Burger (2010) are in agreement with the abovementioned statement.

Maphanga (2003:21) states that fronting can also be committed by window dressing, which is when –

- white-owned companies join forces with black partners to be recognised as black economic empowerment companies; once the contract is awarded, the black partners are excluded.
- black partners are being made shareholders in companies, without explaining to them the requirements and responsibilities of a shareholder.
- white-owned companies use the names of black individuals without their consent, to meet the requirements of BEE.
- black individuals are allowed to be made shareholders, and when the contract is awarded, the black shareholder collects a commission for lending his name to the contract.

According to Ndabezitha and Zilwa (2005:18–21), there are certain concrete manifestations in fronting. These can be illustrated as follows:

- One of the most prominent forms of fronting is where white businesses conceal or misrepresent their true equity status, procurement from empowered entities, and the degree of participation by blacks and women.
- Black individuals are appointed as directors, yet it was never intended to utilise their services in the capacity as director. Often, these victims are not aware of

the abuse by white company owners, while in some cases black individuals allow this to take place for a fee.

- While the rest of the company practices are left untouched, the name and racial composition of the company's frontline staff is changed.
- Certain individuals are employed in positions, and are never given the responsibility which accompanies the relevant portfolio.
- White companies establish a BEE company, and then enter their existing companies into relationships with their BEE company. Black employees are made to sign certain documents whereby the correct racial profile is created.
- Especially in the construction industry, black contractors who are successful in securing contracts, sell these contracts to white companies at a significantly lower rate than the contract is worth.
- Collusion between white and black participants is common. Facts are misrepresented to create the impression that a certain company is empowered when it is not.
- By using sophisticated corporate instruments, white shareholders could structure voting arrangements in order to maintain influence and control in a company which is presented as empowered.

Consulting Engineers South Africa (CESA) (2005) explains that the South African Association of Consulting Engineers (SAACE) has taken a very strong stance against fronting. According to the SAACE, empowerment is undermined, and a "few" are being enriched through fronting. The SAACE has identified three basic fronting practices, which can be illustrated as follows:

- In certain cases, relationships between white and black individuals are established purely to ensure that the white individuals procure the contract. In these instances, black individuals do not advance their technical or intellectual skills and they do not benefit financially or in a material sense.
- Certain companies create BEE companies, or they use empowerment shell companies, which do not have separate shareholders or staff, to undertake significant portions of procurement work.
- Companies use the names of influential black individuals during the tender process. These companies pay the particular black individual a fee for using the name, and no independent black empowerment takes place.

According to *The facts of fronting* (2008), a business arrangement which involves only superficial involvement of a black company, can be regarded as fronting. Such examples include the following:

- *Window dressing* – A black individual is introduced to and appointed in a business, purely because of his colour. This individual is then prevented and discouraged from any core activities of the business. Bartlett (2010) explains that this includes cases in which black people are appointed or introduced to an enterprise on the basis of tokenism. These individuals may be discouraged or inhibited from substantially participating in the core activities of the enterprise. Burger (2010) supports this view, and is of the opinion that window dressing is when a black person is introduced to an enterprise/company on the basis of tokenism.
- *Benefit diversion* – Economic benefits awarded to a black company, based on its BEE rating, are diverted away from the black participant upon whom the rating is based.
- *Opportunism* – Joint venture arrangements are made with black individuals to boost one party's BEE status. The bulk of the work to be done is then, in actual fact, outsourced back to the non-BEE company or to the non-BEE-compliant suppliers.

The transactions which are targeted the most, relate to services rendered and repairs. Bid rigging or cover quoting is often found in the procurement process. It normally occurs in the quotation stage, when the procurement officer colludes with the external supplier. The supplier will submit multiple quotations, and thereby ensure that the contract is awarded to them.

According to Maphanga (2003:23), fronting is committed because of the following possible reasons:

- A white partner is regarded as an individual who understands tender documents and can do the required calculations. The black partner is therefore convinced that they will be successful in that particular tender.
- Certain black partners are still under the impression that a white person can produce better quality work, and therefore the black person lacks self-confidence.

- A perception exists among certain black people that more contracts will be secured – therefore they can make more money, quicker, than contractors who do not commit fronting.
- Certain black contractors are ignorant.

The one fact which all the abovementioned authors have in common, is the fact that in all illustrations of fronting practices, there are misrepresentations made, in order to receive a benefit (normally in the form of a contract). Bartlett (2010) is of the opinion that fronting is also committed by black-owned companies, where the shares are allocated on an “earn-out” basis, or are deferred ordinary shares. Once dividends are paid, the black-owned company (shareholder) only receives a small percentage of the profits. Burger (2010) says that when fronting is committed, the black individuals’ status is abused, and they receive no financial benefit as indicated in the original tender documents.

During the interviews, 85% of the sample could provide examples of different forms of misrepresentations in fronting. These participants provided examples, and were all in agreement that fronting is mainly committed by window dressing, benefit diversion and opportunistic intermediaries. The sample also agreed that companies fraudulently misrepresent their BEE status, in order to secure large contracts. The remaining 15% of the sample could not provide any examples of fronting practices, as they had not had any exposure to fronting investigations, nor had they received any formal training therein.

3.2.2 Procurement fraud

Procurement fraud can often prove to be challenging, as it can take on many different forms. It is normally regarded as an administrative irregularity, due to the fact that it is always masked by deception. Another inhibiting factor is the fact that procurement fraud is normally committed by the contractor and the procurement official. Chêne (2010) states that a transparent and effective procurement process can be characterised by the following underlying factors:

- *Fairness* – Component suppliers should have equal chances to participate.
- *Transparency* – Procedural steps should be open and predictable, and participating bidders should be treated equally.

- *Recourse possibilities* – Transparent procurement processes should allow for independent contestation mechanisms.

Effective, transparent and equitable procurement are some of the objectives of supply chain management (SCM) (Burger, 2010). When asked to define SCM, Bartlett (2010) said that the framework for SCM had been promulgated as Treasury Regulations, issued in terms of Section 76(4)(c) of the PFM Act. SCM forms an integral part of the financial management system of every institution, and deals with the supply chain of goods and services. SCM will continue to address an effective, efficient and innovative process for demand planning, procurement (including strategic sourcing), contract management, inventory/asset control and obsolescence/disposal planning. With this process it is planned to add value at every stage of the supply chain process. Burger (2010) agreed.

When asked what procurement fraud was, the participants were unanimous in their view, and all of them stated that procurement fraud is when a public official, who does procurement as part of their duties, awards an unfair advantage to someone in the procurement process because of a misrepresentation made, which causes loss of public funds.

Twenty-six per cent of the sample interviewed had received specific training in tender fraud, in the form of courses presented by the SIU and the AG. Eighty-one per cent of the sample added, and, further, all agreed that incorrect information was being supplied on tender documents which are submitted during the tender stage. These misrepresentations normally consist of –

- non-disclosure of conflict of interests.
- falsification of documentation.
- BEE status not correctly disclosed.
- falsification of VAT certificates.
- levels of services that have been performed previously, and the capabilities of the contractor to undertake current tasks.
- price fixing.
- submitting more than one tender from a person who represents more than one company.

The remaining 19% of the sample could not provide examples of how facts are misrepresented in tender documents.

3.3 THE DETECTION OF FRAUD

Davia (2000:34–35) states that fraud detection, and the investigation thereof, are concepts which are linked together. The detection of fraud can be seen as the proactive stage and the investigation of fraud as the reactive stage. The detection of fraud can therefore be regarded as one of the investigation phases which the investigator needs to complete. The detection of the circumvention of procurement controls is important (*SIU Training Manual*, 2010:145).

Before the actual investigation commences, it is important for the investigator to filter available data, in order to identify unusual/exceptional transactions. Once this exercise has been performed, the investigator can focus his attention on high-risk transactions (*SIU Training Manual*, 2010:146). Bartlett (2010) is of the opinion that the detection of fraud is vitally important, because fraud, corruption, maladministration and misconduct are very serious matters. Burger (2010) states that fraud contributes to the loss of State funds, and impacts negatively on the economy of the country. He further states that these matters always cause potential or actual loss to a company/institution. Both experts agree that the early detection of fraud (and other irregularities) is certainly one proactive investigative method which should be applied.

Bologna and Shaw (1997:1) explain that in a corporate context, fraud can be categorised as internal (committed by employees, directors, etc.) and external (committed by contractors, suppliers, etc.). It is important for investigators to know what type of fraud they are hoping to identify. Normally, fraud which is detected consists of a few shreds of evidence which need to be pieced together before the case can be presented in court (Davia, Coggins, Wideman & Kastantin, 2000:60).

Ndabezitha and Zilwa (2005:21) explain that, due to the fact that fronting practices can range from the misrepresentation of a company's BEE status to more sophisticated corporate structures which are designed to hide the true nature of business relationships between a company and its BEE partners, the following measure could be implemented to discourage and combat fronting:

- Fronting, and other forms of BEE circumvention, could be discouraged by verification agencies who actually report fronting practices to the Minister of Trade and Industry, who may blacklist such enterprises. The objective of blacklisting fronting enterprises is to create potential loss of business for such culprits. Business owners are more likely to avoid associating with fronting enterprises, and such exposure may harm their own companies. If a company is seeking continued success and promotes the objectives of BEE, they should avoid being blacklisted, as this will cause a loss of income and severe damage to the company image.

According to Maphanga (2003:22), possible fronting can be detected in the following ways:

- *Word of mouth* – When a contractor becomes aware of another contractor who is committing fronting, the latter is reported to the relevant authorities for further investigation.
- *Work carried out* – When a contractor is unable to supply any reference of previous work performed, during an interview.
- *Plant and equipment* – When the contractor indicates that they own certain construction equipment, but in actual fact cannot produce documents such as log books, to prove it.
- *Employment equity detail* – When it appears that certain company owners are not racially disadvantaged individuals.
- *Company registration certificate* – When the percentage of shareholding and ownership details of a company appears not to be that of racially disadvantaged individuals.

In cases of corporate fraud, allegations of fraud, theft and corruption are often received by the security investigator. In some cases, accounting discrepancies will be detected by internal auditors who will start an investigation process (Bologna & Shaw, 1997:2).

The sample were asked for their views on the detection of fraud, how important the detection of fraud is, and why. One hundred per cent of the sample agreed that the

detection of fraud is vitally important, and they listed the following seven points as the reasons why:

- Fraud, corruption, maladministration and misconduct are serious behaviours that contribute to the loss of State funds, and impact on the economy of the country, eroding society of benefits and vital services (11 respondents, which constitutes 36,66% of the sample).
- Early fraud detection can act as a deterrent for potential perpetrators (30 respondents, which constitutes 100% of the sample).
- General fraud awareness among the public will ensure that fraud is reported and justice prevails (6 respondents, which constitutes 20% of the sample).
- Early fraud detection plays a vital role for company owners, due to the large losses which could result from fraud (9 respondents, which constitutes 30% of the sample).
- Early fraud detection can also save large companies from long, expensive forensic criminal investigations (30 respondents, which constitutes 100% of the sample).
- Fraud perpetrators could be identified and eliminated from the system before they cause financial loss (5 respondents, which constitutes 16% of the sample).
- It creates new client trust, and increases operational efficiency (4 respondents, which constitutes 13% of the sample).

3.3.1 Red flag indicators of fraud

White-collar crime can be regarded as the costliest and most deadly form of crime (Walsh & Hemmens, 2008:499). It is therefore vitally important to detect any sign thereof as soon as possible, and then act accordingly. Magnuson (1992:100) maintains that it is wise to conduct internal investigations before law enforcement agencies become aware of irregularities. According to Bologna and Shaw (1997:3), the techniques used to identify fraud vary significantly. They state further that there are no generally accepted checklists to assist with fraud detection, but the following “red flags” could be of assistance to the investigator in the fraud detection phase:

- Journal entry adjustments which have no authorisation and supporting documentation
- Expenditure which lacks supporting documents
- False and improper entries in accounting records

- Unauthorised payments
- Unauthorised use of corporate assets
- When misapplication of corporate funds occur
- When documents which support payments are destroyed and forged

According to the *SIU Training Manual* (2010:149–150), the procurement fraud investigator might find it useful to look out for the following “red flag” payments during his investigation:

- Suppliers who submit more than one invoice on the same day
- Invoices which are in sequence and received from the same supplier
- Duplicate payments
- On the same dates, the same amounts with the same invoice numbers are paid to different suppliers
- Invoices dated on weekends or public holidays
- Invoice amounts which are higher or lower than the payment amount
- Invoices with no payments
- Payments with no invoices
- Suppliers using the same invoice number
- Order numbers which are in sequence
- Orders which are in sequence on the same day
- Suppliers who use more than one account number
- Bank account details which constantly change
- Round amount payments
- Payment amounts from R29 000,00 to R29 999,00 (these amounts are just below the delegation and can indicate possible splitting of tenders)
- Invoices which are repeated and paid twice

The sample were asked what “red flag indicators” are, and how they can assist the investigator. Ninety-one per cent of the participants were in agreement that it could be regarded as a way of detecting fraud, which will assist the investigator. These abovementioned activities can often be relied on to either start a new investigation or to continue with an existing investigation.

Bartlett (2010) states that “red flags” are indicators of fraudulent activity within a company or government institution. Such “red flags” normally consist of inadequate controls regarding financial procedures, no proper auditing procedures in place, inadequate training of staff, and poor accounting/financial record keeping. Burger (2010) adds that unnecessary purchases made, unauthorised purchases, and quotations applied for and obtained *ex post facto*, can be regarded as “red flags”. In order to be effective in the fight against procurement fraud, it is vitally important for investigators to be aware of, and to look out for, these “red flag” indicators.

3.4 THE INVESTIGATION PROCESS

Bologna and Shaw (1997:99) state that there is no algorithm for the solution of crime, and the detective’s road to solving a crime will therefore be full of trial and error. Although the investigation process of a violent crime differs from the investigation of a fraud case, there are many commonalities (Davia et al., 2000:229). In the researcher’s experience, during a fraud investigation an investigator will gather sufficient evidence to support the allegation received, and determine whether fraud was, in fact, committed. He will also quantify the loss, determine who was and was not involved, determine how it happened, and identify the perpetrator.

The experts could not comment on the cooperation, or the lack thereof, from government departments, in the investigation of procurement-related matters. The sample were asked how an investigator would prove misrepresentations in BEE fronting investigations. Fifty per cent of the sample were of the opinion that the investigator should –

- check tender application documents for similar information such as names, telephone numbers, addresses, fax numbers, etc. (3 respondents, which constitutes 1% of the sample).
- check with Cipro to ensure who the members of the CC’s or directors of companies are (15 respondents, which constitutes 50% of the sample).
- determine existence of SCM/tender procedures, a policy framework, and procurement process (15 respondents, which constitutes 50% of the sample).
- determine compliance with SCM/tender procedures, policy framework and procurement process (7 respondents which constitutes 23,33% of the sample).

- review preferred supplier database (5 respondents, which constitutes 16,66% of the sample).
- review tender submissions of all companies that submitted (10 respondents, which constitutes 33,33% of the sample).

The remaining 50% of the sample answered the question incorrectly, or could not answer it at all, as they were of the opinion that they had had no previous BEE fronting investigation experience.

The researcher has previous experience in the investigation of matters related to the Department of Housing. The investigation team consisted of investigators, as well as a procurement expert, a civil engineer, a former prosecutor and an accounting expert. These four experts played a vital role in providing guidance on relevant and applicable policies and procedures, contractual agreements between departments/municipalities and contractors/consulting engineers, technical matters, and, ultimately, what evidence was required for the purpose of prosecution. However, only 33% of the participants agreed that the following expert services have proved to be successful in BEE fronting investigations:

- Procurement specialist
- Legal specialist
- Accountant
- Investigative specialist
- Data capturer/analyst

The remaining 67% of the sample could not provide any comment on the use of experts in the investigation process. Therefore, the same percentage (33%) of the sample said that experts could add value to the investigation process by assisting with the following:

- Analysis of the scoring process conducted by the bid evaluation committee.
- Analysis of financial records to determine profit allocation and dividends.
- Applicable legislative framework and amended case law.
- Work performed by contractors/engineers could be inspected by experts who could provide technical evidence during court proceedings.

- Experts could speed up the investigation process by contributing their knowledge and experience.
- Experts could play a vital role in providing systemic recommendations to departments.
- The value of the actual and potential loss, due to non-delivery/substandard work by contractors/engineers, could be determined.

3.4.1 The meaning of a criminal investigation

The *SIU Training Manual* (2010:139) states that the nature of the allegation received by investigators will determine which investigation approach to follow. Two broad categories of referrals have been encountered by the SIU:

- **Specific allegations**

Such an allegation could relate to a specific tender awarded. Therefore, the tender award process to be investigated is already identified.

- **General allegations**

A department has, for example, noticed an increase in expenditure, and requires the investigation to determine any procurement-related irregularities. Sennewald and Tsukayama (2001:3) state that an investigator should always remember to ask what, who, where, when, how and why, whenever starting an investigation. Du Preez(1996:2–3) maintains that a criminal investigation consists of the collection of information in different phases. These phases are:

- *A systematic planned process*
 - Notification
 - Collection
 - Arrest
 - Prosecution

Normally, during this phase, information is generated by people and objects. Due to the fact that information must be gathered according to legal direction, no room for a random, unplanned process exists. A systematic

plan will, therefore, assist the investigator in identifying the perpetrator or proving their innocence.

- *Information*

The investigator will attempt to gather information, in order to determine the truth in a crime situation.

- *Recognition*

Before the information is collected, the investigator must be able to identify which information is relevant to the crime under investigation.

- *Gathering and preservation of information*

During an investigation, information is normally obtained from people or objects. A systematic plan of action can be considered as being the basis of a criminal investigation. Evidence which is presented should illustrate the unlawful act of the perpetrator beyond reasonable doubt. Relevant information should be gathered in such a way that its physical and legal integrity is maintained at all times. The maintenance of the continuity of possession is vitally important in the evidential process.

- *Evaluation*

All information should be evaluated properly. Not only must the investigator determine relevance; the positive potential to reveal the truth has to be determined as well. Not all information gathered will be presented as evidence during the court proceedings. The evidence which is presented in the trial is the end product of evidence gathered by discovering, tracing, evaluating and selecting relevant information.

3.4.2 Objectives of criminal investigation

Du Preez (1996:4) states that the identification of the crime, gathering evidence, individualisation of the crime, arresting the criminal, recovery of stolen property, and involvement in the prosecution process, can be regarded as the objectives of a criminal investigation. These objectives can be illustrated as follows:

▪ **Identification of the crime**

The investigator must identify which crime was committed, if any, and then determine what information needs to be collected. Information and facts which are gathered must confirm the act indeed amounts to unlawfulness, and that the specific individuals under suspicion are responsible.

▪ **Gathering evidence**

Du Preez (1996:4) further states that evidence is all the information presented to a court, in order to enable it to settle a factual dispute, so it includes the written and oral statements by witnesses as well as objects submitted for inspection.

Sources of direct information are –

- victims and complainants.
- witnesses directly involved in the event.
- persons who were involved in the events in question, but were not present when it actually happened.
- accomplices or suspects.

Indirect evidence can be regarded as physical clues which can be used to prove the association between the suspect and the alleged offence. It is the view of Manning (2000:55) that evidence will establish or disprove a particular allegation.

In financial crime investigations, the investigator will attempt to determine whether the suspect was involved in profitable activity. Evidence will be legally admissible in court under the rules of evidence, if it is used to support or prove a fact. Evidence is not proof; proof is the result of evidence. Sennewald and Tsukayama (2001:139) explain that evidence is “a statement of a witness, an exhibit, etc. bearing on or establishing the point in question in a court of law”.

The rules of evidence state that all evidence obtained must be relevant to the case, it has to be marked accordingly, it should be stored so that it is protected from any contamination or destruction, and the chain of continuity between the discovery of the evidence and the presentation thereof in court needs to be established (Sennewald & Tsukayama, 2001:140-141). The *SIU Training Manual* (2010:147) states: “The timing and frequency of procurement transactions or

the flow of payments to a service provider can provide important indications of irregularities”.

- **Individualisation of the crime**

The objective here is to determine the involvement of the perpetrator, or alleged criminal, with the alleged offence. The investigator will determine whether the offence was committed by a particular individual. Du Preez (1996:6) states further that there is a distinct difference between identification and individualisation. Identification is only the identification of an object belonging to a specific category. For example, a hair is simply a hair, and no comparisons are drawn. In the case of individualisation, on the other hand, an object found at the crime scene is linked to a particular individual. For example, a fingerprint found at the scene of a crime is processed and compared with that of the suspected criminal, in order to prove the perpetrator’s involvement in the crime.

The researcher has previously used the services of the “Disputed Documents” section of the SAPS, where particular individuals were linked to handwriting on specific documents which were under investigation. As misrepresentations during the tender/procurement processes are normally made in writing, investigators could perhaps consider applying the abovementioned method to individualise the particular offence. Svensson, Wendel and Fisher (1981:4) state that individualisation refers to the fact that an item is unique. An item can be shown to be directly related to a particular individual. In identification, it can only be shown that items share a common source, and that a group of items contain the same properties.

- **Arresting the criminal**

Once all the evidence has been collected by the investigator, and the perpetrator has been identified, the arrest will follow, to ensure presence at the forthcoming court proceedings.

- **Recovery of stolen property**

During a criminal investigation, the victim’s losses are restricted to a minimum, and the recovered material will be presented as evidence in court. In fraud-

related offences, the investigating officer will quantify losses suffered by departments or individuals.

- **Involvement in the prosecution process**

Investigators assist the prosecution during court proceedings. During this phase, the investigator will present all information gathered, and ensure that all relevant role-players are present in court.

Swanson, Chamelin and Territo (1988:23–24) agree, and state that an investigator gathers documents and evaluates facts about a particular offence. Investigation is considered as the actual process through which these are accomplished. Four investigation phases are identified:

- Establishing that a crime was, in fact, committed
- Identifying and apprehending the suspect
- Recovering stolen property
- Assisting the State in prosecuting the party charged with the offence

In order to identify the perpetrator, Sennewald and Tsukayama (2001:228) maintain that the investigator should first apply a process of elimination, and determine who did not commit the offence. In seeking to determine who committed the offence, the following should be remembered:

- Eliminate those who could not have played any role in the offence.
- Collect and analyse all available evidence.
- Establish the relationship between the suspect and the evidence.
- Obtain the assistance of law enforcement.
- Utilise all available information sources.
- Do not prejudice the case by jumping to conclusions.
- Utilise investigative interviewing techniques.
- Display persistence.

3.4.3 Phases of the investigation process

The sample were asked to explain the different phases in a typical fraud investigation. Although the answers were not exactly the same, all the participants (100%) were generally in agreement that a systematic approach, as recommended by Du Preez

(1996:2-3), should be followed. Eighty-one per cent of the sample were of the opinion that a fraud investigation is conducted by –

- receiving an allegation.
- scoping and planning of the investigation.
- investigation.
- reporting on findings.

Twelve per cent of the sample were in agreement that a fraud investigation will consist of the following phases:

- Identifying the allegation
- Gathering information in support of the allegation
- Conducting the investigation (which will include document analysis, interviews, affidavits and financial analysis)
- Instituting disciplinary and criminal proceedings
- Assisting the AFU with the civil recovery of funds
- Reporting findings and recommendations to the client (department)

Seven per cent of the sample agreed to focus on, and prove, the elements of fraud during a fraud investigation.

Although the responses from the sample regarding the investigative phases were not the same as those proposed by Du Preez (1996:2-3), they can be regarded as valid. The sample referred to the phases followed by a SIU investigator.

Davia (2000:42) states that it is very difficult to convict a perpetrator of fraud. It has to be proved, beyond all reasonable doubt, that the perpetrator had the intent to commit fraud. Investigators should always obtain evidence demonstrating intent, and it is always advisable to obtain more than one instance where the perpetrator was dishonest. Joubert (2001:155) agrees by saying that “the perpetrator must have had the intention to defraud the prejudiced party”. It is important to realise that the intention to mislead will not constitute fraud. If the perpetrator only wanted to mislead the victim, without expecting him to act thereon to his detriment, it will only constitute intention to mislead. On the other hand, if the perpetrator wanted the victim to act on the misrepresentation made, resulting in prejudice, intention is present.

3.5 SUMMARY

Black individuals are abused, in terms of being misused, to secure large government contracts. Fronting is detrimental to the transformation of the South African economy. It has been determined that fronting (which is fraud) can be regarded as a dimension of corruption. Any corrupt activities relating to tenders are addressed by the PCCA Act and the CPA. Fronting practices which have been identified as the most problematic were discussed; however, more of such practices could exist. It is vitally important for institutions to have fraud detection and prevention strategies in place. It is equally important to have a system in place where “red flags” can be identified as part of a preventative plan.

CHAPTER 4

FINDINGS AND RECOMMENDATIONS

4.1 INTRODUCTION

The aim of this particular research was to determine what BEE and fronting is, how certain facts are misrepresented during the commission of the alleged offence, and how the State could prove such allegations. The researcher focused on the following two research questions during his research:

- What is BEE and fronting?
- How can misrepresentation be established and proved in fronting investigations?

Findings were made in relation to these research questions, and are addressed, below, as primary findings. In addition to these primary findings, secondary findings were also made. These findings indirectly link to the primary research questions. Based on the primary and secondary findings of the research, a number of recommendations are also made.

4.2 FINDINGS

Specific questions to be addressed were developed during the beginning of the research. Based on the personal experience of the researcher, the literature and the interviews, the following findings were made:

4.2.1 Primary findings

4.2.1.1 *Research Question One: "What is BEE and fronting?"*

(a) It was established by conducting interviews and from the literature that the BEE policy was introduced to redress past racial and economic imbalances. BEE provides for an increase in representation, education and employment opportunities for groups including:

- women
- black Africans
- Indians
- coloureds

- (b) It was found that the sample generally agreed that the objectives of BEE can be explained as economic empowerment and transformation. BEE objectives can also be illustrated as the distribution of wealth across as broad a spectrum of South African society as possible.
- (c) It was established by the sample and literature that black South African citizens, such as women, disabled individuals, the youth and individuals living in rural areas, will benefit from BEE.
- (d) It was further determined that BEE is implemented as an initiative by Government to redress the inequalities of the past by creating economic opportunities for the previously disadvantaged.
- (e) The interviews and the literature revealed that fronting is a deliberate or attempted circumvention of the B-BBEE Act and the codes. When fronting is committed, the company owners would generally indicate that their particular company complies with BEE requirements, thereby ensuring a better chance of securing large contracts. Due to the fact that the government procurement process is complex in nature, it is often abused by perpetrators and corrupt government officials (in the procurement section), in order to defraud Government. Although this is not the only manner, fronting is normally committed by the superficial inclusion of HDIs in their businesses.
- (f) The researcher identified that fronting is none other than fraud, and therefore the elements of fronting would be similar to that of fraud. The elements are explained as being misrepresentation, prejudice, unlawfulness and intent.
- (g) After interviewing the sample and experts, and consulting literature, it was found that the following table will illustrate how fronting is committed, as well as some of the most common fronting practices. This could assist a fronting investigator to identify misrepresentations:

TABLE 8: Fronting practices

NO.	TYPE	KEY PHRASE DESCRIPTION
1	Fronts on paper	Company documents appear legitimate – “owner” has no control of management function.
2	Company fronts	Contractors pretend to be black owned companies and sub-contract to white-owned companies –these black shareholders are major shareholders in the white companies.
3	Fictitious companies	Black-owned companies established – white-owned companies do actual work
4	Fronts in a joint venture (JV)	Non – BEE companies forms JV with BEE companies – BEE company is not signatory and only provides labour
5	Benefit diversion	Benefits received as result of certain BEE status are not transferred to those stipulated in contracts.
6	Opportunistic intermediaries	Companies conclude agreements – view is to leverage opportunistic intermediaries’ BEE status.
7	Window dressing	Black individual introduced into company because of colour – prevented from activities of any core functions of company.

- (h) The sample and experts were generally in agreement that fronting adversely affects, and defeats, the objectives of BEE.

4.2.1.2 Research Question Two: “How can misrepresentation be established and proved in fronting investigations?”

- (a) The majority of the sample agreed that investigators should always ensure that the elements of fraud have to be proved when investigating misrepresentations in a fronting case. These can be illustrated as follows:
- Ensure that the required element of misrepresentation is established by proving that there was a perversion, distortion or deception of the truth.

4.2.2 Secondary findings

The following findings were made in terms of certain other relevant points that the researcher came upon during the research:

4.2.2.1 Misrepresentation of facts in procurement

The samples agreed that during the procurement process, facts are normally misrepresented in the following ways:

- Incorrect information is submitted in bidding documents during the tender process.
- Incorrect information is supplied at tender meetings.
- Facts concerning the nature, quality and quantity of goods to be rendered are misrepresented.
- Conflicts of interest are often not disclosed.
- Status with SARS is misrepresented.
- BEE contribution levels are misrepresented.
- Information concerning the involvement of certain subcontractors or outsourced service providers in the performance of the contract is withheld.

4.2.2.2 Preferential procurement

By interviewing the experts and consulting relevant literature, it was found that during preferential procurement, certain groups of individuals were being given preference during the awarding of tenders – which has to be carried out in terms of the PPPF Act. It was also found that the purpose of preferential procurement is the “empowerment” and restructuring process as mentioned above. However, large share options are offered to black empowerment partners, who offer little expertise but have significant access to government business because of their acquaintance with influential public servants.

4.2.2.3 Problem areas in public sector procurement

The experts agreed that certain problem areas within the public sector procurement were identified as –

- different interpretation of the Acts and regulations by various agencies.
- non-alignment of the PPPF Act and the relevant regulation.
- officials who have profit sharing in companies, tendering on public tenders.

The experts further agreed that these problems could, however, be addressed by implementing good governance in –

- value for money.
- good financial control.
- countering corruption.
- meeting tax and service charge obligations.
- adhering to prescribed labour practices.

4.2.2.4 The preference point system

Relevant literature, and interviews with the experts, has revealed that the preference point system has been implemented to address certain past discriminatory policies and procedures. The PPPF Act has designed the point system to assist with the allocation of contracts. According to the procurement regulations, organs of state must indicate, in their tender documents, which preference point system will be applied in the adjudication of a particular tender. A maximum of 100 points may be awarded to a contractor. More preference points will be attained for contracts with a lower price, than contracts with a higher price.

4.2.2.5 Legislation

The experts and relevant literature are generally in agreement that the following legislation (although not the only legislation) which governs BEE, can be regarded as among the most important:

- The Broad-Based Black Economic Empowerment Act 53 of 2003 –
 - is the legislative framework established to promote black economic empowerment.
 - was instituted to address economic empowerment of all black people.
 - clearly sets out which imbalances are to be redressed.
 - outlines the objectives of the B-BBEE Act.
- It was found that the Constitution of the Republic of South Africa Act 108 of 1996 –

- ensures that contracts for goods and services must be fair, equitable, transparent, competitive and cost effective.
- ensures that procurement policies implemented provides for the preference of allocation of contracts.
- ensures that disadvantaged persons (due to unfair discrimination) are protected.

4.2.2.6 *Fronting risk indicators*

The experts confirmed that verification agencies are utilised to assist with the identification of fronting risk indicators. These agencies are also used for the determining of fronting scores and for the reporting on their findings. In cases where fraud is committed, provision is made for companies to be blacklisted. Fronting and other forms of BEE circumvention are normally discouraged by reporting fronting practices to the Minister of Trade and Industry – whereafter such companies are blacklisted.

4.2.2.7 *Concerns*

Among other types of fraud, the SIU is also responsible for conducting fronting investigations. By conducting interviews with the sample, the following areas of concern were identified, which need to be addressed accordingly:

- 27% of the sample had never been exposed to fronting investigations.
- 3% of the sample had received training in fronting.
- 26% of the sample had received training in tender fraud.
- 19% of the sample had experience in fronting investigations.
- 46% of the sample could provide the elements of fronting.
- 33% were of the opinion that “experts” could be beneficial to a financial investigation.

4.3 RECOMMENDATIONS

Based on the primary and secondary findings made during this research, certain recommendations can be made in relation to the subject of the research. The secondary findings of this research indicate that a relatively small percentage of the sample –

- have been exposed to fronting investigations.
- have received official training in fronting-related matters.
- have received official training in tender fraud related matters.
- have had experience in fronting-related investigations.
- can identify and know what the elements of fronting are.
- believe that “experts” could be beneficial in the investigation of tender fraud.

To enhance investigative skills and improve knowledge among investigators, it is recommended that a training curriculum for investigators be compiled, and include all of the abovementioned points. It is important to address these areas and rectify these shortcomings. It is further recommended that the SIU provide its members with exposure to these aspects, where possible. Training for government officials (who work in the procurement sections) in the identification of fronting, is recommended.

Once the abovementioned recommendations have been implemented, additional research can be undertaken to provide clarity on whether or not the investigation component of the SIU has benefitted at all. The necessity of further training in this field can be determined. It is, however, also recommended that more research be conducted on BEE fronting and its effect on procurement in South Africa. In particular, further research can be beneficial in the following areas:

- Fronting as a form of fraud
- The association between fronting (fraud) and corruption
- The application and enforcement of the relevant legislation designed to govern BEE fronting
- The identification of new methods in committing fronting by perpetrators
- Determining whether investigative authorities have improved their skills, and if they are in a better position to combat fronting

4.4 CONCLUSION

At the beginning of the research, it was stated that the aim of this particular research was to determine what BEE fronting is, how certain facts were being misrepresented during commission of this alleged offence, and how the State could prove such allegations.

In Chapter 2, the researcher established what BEE is and why Government adopted this strategy. It was further determined what fronting is, and how it is associated with fraud. Normally, fronting is committed during procurement processes, and the various ways in which this is done, were outlined. Fronting is a mechanism to circumvent the objectives of BEE.

It was established that tender fraud consists of misrepresentations made in the procurement process. It was revealed that corruption normally occurs during the procurement process, and that it entails a corrupt relationship between a public official and a service provider. The importance of verification agencies in blacklisting fraudulent companies was discussed. The researcher explained how preferential procurement and the codes impact on BEE, and which legislation is most applicable.

In Chapter 3, the researcher explained the various ways in which facts are misrepresented by perpetrators committing fronting, and illustrations of various fronting practices were provided. The researcher clarified the role of corruption in the procurement process, and highlighted the importance for company owners to be aware of fraud prevention and detection methods – which could be of great benefit. These points were discussed in detail. The importance of “red flag” fraud indicators and the fraud investigation process were also elaborated on.

The researcher hereby aims to empower investigators with more knowledge and skills in their fight against white-collar crime. Investigators may use this research document to enhance their performance, and to be more effective in their daily functions.

LIST OF REFERENCES

- Bailey, K.D. 1987. *Methods of social research*. 3rd edition. New York: Free Press.
- Bartlett, C. Independent Consultant, Usquebough Consulting. 2010. Statement to author, 29 March. East London.
- BEE: What exactly counts?* [s.a.] From: https://www.southafrica.info/doing_business/trends/empowerment/definition.htm (accessed 14 October 2008).
- Black economic empowerment: commentary, legislation & charters*. 2007. [Loose-leaf]. Lansdowne: Juta.
- Blaikie, N.W.H. 2003. *Analyzing quantitative data from description to explanation*. London: Sage.
- Blow the whistle on fraud and corruption*. [s.a.] From: www.ecodev.gpg.gov.za/Anti-corruption%20booklet.pdf (accessed 12 January 2010).
- Bologna, J. & Shaw, P.D. 1997. *Corporate crime investigation*. Boston: Butterworth-Heinemann.
- Bolton, P. 2006. *Government procurement as a policy tool in South Africa*. From: www.ippa.ws/IPPC2/JOPP6_3/Article1_Boltol.pdf (accessed 1 November 2009).
- Bolton, P. 2007. *The law of government procurement in South Africa*. Durban: LexisNexis Butterworths.
- Broad-Based Black Economic Empowerment Act see South Africa, 2003.
- Burger, C. Professional Engineer, Inggandi Consulting. 2010. Statement to author, 23 March. East London.
- Business Unity South Africa*. [s.a.] From: www.busa.org.za/.../Verification%20Methodology%20-%20preferential%20procurement.ppt – (accessed 2 November 2009).
- CESA see Consulting Engineers South Africa
- Computer forensics*. 2008. From: www.us-cert.gov/reading_room/forensics.pdf (accessed 13 March 2011).

- Concise Oxford English dictionary*. 10th revised edition. 2002. s.v. "tender". Oxford: Oxford University Press.
- Constitution... see South Africa, 1996. Consulting Engineers South Africa. 2005. *SAACE takes strong stand against fronting*. From: www.cesa.co.za/showpress.php?id=101 (accessed 13 March 2010).
- Creswell, J.W. 1998. *Qualitative inquiry and research design: choosing among five traditions*. 8th edition. Thousand Oaks, CA: Sage.
- Creswell, J.W. 1994. *Research design: qualitative and quantitative approaches*. New Delhi: Sage.
- Criminal Procedure Act see South Africa.1977.
- Davia, H.R. 2000. *Fraud 101: techniques and strategies for detection*. New York: Wiley.
- Davia, H.R., Coggins, P.C., Wideman, J.C. & Kastantin, J.T. 2000. *Accountant's guide to fraud detection and control*. 2nd edition. New York: Wiley.
- De Koker, L., Rider, B.A.K. & Henning, J.J. (eds.) 1999. *Victims of economic crime*. Bloemfontein: University of the Orange Free State.
- De Vos, A.S., Strydom, H., Fouché, C.B., & Delpont, C.S.L. 2002. *Research at grass roots: for the social sciences and human service professions*. 2nd edition. Pretoria: Van Schaik.
- Denscombe, M. 2002. *Ground rules for good research: a 10-point guide for social researchers*. Philadelphia: Open University Press.
- Denscombe, M. 1998. *The good research guide for small-scale social research projects*. Philadelphia: Open University Press.
- Francis Baard District Municipality Fraud Policy*. 2006. From: www.francesbaard.gov.za/.../Anti-fraud%20and%20Corruption%20Policy%20frances%20baard%20nov%20... (accessed 22 April 2010).
- Gardner, R.M. 2005. *Practical crime scene processing and investigation*. Boca Raton, FL: CRC Press.
- Geis, G. & Meier, R.F. 1977. *White-collar crime: offences in business, politics and the professions*. Revised edition. London: Collier Macmillan.

- Guidelines on complex structures & transactions, and fronting*. [s.a.]. From: http://www.thedti.gov.za/economic_empowerment/docs/Acts_strat_policies/codes%20of%20good%20practice%20files/GuidelinesComplexstructuresFronting.pdf (accessed 1 April 2010).
- Guwa-Ngamlana, N. 2009. *Corruption at local government level – time to crack the whip*. From: http://www.atesis.org.za/Local-Governance-Articles/corruption-at-the-local-governmedpsa.gov.za/.../Public%20service%20anti_corruption_strategy.pdf (accessed 11 February 2010).
- Hale, A. 2009. *BEE article for FASA: what is BEE?* From: www.fasa.co.za/downloads/bee.pdf (accessed 13 February 2010).
- Hayton, J. 2000. *Procurement fraud in E-business*. From: www.Special.zonebg.com/izmami/procurement_fraud.pdf (accessed 12 March 2010).
- Joubert, C. 2001. *Applied law for police officials*. 2nd edition. Lansdowne: Juta Law.
- Kalula, E. & M'Paradzi, A. 2008. *Black economic empowerment: can there be trickle down benefits for workers?* From: www.research2008.net.ac.za/pdfs/Research2008.pdf (accessed 2 November 2009).
- Khatleli, N. & Root, D. 2008. *Managing pre-contractual and post-contractual opportunism in BEE delivery in PPPs*. From: www.grif.umontreal.ca/pages/conference/grif08-papers.htm (accessed 30 October 2009).
- Leedy, P.D. & Ormrod, J.E. 2005. *Practical research: planning and design*. 8th edition. Upper Saddle River, NJ: Prentice Hall.
- Leedy, P.D. & Ormrod, J.E. 2001. *Practical research: planning and design*. 7th edition. Upper Saddle River, NJ: Merrill Prentice Hall.
- Mackenzie, R. 1998. Virtual money, vanishing law: dematerialization in electronic funds transfer, financial wrongs and doctrinal makeshifts in English legal structures. *Journal of money laundering control*, 2(1):22–32.
- Magnuson, R.J. 1992. *The white-collar crime explosion: how to protect yourself and your company from prosecution*. New York: McGraw-Hill.
- Manning, G.A. 2000. *Financial investigation and forensic accounting*. Boca Raton, FL: CRC Press.

- Maphanga, T.G. 2003. *How the KwaZulu-Natal Department of Transport achieves Black Economic Empowerment through their Emerging Contractor Development Programme (Vukuzakhe)*. From: www.kzntransport.gov.za/reading_room/research/general/EmergingContractorProgramme.pdf (accessed 12 October 2009).
- Marais, C.W. & Van Rooyen, H.J.N. 1990. *Crime investigation*. Silverton: Promedia.
- Maxfield, M.G. & Babbie, E. 1995. *Research methods for criminal justice and criminology*. Belmont, CA: Wadsworth.
- Minnaar, J. 2000. *Understanding fraud and white collar crime: the origin, definition and elements of fraud*. From: www.ethicsa.org.za/index.php...preventingwhiteccunderstandingfraud (accessed 21 October 2009).
- Moloi, M. 2006. *Combating corruption and fronting*. From: [www.idasa.org.za/.../Procurement%20corruption%20-%20New%20Agenda%20\(Issue%2031%20Third%20Q%202008\).pdf](http://www.idasa.org.za/.../Procurement%20corruption%20-%20New%20Agenda%20(Issue%2031%20Third%20Q%202008).pdf) (accessed 19 January 2010).
- Mouton, J. 2001. *How to succeed in your master's and doctoral studies: a South African guide and resource book*. Pretoria: Van Schaik.
- Ndabezitha, S. & Zilwa, S. 2005. *A guide on recognising and preventing fronting*. From: www.busa.org.za/docs/2410busa_booklet%20print2%20fh11.pdf (accessed 2 October 2009).
- Noaks, L. & Wincup, E. 2004. *Criminological research: understanding qualitative methods*. London: Sage.
- Ntuli, Z. 2005. *Govt gets tough on BEE fronting*. From: <http://www.southafrica.info/business/trends/empowerment/bee-public-works-030805> (accessed 19 September 2008).
- Pienaar, G. 2008. *Procurement corruption*. From: www.business-ant-corruption.com/country-profiles/sub.../sources (accessed 9 November 2009).
- Preferential Procurement Policy Framework Act see South Africa. 2000.
- Prevention and Combating of Corrupt Activities Act see South Africa. 2004.
- Public Finance Management Act see South Africa. 1999.
- Public Service Anti-Corruption Strategy*. 2002. From: www.dpsa.gov.za/...Public%20service%20anti_corruption.strategy.pdf (accessed 21 April 2010).

- Rumney, R. 2008. *Fronting = BEE?* From: www.thoughtleader.co.za/regrumney/2008/02/fronting-bee/ (accessed 9 November 2009).
- Schloss, P.J. & Smith, M.A. 1999. *Conducting research*. Upper Saddle River, NJ: Prentice-Hall.
- Sennewald, C.A. & Tsukayama, J.K. 2001. *The process of investigation: concepts and strategies for investigators in the private sector*. 2nd edition. Boston: Butterworth-Heinemann.
- Silvermand, D. 2000. *Doing qualitative research: a practical handbook*. London: Sage.
- Snyman, C. R. 2008. *Criminal law*. 5th edition. Durban: LexisNexis Butterworths.
- South Africa. 2004. Prevention and Combating of Corrupt Activities Act 12 of 2004. Pretoria: Government Printer.
- South Africa. 2003. Broad-Based Black Economic Empowerment Act 53 of 2003. Pretoria: Government Printer.
- South Africa. 2000. Preferential Procurement Policy Framework Act 5 of 2000. Pretoria: Government Printer.
- South Africa. 1999. Public Finance Management Act 1 of 1999. Pretoria: Government Printer.
- South Africa. 1996. Constitution of the Republic of South Africa Act 108 of 1996. Pretoria: Government Printer.
- South Africa. 1977. Criminal Procedure Act 51 of 1977. Pretoria: Government Printer.
- Special Investigating Unit. 2010. *Training manual on procurement fraud*. East London: The Unit.
- Svensson, A., Wendel, O. & Fisher, B.A.J. 1981. *Techniques of crime scene investigation*. 3rd edition. New York: Elsevier.
- Swanson, C.R., Chamelin, N.C. & Territo, L. 1988. *Criminal investigation*. 4th edition. New York: Random House.
- Tesch, R. 1990. *Qualitative research: analysis types and software tools*. New York: Falmer Press.

- The facts of fronting*. 2008. From: [www.stdbankstage09.aquaonline.com/articles.htm?article=586 & cat...](http://www.stdbankstage09.aquaonline.com/articles.htm?article=586&cat...) (accessed 12 March 2010).
- Du Preez, G. 1996. Criminal investigation. In: Van der Westhuizen, J. (ed.) *Forensic criminalistics*. 2nd edition. Johannesburg: Heinemann.
- Walsh, A. & Hemmens, C. (eds.) 2008. *Introduction to criminology: a text/reader*. Los Angeles: Sage.
- Welman, J.C. & Kruger, S.J. 2001. *Research methodology for the business and administrative sciences*. 2nd edition. Cape Town: Oxford University Press.
- Welman, J.C. & Kruger, S.J. 1999. *Research methodology for the business and administrative sciences*. Oxford: Oxford University Press.
- Welman, J.C., Kruger, S.J. & Mitchell, B. 2005. *Research methodology*. 3rd edition. Cape Town: Oxford University Press Southern Africa.

CASES CONSULTED

S v Myeza 1985 (4) SA 30 T

Viking Pony Africa Pumps v Hidro-Tech Systems (175/09) [2010] ZASCA 23 (25 March 2010)

ANNEXURE 1: INTERVIEW SCHEDULE (SAMPLE)

“Investigation of misrepresentation in tender documents”

The aim of a particular research [study] will determine which research method will be used during the research project. The aim of this particular research is to determine what BEE fronting is, how certain facts are misrepresented during the commission of the alleged offence, whether or not investigators have deficiencies in identifying such misrepresentations, and how the State can prove such allegations.

The researcher will focus on the following research questions during his research:

- What is BEE fronting and Broad Based Black Economic Empowerment?
- How can misrepresentation be established and proved in fronting investigations?
- What are the deficiencies among investigators in identifying misrepresentations in tender documents?

I, _____ (name and surname), give permission to be interviewed, and the information I supply may be used in the research. Yes / No

A. Historical information

1. Are you an investigator?
2. If not, state your occupation.
3. Which crimes/offences do you specialise in?
4. Who is your current employer?
5. What position do you hold within your organisation?
6. Have you received any training in the investigation of crime?
7. Specify the training referred to in Question 6.
8. For how many years have you been conducting investigations?

B. BEE fronting and tender fraud

9. What is Black Economic Empowerment (BEE)?
10. What are the objectives of BEE?
11. Have you received specific training in the investigation of BEE fronting?
12. Do you have any experience in the investigation of BEE fronting matters?

13. If the answer to Question 12 was 'yes', please specify.
14. Define 'fronting'?
15. Does fronting affect the objectives of BEE?
16. What are the elements of fronting?
17. Define fraud.
18. What are the elements of fraud?
19. Why is BEE implemented?
20. Who will benefit from BEE?
21. In your opinion, why do criminals misrepresent certain facts to other individuals/institutions?
22. Give an explanation of 'tender document'.

C. The investigation of fraud

23. Name the different forms of misrepresentation you experience in the investigation of BEE fronting.
24. Have you received any training in tender fraud?
25. If your answer in Question 24 was 'yes', please specify.
26. How are misrepresentations made in tender documents?
27. In your opinion, what is procurement fraud?
28. What is your view on the detection of fraud? How important is it and why?
29. What are "red flag" fraud indicators and how can it help the investigator?
30. In your opinion, which experts' services have proved to be successful in previous investigations of BEE fronting?
31. What value could such an expert add to the investigation process?
32. How does an investigator prove misrepresentations in BEE fronting investigations?
33. Please explain the different phases of a fronting investigation.

ANNEXURE 2: INTERVIEW SCHEDULE (EXPERTS)

“Investigation of misrepresentation in tender documents”

The aim of a particular research [study] will determine which research method will be used during the research project. The aim of this particular research is to determine what BEE fronting is, how certain facts are misrepresented during the commission of the alleged offence, whether or not investigators have deficiencies in identifying such misrepresentations and how the State can prove such allegations.

The researcher will focus on the following research questions during his research:

What is BEE fronting and Broad Based Black Economic Empowerment?

How can misrepresentation be established and proved in fronting investigations?

What are the deficiencies among investigators in identifying misrepresentations in tender documents?

I, _____ (name and surname), give permission to be interviewed, and the information I supply may be used in the research. Yes / No

I, _____ (name and surname), give permission to be interviewed, and the information I supply may be used in the research. Yes / No

A. Historical information

1. State your occupation.
2. Please supply a brief overview of your current and previous occupation.
3. Are you familiar with any investigative methods applied to the investigation of white-collar crimes in particular?
4. If so, please be specific.

B. Black Economic Empowerment (BEE), fronting, fraud and corruption

5. Define BEE.
6. What are the objectives of BEE?
7. Define ‘fronting’.

8. Define fraud.
9. How are facts misrepresented in tender fraud?
10. Supply a description of a 'tender document'.
11. Define corruption.
12. Are you of the opinion that there is a relation between corruption and fraud?
Please explain.
13. Give examples of fronting risk indicators.
14. What is importance of risk indicators?
15. Please explain the function and importance of verification agencies?

C. Public Sector Procurement and fronting investigations

16. Define the Public Sector Procurement.
17. What are the objectives of the Public Sector Procurement?
18. Explain any problem areas in the Public Sector Procurement system?
19. If any, how could these problem areas be addressed effectively?
20. What is your understanding of "preferential procurement"?
21. Briefly explain what you understand about the "preference point system".
22. Briefly explain what you understand about the "Codes of Good Practice".
23. Which legislation do you regard as most applicable in governing BEE?
24. Explain the various ways in which fronting is committed.
25. Please be specific on the following:
 - Fronts in a joint venture
 - Opportunistic intermediaries
 - Window dressing
26. What role would the prevention and detection of fraud play in the investigation of fraud?
27. Are you of the opinion that the prevention and detection of fraud can be regarded as a proactive investigative method? Please explain.
28. What are "red flag" indicators and can it be of any importance to the procurement fraud investigator?
29. Define supply chain management.
30. Can you comment on the impact of cooperation or lack thereof from government departments in the investigation of procurement related matters?

ANNEXURE 3: LETTER OF AUTHORITY – SIU

SPECIAL INVESTIGATING UNIT 74 Watermeyer Street, Rentmeester Building, Meyerspark, Pretoria, 0001
Tel +27 12 843 0000 Fax +27 843 0115 website siu.org.za e-mail info@siu.org.za



2 November 2009

POISED TO STRIKE
against corruption

*Mr Armand Mynhardt
Chief Forensic Investigator
Special Investigating Unit
EAST LONDON*

Dear Armand

PERMISSION TO INTERVIEW MEMBERS OF THE SIU FOR ACADEMIC RESEARCH PURPOSES

Permission is hereby granted for you, in your capacity as a student with the University of South Africa, to interview members of the Special Investigating Unit as part of your research for your Master's in Forensic Investigation for the research topic "Forensic Investigation of Misrepresentation in Tender Documents".

You are however not permitted to make use of any specific information from cases under investigation by the Special Investigating Unit that have not been finalized in court, nor may you make use of any information from them that would result in them breaching their oath of confidentiality with the Special Investigating Unit

Yours faithfully,

William Andrew Hofmeyr
Head of the Unit

