

# South African Forum of Civil Engineering Contractors



## **SAFCEC**

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22 February 2022

**ISO9001**  
CERTIFIED

**Presentation to the  
Select Committee  
on Trade and Industry**

**SAFCEC presentation into the proposed  
Employment Equity Amendment Bill 2020**

# Presentation Overview

1 Introduction to SAFCEC & Our Industry



2 Interaction with DOEL & State since 2018



3 Legal Review



4 Our Proposals



5 Conclusion



# SAFCEC at a Glance



- Only Registered Employer Body for Contractors engaged in Civil Engineering Construction.
- SAFCEC active since 1939 in all the regions of South Africa.
- 350+ companies members jointly representing >50% of employees in the Industry.
- Represents a diverse range of established and emerging Civil Engineering Contractors
- Key initiators and Founder Members of Construction Sector Charter Council, and lead negotiators in the Amended Construction Sector Codes of 1 December 2017 and a founding member of the bargaining council for civil engineering industry.

# State of the Construction Industry

## Construction industry is the largest employer of youth and unskilled workers

- Severe collapse of the Construction Market since 2014 continues.
- Listed entities shedding value and many companies going out of business, listed and non-listed alike.
- Victim of cyclical markets compounded by ever-changing procurement legislation and the consequential delay in the awarding of contracts.
- Flight of skilled employees of all demographics often due to lawlessness and business forums prevalent where service delivery is needed most.
- Shortage of experienced key personnel at Management and Senior Levels.
- Lack of Engineering skills and experience in the private and public sectors which is an impediment to service delivery.
- Industry is complex with many sub-sectors and an extensive, dependent, supply chain.
- Industry derives 64% of its revenue from State work which can rise to 80% if the NDP targets are achieved.
- Engineers listed as 'SCARCE SKILL' yet DOEL aims to impose racial and gender quotas?



# State of the Industry

*Extract:* President's address SONA 10 February 2022

“To create conditions for long-lasting stability and development”

“This should be a new consensus which recognises that the state must create an environment in which the private sector can invest and unleash the dynamism of the economy.”

“If there is one thing we all agree on, it is that the present situation – of deep poverty, unemployment and inequality – is unacceptable and unsustainable.

“We all know that government does not create jobs. Business creates jobs”

“Around 80% of all the people employed in South Africa are employed in the private sector.”

# State of the Industry

*Extract:* President's address SONA 10 February 2022 *(continued)*

“There are too many regulations in this country that are unduly complicated, costly and difficult to comply with. This prevents companies from growing and creating jobs.”

“We are therefore working to improve the business environment for companies of all sizes through a dedicated capacity in the Presidency to reduce red tape.”

“At the same time, we need to confront the criminal gangs that invade construction sites and other business places to extort money from companies.”

# Critical Importance of the Industry

The only industry making an immediate impact to reduce poverty in all areas, particularly in rural areas

- Potential to be the second or third largest contributor to GDP after Agriculture and close to mining
- Construction sector employs the highest number of unskilled workers, youth and unemployed and is the only industry making an immediate impact to reduce poverty in all areas, particularly in rural areas
- A domestic construction industry supports a large supply chain and returns value to the fiscus
- Consists of a large number of businesses and presents opportunities for many entrants with low barriers to entry.
- The urgency of job creation and service delivery for a rapidly growing population via construction of infrastructure eclipses the current challenges in combatting COVID. We are simply not staying ahead of the ever-growing need.
- This industry has been devastated and needs support and nurturing, not any form of regulation hampering the urgent delivery expected from our industry

2

## Interaction with DOEL & State since 2018



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# SAFCEC Engagement on EEAB

- SAFCEC Submission to Minister of Labour 20 November 2018 on 2018 Draft EEAB – *no response*
- Attendance at DOEL meeting 28 February 2020 – *confirmed Construction Sector not in attendance, follow-up queries requests for clarity not responded to*
- Department of Labour – substantive submission including data, stats, research and highlighting issues of concern – 18 June 2020 – including request for substantive engagement – *no response*
- Commission of Employment Equity – 18 June 2020 copy of DOEL submission also requesting substantive engagement – *no response*
- Letter to Chairperson Portfolio Committee of Labour 18 June 2020 requesting that the Draft EEAB not be presented in Parliament and referencing submissions made to DOEL
- ABOVE INTERACTION IGNORED, BILL PUBLISHED 20 JULY 2020 as draft EEAB 2020, *ignoring all previous input*
- Submission to BUSA 7 October 2020, referencing previous engagements at NEDLAC and BUSA *that have been ignored.*
- December 2020 SAFCEC engaged with Construction Alliance South Africa to explore common ground, possibility of target setting, legal challenges etc.

# SAFCEC Engagement on EEAB *(Continued)*

- December 2020 to March 2021 – SAFCEC attended weekly meetings with CASA grouping to explore common purpose
- 16 February 2021 submission to Parliamentary Portfolio Committee copying previous submissions of 18 June 2020, noting the lack of engagement and response, (after further calls for commentary on the EEAB!)
- 26 March 2021 – *SAFCEC joined CASA in making representation to a meeting of Department of Employment and Labour, presentation met with hostility*
- 13 April 2021 – *substantive submission to Portfolio Committee on Employment and Labour – including hardcopies of all previous submissions to all sub-committee members*
- 15 April 2021 – *slide presentation and discussion to Portfolio Committee*
- 24 November 2021 – *letter to Parliamentary Portfolio Committee asking for record of discussions, engagement, transcripts of legal consideration after the April engagements – nothing received*
- December 2021 – notification in City Press (during December shutdown) calling for commentary on the EEAB to Select Committee of Trade and Industry
- 20 January 2022 – SAFCEC submission to Select Committee on Trade Industry



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3

## Legal Review



# Critical Legal Considerations

- Introductory Comments
- Constitutional Aspects
- Procurement vs Labour
- Participation thresholds and the Framework Act
- Compliance Certification
- Section 53(6) and Section 15
- Targets and Quotas
- Case reference: Minister of Finance v Afribusiness NPC (CCT 279/20) [2022] ZACC 4 (16 February 2022)



# Race-based quotas as opposed to racial targets

- Section 15 of the EEA describes “affirmative action measures” as including “measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce”
- Section 15(3) provides that such measures “include preferential treatment and numerical goals, but exclude quotas”
- Goals [or targets] represent a preconceived target or objective of what is rationally capable of achievement in the light of the expected impact of external factors.
- Quotas, on the other hand, function as an end in themselves by providing a ‘target’ that is non-negotiable, fixed and removed from the reality of factors that determine the achievability of a true goal.
- Accordingly (in the context of transformation), while ‘goals’ represent objectives, a quota functions as a measure in itself.
- In Barnard Moseneke J expressly condemned quotas, observing that “the primary distinction between numerical targets and quotas lies in the flexibility of the standard. Quotas amount to job reservation and are properly prohibited by section 15(3) of the [EEA]”.
- To gainfully employ all available South African engineers in the public and private sector.

4

## Our Proposals



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# Practical Considerations

## Compliance

- Compliance certificates potentially barring companies to bid for State work is the incorrect and counter productive approach.
- Enforcement:
  - The current Act has significant powers assigned to enforce EE Compliance. (eg. Significant fines levied via CEE).
  - Compliance certification is seen as another measure to enforce compliance, particularly in our industry. All industries should be treated the same as far as impact is concerned.
  - The combined effect of both fines and denying certificates are unreasonable
- How will international competitors in our industry be treated? Black owned companies that do not currently submit EE Plans?
- The implementation and actions of an inspectorate to enforce compliance must be defined and guided by the Act.
- Significant concerns relate to the power assigned to inspectors.

# Bill impact on our Industry

## Concerns

- Strong growth in industry required to enter employment cycle – Needed to meaningfully impact EE
- Job creation through infrastructure investment must take priority.
- Poorly conceived and implemented EE legislation can severely damage our fragile industry denying the country a national asset and skill set which has been defined as critical.
- Ongoing legal processes absorb resources and is counter productive.
- It creates a fertile breeding ground for potential bribery within a powerful inspectorate holding sway over company survival.
- Ease of doing business decreases which is in conflict with 2022 SONA.
- Employment costs escalate.
- Employers avoid employment and employ minimum number of employees.
- Further skills flight of people we need as the mentors and drivers of change.



# Proposals to achieve objectives

- Comprehensive legal review needed
- Well funded, joint research and policy support programme needed to plan, track and evaluate EE in our Industry aiding policy- and decision making
- Develop, agree and implement regulations including the measurement of progression of potential incumbents as they progress from secondary to tertiary education and onward toward registration, and/or the assumption of senior roles:
  - Defining the process of setting sector targets
  - Regulating inspectorate responsible for compliance certification
- Consider sub-sectors as well as regional EAP's in agreed targets
- **For growth and employment, we MUST FOCUS on:**
  - Vocational Schooling & STEM education
  - Training competent engineers and engineering technologists, make it a career of choice
  - Professional development toward registration Industry and the CBE, with its councils, should interact to identify in service development and registration. The process continues to be ineffective.
  - We stand ready to participate in a **Joint, Consensus Seeking** process in the interests of creating jobs and alleviating poverty. Increasing infrastructure spend creates opportunities for all.

5

Conclusion – Thank you



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