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## ILLICIT BUSINESS FORUMS IN SOUTH AFRICA: A SURVEY

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### ABSTRACT

Extortion is understood as one party taking from another a patrimonial or non-patrimonial advantage by intentionally and unlawfully subjecting them to pressure which forces them to submit to a bribe. Extortion is not an unfamiliar concept in South Africa. In this article it is contended that extortion has become a major concern in the construction industry. Sites where the installation of critical infrastructure occur and construction sites throughout South Africa are being invaded by what some may call the 'construction mafia'.<sup>1</sup> The South African Forum of Civil Engineering Contractors reports that in 2019 alone over 180 infrastructure and construction projects were affected by acts such as extortion perpetrated by groups who call themselves 'local business forums'. The business forums often mislead construction companies by demanding 30% of the value of the contract awarded to such companies. They refer to the stipulations in the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and subsequent Preferential Procurement Regulation, 2017 (PPR) to create the perception that they have a rightful claim to 30 percent of the contract value. If their demands are not met the business forums resort to violence which halts construction site activities. The business forums justify their actions as 'radical transformation'. This view is supported by some local politicians who actively encourage the activities by the forums or are involved for financial or political gain.

President Cyril Ramaphosa has called for these actions to stop, but law enforcement is not yet in control of the situation. The increase in activities by the illicit business forums can be linked to poor responses from law enforcement. Such poor responses may be attributed to

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the fact that law enforcement often do not understanding the extent of the problem, lack knowledge of the applicable legislation or the nature of the crime taking place. This article thus firstly, determines which unlawful actions are committed by these business forums. It also considers the possible negative effect of these actions on the construction industry and South Africa's economy. In conclusion it will be shown that there is a need for the amendment of the PPPFA to better equip the South African construction industry with legal recourses and assist law enforcement with a better understanding of these crimes.

## Methodology

Two methodologies were employed to investigate the phenomena of the South African construction mafia: First, semi-structured interviews were conducted, and online questionnaires were completed by several role players within the construction and infrastructure development industry, including business owners, law enforcement agencies and members of business forums. Participation in interviews were done on condition of anonymity due to the high possibility of retaliation; Secondly, desktop research was conducted to analyse the applicable legislation. The questionnaires targeted three groups:

1. The victims of illicit business forums such as contractors, developers, companies who install fibre, business enterprises and their professional bodies to understand their experiences, their interaction with law enforcement agencies and to gauge the magnitude of the problem, if any.
2. Law Enforcement officials were requested to share the strategies, details about special training to deal with the forums and their experiences.
3. An attempt was made to discuss the concepts with known associates of the illicit business forums currently in a judicial diversion programme after they had been found guilty. This was to gauge why these crimes are committed, their motivations for their conduct and connected crimes, if any.

The aim of the interviews was to acquire an in-depth understanding of the illegal business forums, how they operate as well as the scale of infiltration to the industry.

## 1. INTRODUCTION

Construction sites, business enterprises and infrastructure development are amongst the entities targeted by what the media calls the 'construction mafia'.<sup>2</sup> These are people or

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2 Daily Maverick "*Global Initiative Against Transnational Organized Crime*" <https://www.dailymaverick.co.za/article/2022-06-16-construction-mafias-are-holding-a-key-south-african-economic-sector-to-ransom/> (visited 1 August 2022), Okuhle Hlati "*Bid for*

groups who, under the pretext of providing employment and inclusion of communities in which the development or enterprise is taking place, demand money, 30% of the contract or development value,<sup>3</sup> subcontracting or a share in the project, under threat of violence and unrest. They call themselves ‘business forums’ whereas law enforcement agencies call them ‘illicit business forums.’ These illicit business forums target multiple construction sites and developments including state funded constructions sites,<sup>4</sup> privately owned and funded developments and businesses.<sup>5</sup> This causes delays in critical infrastructure developments.<sup>6</sup>

It is possible that the perpetrators seek sympathy from police, policy makers and politicians by camouflaging their criminal enterprise as job creation and encourage a radical transformation narrative. This is compounded by law enforcement agencies seemingly reluctance to get involved in the aftermath of Marikana and a Directive<sup>7</sup> which cautions against arrests in minor cases such as intimidation. Additionally, law enforcement officials seem unsure of the nature of the offences as well as their mandate to act.

## 2. EXTORTION

The South African Police Service (SAPS) defines extortion as the taking from another some patrimonial or non-patrimonial advantage by intentionally and unlawfully subjecting that person to pressure which induces him or her to submit to the taking.”<sup>8</sup> Thus, extortion is a crime where a person or company,( the victim), is subjected to some threat of violence, damage to property, assault or unrest, unless the victim gives ‘something’, usually money, property, contracts or employment to another. According to the United Nations the actual exchange of the patrimonial or non-patrimonial advantage is not required, but the threat

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*special police unit to tackle ‘construction mafia’ welcome”*

<https://www.iol.co.za/capetimes/news/bid-for-special-police-unit-to-tackle-construction-mafia-welcomed-2ca70e1d-ee9b-49ba-8550-a6fb7bbf57cd> (visited 1 August 2022).

3 BizNews “‘Working conditions are worse in SA than in Iran and Afghanistan’ – German firm Strabag International” <https://www.biznews.com/global-citizen/2022/06/29/construction-mafias-working-conditions> (visited 2 August 2022).

4 Mail and Guardian “‘Construction mafia’ closes down municipal housing project” <https://mg.co.za/news/2022-06-03-construction-mafia-closes-down-municipal-housing-project/> (visited 1 August 2022).

5 Moneyweb “‘Construction mafia creates crisis by derailing infrastructure projects” <https://www.moneyweb.co.za/news/industry/construction-mafia-creates-crisis-by-derailing-infrastructure-projects/> (visited 3 August 2022).

6 My Broadband “‘Mafias holding back better fibre networks in South Africa” <https://mybroadband.co.za/news/fibre/441666-mafias-holding-back-better-fibre-networks-in-south-africa.html> (visited 3 August 2022).

7 National Commissioner of the South African Police Service “‘Instructions relating to arrest and detention of suspects” <https://www.firearmtrainingacademy.co.za/wp-content/uploads/2020/01/SAPS-Circular-Arrest-and-detention-19.11.2019.pdf> (visited 22 August 2022) provides that intimidation is a minor offence.

8 South African Police Service “‘Common law offences-Definitions” <https://www.saps.gov.za/faqdetail.php?fid=9> (visited 1 August 2022).

must be of such a serious nature that a reasonable person would believe the threat is real and eminent.<sup>9</sup>

‘Episodic’ extortion is regarded an organised crime which occurs sporadically. It is aimed at a single target whereas ‘systemic’ extortion targets multiple victims. Systemic extortion is also characterised by a well-organised systemic criminal system in a Mafia-style criminal enterprise.<sup>10</sup>

Since 2015, the existence of the construction mafia was recognised as a serious threat to development of critical infrastructure, housing and development, and the reason why several investors withdrew from projects.<sup>11</sup> To date this threat has exponentiated and the trust in law enforcement agencies has dwindled. Developers either file for business rescue or closed their doors. Projects are often delayed for months, deadlines missed, and contract costs increase rapidly. Below, our research shows that there is a disconnect in the understanding of victims’ available legal recourse and the criminal actions of the illicit business forums.

### 3. ROLE PLAYERS: SETTING THE SCENE

#### 3.1 Security companies

The role of security companies, need to be mandated and should be included in a comprehensive, all-inclusive strategy between the SAPS, Metro Police: SA and Psira,<sup>12</sup> so that criminality at illegal gatherings can be dealt with. Specific training needs to be developed for all the law enforcement agencies, including security companies, to enable them to identify and deal with illicit business forums and their criminal activities.

#### 3.2 Community liaison officers: Business Forums infiltration of construction sites and developments

Although there is no legislative obligation, most construction companies are forced by the syndicates or the community to appoint a Community Liaison Officer (CLO). The CLOs’ mandate is to liaise between the community and the contractor. A CLO is usually only

9 United Nations office on Drugs and Crime “*Extortion*” <https://www.unodc.org/e4j/zh/organized-crime/module-4/key-issues/extortion.html> (visited 1 August 2022).

10 Oxford “*Extortion*” <https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0282.xml> (visited 1 August 2022).

11 BizNews “‘*Working conditions are worse in SA than in Iran and Afghanistan*’ – German firm Strabag International” <https://www.biznews.com/global-citizen/2022/06/29/construction-mafias-working-conditions> (visited 2 August 2022).

12 Interview with Lt Col Prem Ethekewini Metro Police on 8 August 2022.

appointed for state tenders, where the 30% claim mentioned earlier comes into play, as the contractor has a contractual obligation to appoint subcontractors, preferably from the community. Although the PPR do not refer to the appointment of labourers and general workers, there is often a need to employ such. A CLO will be responsible for receiving employment applications from the community, and must ensure that medical testing and other legislative requirements are met before members of the community can be employed. The CLO must also ensure that applicants can prove residency within the municipal ward where the development or construction is taking place.

The CLO is furthermore responsible for mediating labour disputes between the community and the construction company. The contractor employs the CLO and is usually a respected and recognised, community leader. Consequently, a Ward Councillor, will on behalf of the illicit business forum insist on a CLO of his/her choice. A recommendation from the Ward Councillor as to who the CLO should be is acceptable – even preferable – but only as far as Municipal Contracts are concerned. It becomes problematic when the illicit business forums use the Ward Councillors to insist in inputs during the appointment of national or private contracts or to further their criminal activities by placing a CLO with strong ties to the illicit business forums.

In practice the CLO has become the centre of the criminal enterprise. The illicit business forums will demand that the CLO of their choice be appointed. They demand employment of their preferred CLO on all sites – private and state, although there is no need to employ a CLO at private developments. If their demands are not met, the construction site is prohibited from operating, usually with associated violence.

Once the CLO is appointed he controls the employment of general workers, as prescribed by the illicit business forums. This includes support functions such as the security services. The illicit business forums are in total control of a construction site. The CLO usually establishes a labour desk which implies that more members of the illicit business forums are employed. The labour desk will also take over the function of the awarding tenders to subcontractors. The formulas as per the PPR will not be applied but contractors are appointed on the basis of good standing with the illicit business forums.

The labour desk does not consider expertise, financial stability or ability to perform the work, experience and technical capabilities when awarding the subcontracts. This has dire consequences such as poor workmanship, inability to timeously deliver work, inability to purchase material and equipment and large portions of the work that needs to be re-done, delayed projects and increased costs as well as fines for the construction companies. Attempts by a company to ensure quality control or any form of resistance from the construction cohort, is met with violent protest action and work stoppage. In several cases,

companies prefer to simply pay the extortion money, instead of dealing with the conflict and constant threat as is deduced from the questionnaires discussed below.<sup>13</sup>

### 3.3 Construction Companies

During interviews, business owners and project managers of construction companies stated that the illicit business forums tend to arrive at a construction site and demand 30% of the total value of the project in employment, protection fees, subcontracting or a 'donation'. They fraudulently claim to represent the local community and emerging contractors. The illicit business forums also falsely promise local emerging contractors, subcontracts and the local community, work. When the illicit business forums cannot honour their promises, they ensure that the construction site becomes unstable, with work stoppages and protests from communities and sometimes workers and then offer to resolve the unrest (which they instigated) at a fee or they demand protection fees to the value of 30% or more.

Sites where the installation of fibre or other critical infrastructure such as waterpipes are being installed experience the same criminal activities by the illicit business forums. One group of extortionists usually operate at multiple sites. The illicit business forums are expanding to local business owners.

Many of the affected contractors did not open criminal cases. The reasons for this are:

- The business owners paid extortion money at some point and fear criminal prosecutions for having done so.
- The station police at client service centres were unhelpful and they dismissed the complaints as labour disputes, which should be solved through round-table discussions.
- The police change the charge from extortion to intimidation.
- The detectives do not follow up after the cases have been opened.
- Prosecution takes too long.
- The construction is often completed long before the case appears in court. The witnesses and in some cases the complainant in the case no longer work for the contractor and are non-contactable. The Construction Mafia will for example threaten the safety officer. Once the contract is completed the safety officer is no longer employed and has no further interest to testify.
- The employees fear retribution from the syndicates.
- The process of obtaining an interdict or dealing with the syndicates is more costly than to simply pay the extortion money.

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13 Figure 17 and comments.

- The hours lost during shutting down periods of the site is more costly than paying the extortion money.

The following are comments provided during interviews with construction companies:

### 3.3.1 *South African Council for the Project and Construction Management Professions (SACPCMP)*

The first response refers to a query “from the Cape Times a few months ago” *vis-à-vis* construction mafia:

Question: I would like SACPCMP’s comment on this announcement if it is something that is indeed much needed.

The SACPCMP supports and appreciates the President’s action, as well as Government’s focus and support directed to the eradication of corruption and intimidation within the Construction Industry. Ensuring robust and ethical practices within the Construction Industry is vital to ensuring the development of the sector, and the SACPCMP supports measures that will ensure that good governance is maintained within the Built Environment at all times.

Question: Has SACPCMP received reports in the province of this problem and how wide is it?

The issue of ‘construction mafias’ has been a long-standing problem within the Built Environment. The SACPCMP has made a number of inputs to industry discourse and conversation regarding the issue. In recent years, the SACPCMP opened its Voluntary Association (VA) platform to include vigorous discussion on the subject. The Council, along with SAFCEC’s Mr. Webster Mfebe, published an article on the ‘construction mafia’ in the SACPCMP’s magazine, the Shape Shifter. The SACPCMP also facilitated a discussion session between industry representatives on the ‘construction mafia’ subject, which was broadcasted as part of the Council’s online talk programme/channel.

In addition, the Council also approached its Voluntary Associations very recently on the

Construction Mafia’ subject, inviting them to share their comments on the issue, and how they have seen or experienced the negative impacts of these intimidation tactics so that the true impact of the situation can be reported upon and further understood.

Question: What is SACPCMP hoping this special police unit will do?

Of course, what the SACPCMP would like to see is the eradication of corrupt practices from every area within the Construction Industry. Through following every measure of the law, the SACPCMP hopes that the special unit will be able to successfully eliminate all incidences of intimidation that result from these 'construction mafias' and open an avenue for – not only constructive engagement – but also decisive action against corrupt practices that hinder the development of the Construction Industry.

### 3.3.2 *South African Forum of Civil Engineering Contractors (SAFCEC)*

The second interview was conducted with SAFCEC, an employer organisation in the civil construction industry. Their members are “directly exposed to the scourge of the ‘construction mafia.’” SAFCEC regularly receives reports from members if an incident occurred, however not all cases are reported.

The problem is quite big. It started in KZN and spread out to the rest of the country. It can be argued seeing no consequences encouraged the rapid formations of so-called business forums- a vehicle under which demand are made to contractors. The industry does engage with business forums in KZN.

The core of the problem seems to be 30% localisation that is stipulated by National Treasury on projects. This is used to demand and force contractors based on this. Some business forums are known to have demanded that they be “paid” the 30% of the value of the contract mainly as subcontractors.

When asked what they suggest can be done it was stated that

More can be done from the law enforcement agencies to curb this phenomenon. The fact that is still happening shows that more must be done to stop it; education in terms of regulations that are passed by the State, visible policing, detective, arrests and convictions of perpetrators; police intelligence and examples set to others; the industry is part of the stakeholders with the police to address the problem. I cannot say anything regarding the adequate training of the police.

And “General lawlessness in the country must be addressed as a matter of urgency.”

### **3.4 Community consultation**

The construction sector is under severe economic pressure. The slow economic growth saw several construction companies retrench employees and some closing their doors. Demands from surrounding communities exacerbated the problem. Communities feel entitled to being included in developments in their area. They expressed the view that they need to be



consulted before any development can occur. These communities live in poverty, often lacking basic services and non-existing service delivery. This leads to frustration and expectations from the community. The construction companies often try to engage with the community leaders before construction starts, at which point the illicit business forums present themselves as the 'authorised' and 'chosen' community leaders.

There is no legislative obligation on the construction companies to consult with the community unless the company infringes upon the property or cultural rights of the community. It is however a common practice to include the community. The illicit business forums create the false impression to communities that it is a legislative imperative that they (communities) are consulted, provided with permanent employment and profit sharing of 30% or more, before the construction commences.

The illicit business forums use the often-unrealistic demands of impoverished communities to fuel unrest. They can thus use the work stoppage as leverage to get a foot in the door with the construction company, by offering to mediate between the community and the company. Companies are usually eager to work with the community, but the community often sees the construction project as a goldmine.

Construction sites projects have an end-date, yet the illicit business forums tend to offer or sell permanent employment to the community. If the construction company decides to employ members of the community, the salaries must be paid to the illicit business forums, who will in turn only pay a fraction of the amount to the workers. When the construction companies are unable to provide permanent employment to workers, the illicit business forums will encourage the community to protest and cause damage to vehicles, construction equipment and site offices.

The illicit business forums and several communities see the actions of the illicit business forums as radical transformation and not unlawful action. Eighty percent of all non-listed construction companies belongs to black owners. This makes the construction sector one of the most transformed sectors in the country. Criminal elements simply use radical transformation as a disguise for criminal enterprise. No skills development or investment in communities have ever been reported where companies paid the extortion money to the syndicates. All funding has been used for luxury items, luxury cars and lifestyle enhancement for the extortionists.

### **3.5 Rent a crowd, the drug and firearm link**

During interviews with people associated to illicit business forums, the link between illegal drug and firearm trade was confirmed. Syndicates recruit unemployed youth in townships and keep them on a 'payroll' as 'rent a crowd'. When the illicit business forums need people

to close businesses and construction sites, they pay these young people to gather and intimidate employees on sites. To keep these youth on a 'payroll', the youth will sell drugs during times when they are not protesting. The syndicates are also linked with illegal firearm trade.

### **3.6 eThekweni/Durban Metro Police**

Illegal business forums are a huge threat to the economic sustainability and future of eThekweni region and KZN. The forums emerged in 2015. They called themselves 'Amadelangakubona' and have gradually gained momentum with many breakaway groups being formed under different banners and under the 'guise' of radical economic transformation resulting in disruptions of projects and impacting negatively on service delivery and other catalytic effects.

The groups of 20 to 50 people transported in 8 to 10 vehicles forcefully enter business premises or project sites. They mobilise the community through misinformation such as promises of employment opportunities and, increases in remuneration. They also use intimidation tactics, aggressive and violent approaches at business premises and project/construction sites/projects, to demand a 30% share in the business without following the application for proper tender process. These groups stop all work at sites until their demands are met. The group usually demands to have meetings with management with the intention of acquiring 30% of the business by force. They insist on providing services such as cleaning, waste removal, security, landscaping and general maintenance. No work is done unless all demands are met.

eThekweni/Durban Metro Police formed a specialist Metro Police Business Task Team which only deals with complaints relating to illicit business forums. The team consists of a Colonel, a Lt Colonel, four Captains and 50 members. They are both proactive and reactive. They understand that most of the illicit business forums operate locally and thus the Metro Police must take responsibility for law enforcement. The team received special training and is the leading law enforcement agency in the eThekweni area. They understand their legislative mandate.

Illegal business forums continuously threaten Metro Police Business Task Team members with assassinations and violence because of corruption and interference by individuals both from within the police service (SAPS and Metro) as well as Council, Provincial and other state departments.

The illicit business forums' threats and activities are increasing consistently due to the recent flood damage to infrastructure within the eThekweni area which gave rise to the need for increased reconstruction, repairs and rebuilding of infrastructure. Many of these

reconstruction and repair projects were occasioned by damages attributed to the July 2021 looting and riots in KZN.

There is poor cooperation with SAPS insofar as dealing with illicit business forums are concerned and all attempts from the Metro Police for a more integrated approach has been unsuccessful. The Metro Police Business Task Team is at the time of writing, deployed at 121 sites. They also monitor 133 sites where their intervention has stabilised the situation. They remain at these now stabilised sites where future problems may flair up based on the sporadic history of violence and interference by the illicit business forums at these sites.

The Task team attributes the problems to inadequate legislation, specifically relating to the Illicit business forums, the lack of cooperation from SAPS and interference and corruption in the National and Metro Police, Local, Provincial and National structures of Government. A coordinated, intergraded approach with SAPS and NPA is needed.<sup>14</sup>

#### **4. QUESTIONNAIRES AND PRELIMINARY INTERVIEWS**

Three sets of questionnaires<sup>15</sup> were sent to South African law enforcement agencies, construction and development companies and illicit business forums respectively. Interviews were also conducted, which, for privacy purposes, must stay anonymous.

##### **4.1 Law enforcement agencies**

An electronic questionnaire was sent to law enforcement agencies on the premise of anonymity. These were security firms dealing with illicit business forums, the Metro Police services in South Africa and the SAPS. The purpose of this questionnaire was to determine the experiences, understanding of legislative mandate, training and proposed solutions of the ground operational members.

133 responses were received.

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14 Interview with Lt Col Prem eThekweni Metro Police on 8 August 2022.

15 See par 4.1- 4.3.

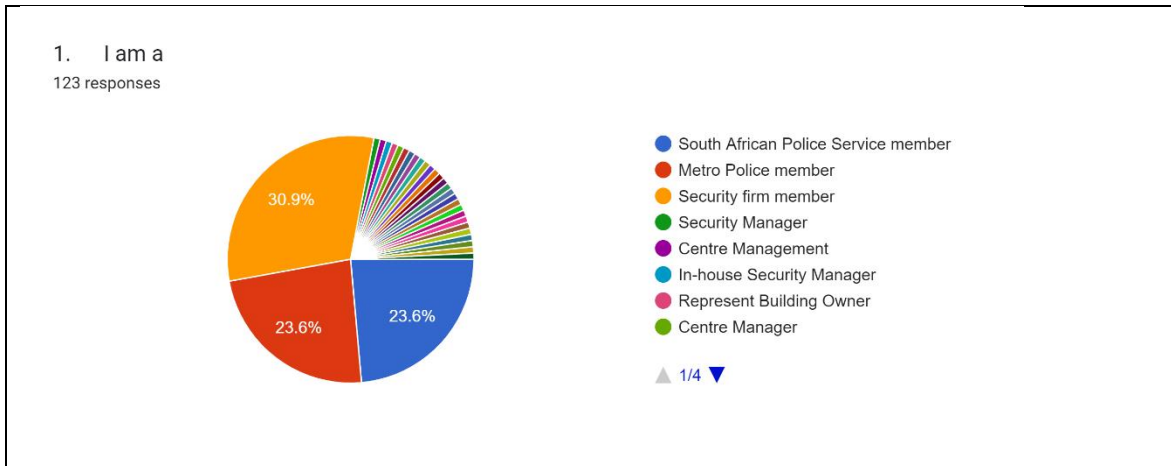


Figure 1.

The participants were as follows: 30,9% security firms; 23,6% Metro Police; 23,6% SAPS; and 21,9% security managers, centre management and others.

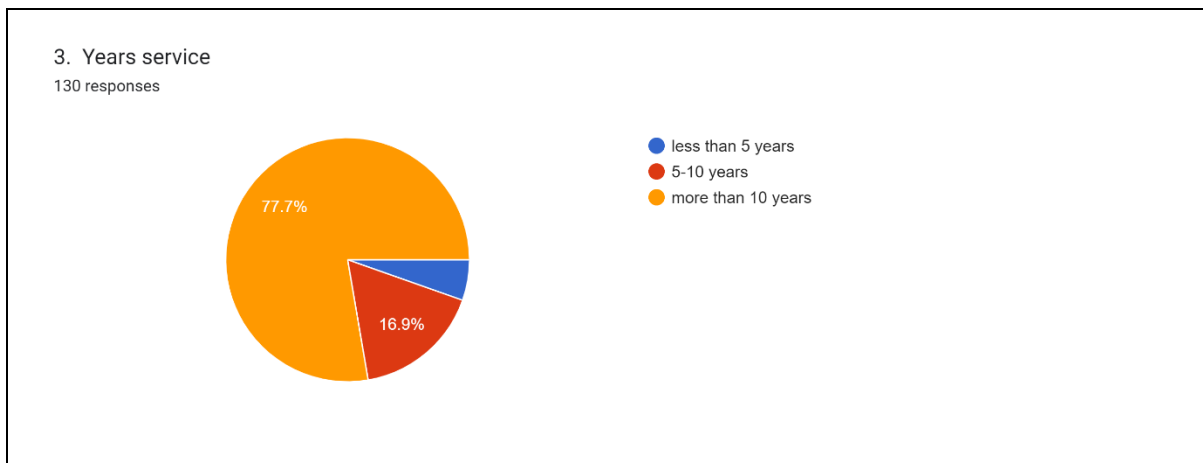


Figure 2.

Most of the respondents had more than 10 years law enforcement experience (77.7%).

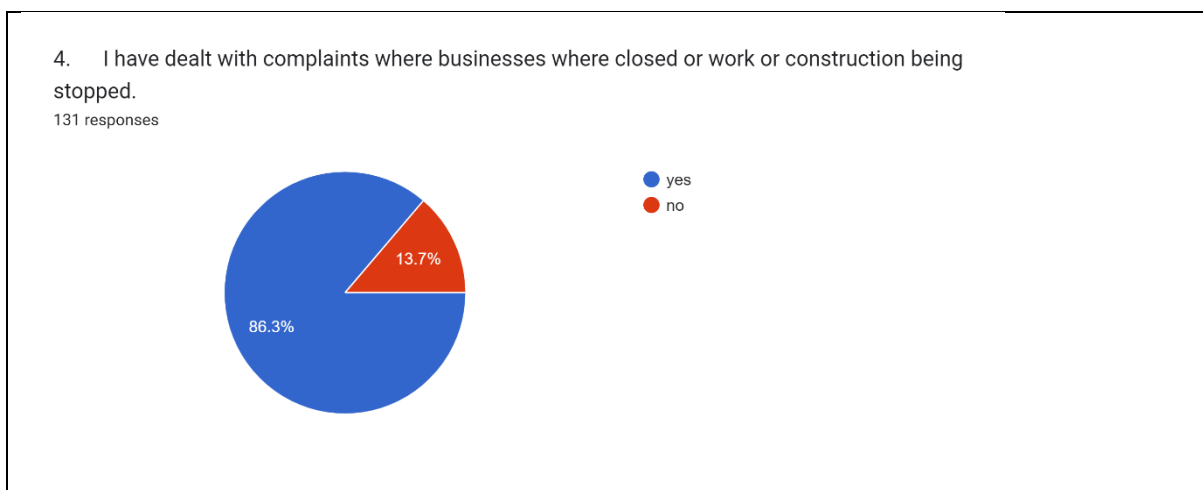


Figure 3.

Most of the respondents dealt with complaints (86.3%) where businesses were closed, or construction sites halted. During interviews the law enforcers agreed that the syndicates use extreme violent tactics, with firearms and rifles often visible. Several legally employed have been murdered, including on a fibre construction site where the construction mafia drove with a vehicle over the workers digging trenches for fibre.

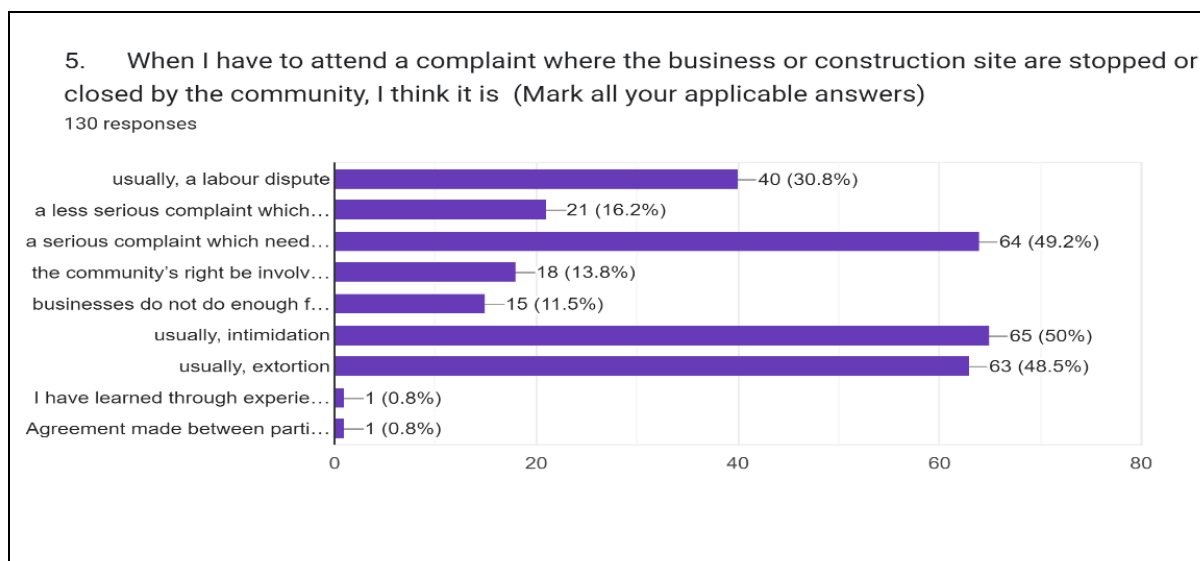


Figure 4.

When asked what the participants thought the dispute was about, they responded as follows: 30.8% stated that it was a labour dispute; 16.2% thought it was a less serious complaint which could be solved by talking; 49.2% mentioned it was a serious complaint which needed police intervention; 13.8% indicated their belief that the community has a right to be involved in construction projects in their area; 11,5% mentioned that businesses are not doing enough for the communities; 50% regarded the acts as intimidation; 48.5% deemed it extortion; and 1,6% indicated other. From the above responses one may deduce that the seriousness of the offence is not yet understood as 30,8% thought it was a labour dispute. Labour disputes are not attended to by the police as these disputes are heard by labour related institutions such as the Labour Courts and the CCMA. When we combine the 30,8% of participants who thought it was a labour dispute with the 16,2% of participants who thought the parties should have round table discussions, it appears 47% of law enforcement officers consider these violent acts of extortion as not serious and that no police intervention may be required.

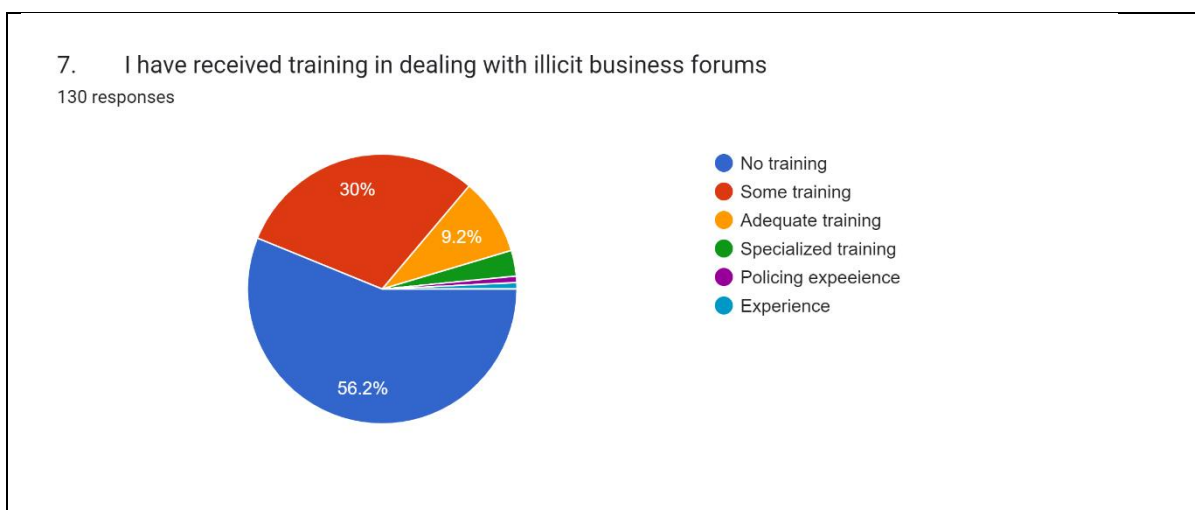


Figure 5.

56.2% received no training to deal with Illicit business forums, while 30% received some training. Only 9,2% of participants felt they were adequately trained. This underlines the urgency to focus on specialised training, not only to deal with systematic corruption but, as highlighted in the Farlam Commission attending to the Marikana mine case,<sup>16</sup> to manage large crowds.

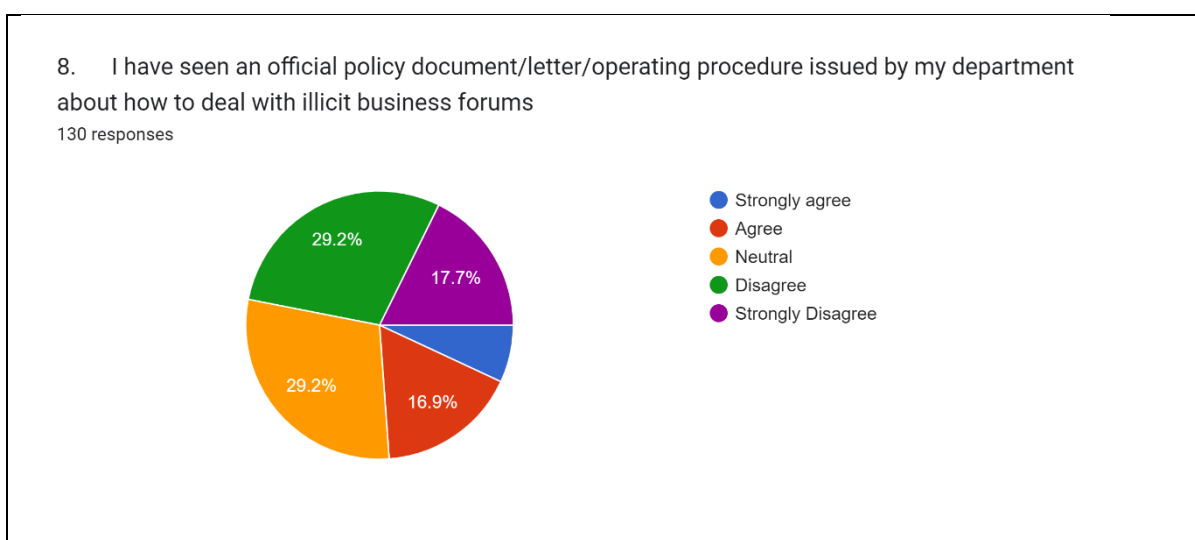


Figure 6.

29,2% and 17,7% have not seen policy documents regarding illicit business forums. Amongst the interviewees of the different agencies, only Durban Metro Police had a policy document and clear guidelines on how to deal with illicit business forums. The SAPS had an instruction

16 Greg Nicolson “Marikana report: Key findings and recommendations” <https://www.dailymaverick.co.za/article/2015-06-26-marikana-report-key-findings-and-recommendations/> (visited 1 August 2022).

circulated to station level to inform the provincial task teams when cases involving illicit business forums are concerned. No other guidelines could be produced for first responders to incidents of extortion or violent site obstructions.

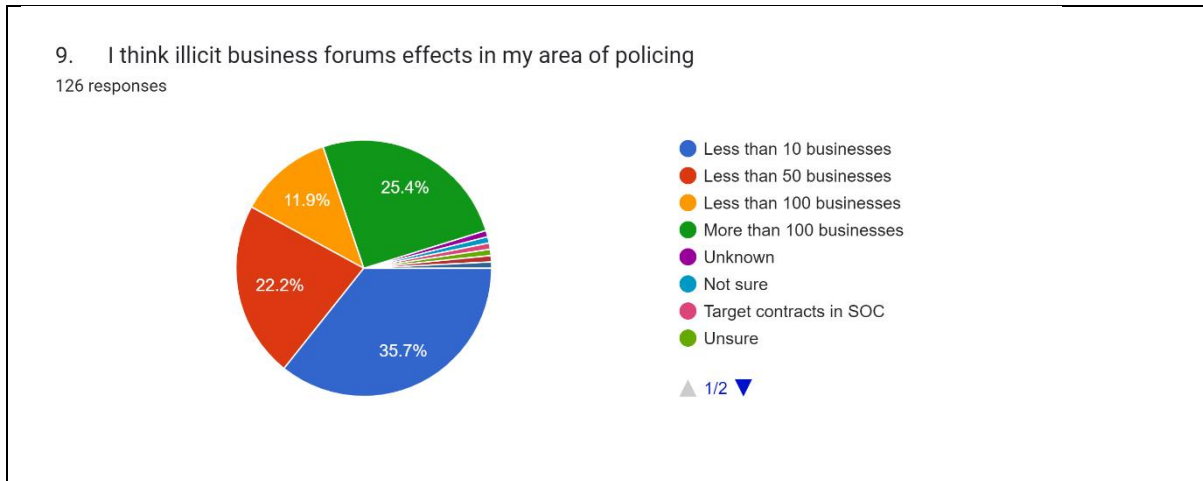


Figure 7.

The question was asked: How many businesses do the law enforcement agencies think, are being influenced by illicit business forum? This was asked to determine if the participants understood the enormity of the construction mafia’s illegal acts. It is clear from the reactions that the law enforcement agencies are unsure or underestimate the severity of the matter: 35,7% thought that less than 10 businesses are being impacted. 22,2% thought less than 50 businesses and 25,4% suspected that more than 100 businesses are being extorted by illicit business forums. Questionnaires sent to construction companies, which will be discussed later in this article, indicate that they have to deal with extortion at all their sites and often on a weekly basis.

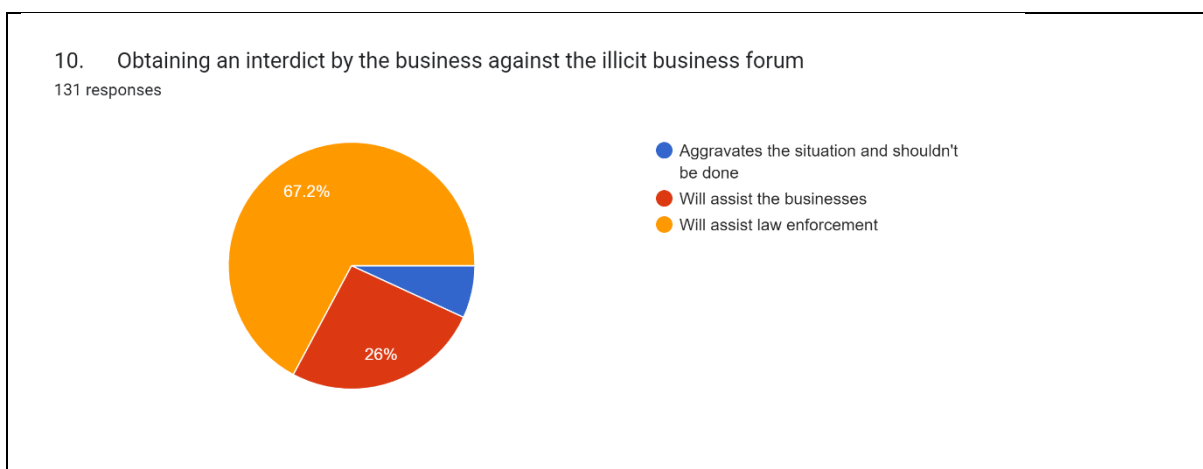


Figure 8.

67,2% of the law enforcement officers suggest that an interdict will assist law enforcement agencies in combatting the illicit business forums.

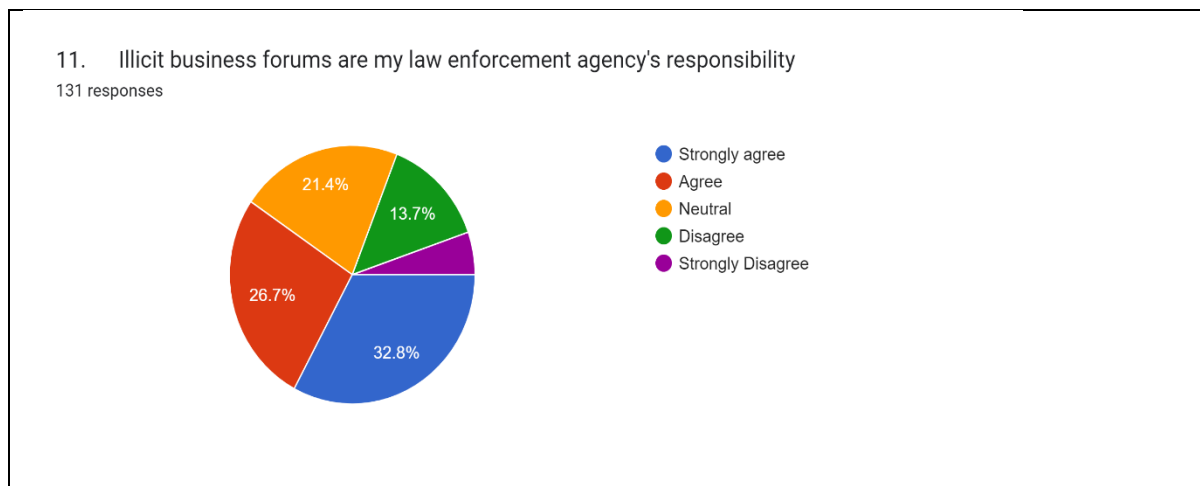


Figure 9.

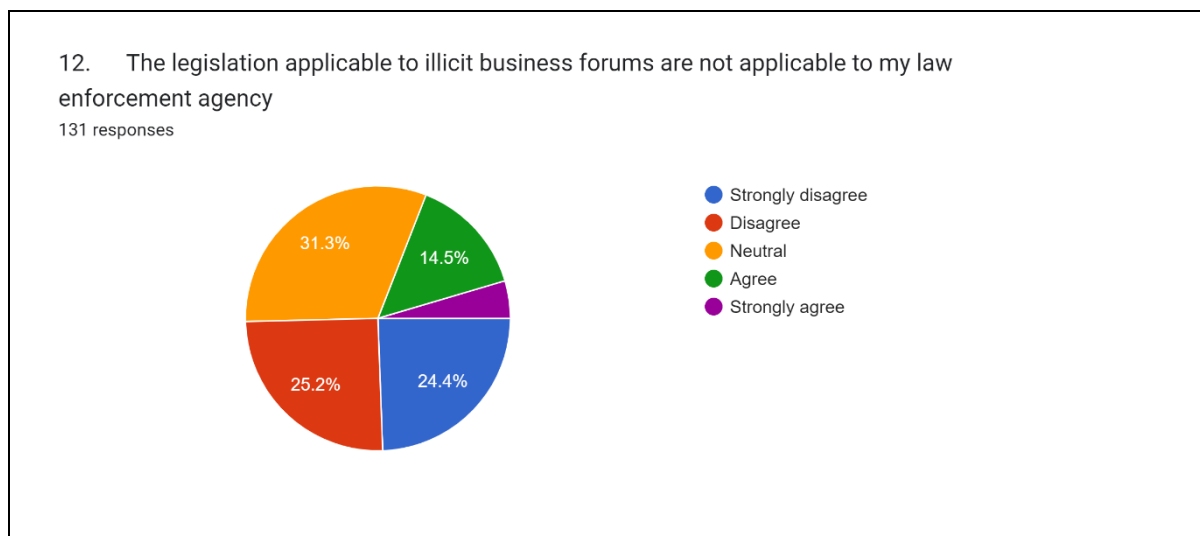


Figure 10.

The majority of participants acknowledged that they have a responsibility towards protecting businesses against the illicit business forums. During interviews first responders within law enforcement indicated that they were instructed not to get involved, that they are not mandated to intervene, that it is a labour dispute or that they are merely attending in a supportive role. First responders were unsure of how to deal with the situation and did not know which crimes were committed on site or which charges should be opened at the client service centre. A number of respondents were afraid of the syndicates, as they seemed 'connected' with support from ward councillors.



The last question to the law enforcement agencies enquired how do they think illicit business forums should be dealt with? The following were their comments:

- Community leaders should be engaged and should assist the community in understanding the running of businesses.
- Business forums should not be allowed to dictate how businesses must be conducted. The forceful taking over of the projects and the contracts should stop and they should be subjected to the same procedures as other service providers. Business forums must understand that competence and compliance, not intimidation, secures employment .
- Business forums must be dealt with peacefully, with strong law enforcement assisted by the justice system.
- Political intervention must be stopped as it negates proper law enforcement. The forum must be dispersed, and resistance must lead to arrests. Also, business or construction management must take responsibility and open the case to make things easier.
- Criminal acts must be dealt with by SAPS.
- Appropriate action should be taken against business forums and proper legislation enacted to regulate them.
- The Department of Labour in conjunction with SAPS must be engaged.
- An interdict normally helps, but construction managers should not compromise the effectiveness of law enforcement by having meetings with these forums' leaders first and only when they cannot meet their demands then the managers turn to the law enforcement for intervention.
- The National Prosecuting Authority (NPA) should get more involved. Businesses must realise that they MUST make statements against perpetrators before a case can be registered against the forums.
- Law enforcement agencies should not tolerate coercive tactics. Arrests must be made, and businesses must be assisted with the registration of cases, obtaining of interdicts, and profiling business forum members. SARS should be instrumental in profiling their banks accounts and work closely with law enforcement doing life-style audits.
- More training from experts with regards to dealing with issues is needed.
- Stronger action by law enforcement to deal with instances of intimidation is required.
- Security must get powers to deal with situations. Law must change.
- Business should not have to pay to be safe from these business forums as all their contracts are being taxed. Government should provide protection.
- Arrest and two years' imprisonment.
- Needs to be stopped at the source as it is politically fuelled and allowed.
- We should get more support from high-ranking officers in the police. The NPA should also be more active in assisting us. We need to reassure the complainants that opening

cases and going to court is the only way forward. I have been dealing with the business forums as a primary function for more than three years now. Corruption and politics play a major role in how they operate. This needs to stop and they should be dealt with accordingly. To me, they are a bunch of thugs trying to extort innocent people of a hard earning. Serious intervention needs to take place, or we will face a negative impact on the economy.

- Get the Asset Forfeiture Unit (AFU) involved.
- Educate the community.
- Special law enforcement units must be trained to deal with this issue.
- They should be neutralized completely by means of law enforcement and by laws.
- Strongly believe that there needs to be a forum with appointed people who represent the business or community.
- An official agreement must be drawn up which stipulates and addresses all concerns including regulations that each party must commit and adhere to. This agreement should be signed between property owners, managing agents, developers, etc which can be reviewed annually. With this in place, we can then liaise with specific key members who would refer us to members of the public or businesses who meet criteria in the said agreement. From this, we would be able to appoint the relevant members.
- Rates, fees, costs should be standardised in this forum which would enable us to work closer with the forum.
- Law enforcement can then step in if the forum does not adhere to the initial agreement between the property owners or developers.
- There should be by-laws implemented and also a code of good practice and there should be inspections done on facilities that are practicing such.
- They should follow the same tender process as other businesses. No negotiations. Zero tolerance since we cannot be controlled or dictated to by so called business mafia who continuously use bully tactics to get what they want.
- Law enforcement agency needs some training, be trained as well on how to deal with political intervention in these business forums, court needs to come and advise on the proper process for strong cases.
- They should be fined and their license of operation taken away.
- I personally think they have to firstly be defined as illicit business forums. And then a strategic plan must be put in place to directly resolve the problem in a way that all parties benefit at the end. This will minimize conflict.
- Prompt intervention by designated SAPS/Metro Police units.
- They should be dealt with in a neutral manner and listen to both parties.

- Open discussions between all stake holders i.e. Law enforcement, Businesses, Security, Provincial government officials/Municipality to determine and discuss clear procedures for allocation of tenders and other interests that leads to conflicts.
- A Specialized Investigation Unit must be formed to investigate these incidents. These forums are mainly managed by the taxi owners' associations, and in many cases turns out to be extortion.
- They are mafia style operators and are not interested in working. They just want a share of everything.
- Open discussions with all parties to have a win-win outcome.
- SAPS/Metro should join forces to disband these groups.
- Community involvement by business owners
- If anything is done without necessary documentation, they should be arrested.
- Businesses and law enforcement agencies should be in partnership in solving illicit business forum issues. Law enforcement should be educated more on illicit business forums.
- They should be directed on how a legal business forum is started and educated on the repercussions of stopping businesses and be made aware of the long-term damage it will do in that specific sector.
- Key members should be charged with any crimes committed by their members during any march/protest/riot that was partially or wholly organized by the forum or that has no direct support from the forum.
- Lock all of them up for blackmail.
- By Director of Public Prosecutions (DPP) driven investigations.
- More specific laws should be drafted to assist law enforcement in dealing with this issue.
- They should be charged for racketeering in terms of POCA.<sup>17</sup>
- I think if the government can just finish tenders and employ people who will work.

#### 4.2 Business owners

Interviews were conducted with thirteen large construction enterprises. Nine of the 13 companies were either 100% Black-owned or 51% Black owned. Due to the violence experienced by companies installing fibre, two companies dealing with fibre installations were included in interviews.

Companies with an annual total revenue of R50 million or more are classified as large enterprises<sup>18</sup>. Exempted micro enterprises and qualifying small enterprise (QSE) that are

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17 Prevention of Organised Crime Act 121 of 1998.

18 Werksmans "BBBEE act and codes explained" <https://www.werksmans.com/wp->

100% Black-owned are deemed to have a Level 1 BBBEE status,<sup>19</sup> and exempted micro enterprises and QSEs that are 51% Black-owned are deemed to have a Level 2 BBBEE status.<sup>20</sup> A QSE is, generally, a company with an annual turnover between R10 million and R50 million.<sup>21</sup> The following are the results from the anonymous questionnaire:

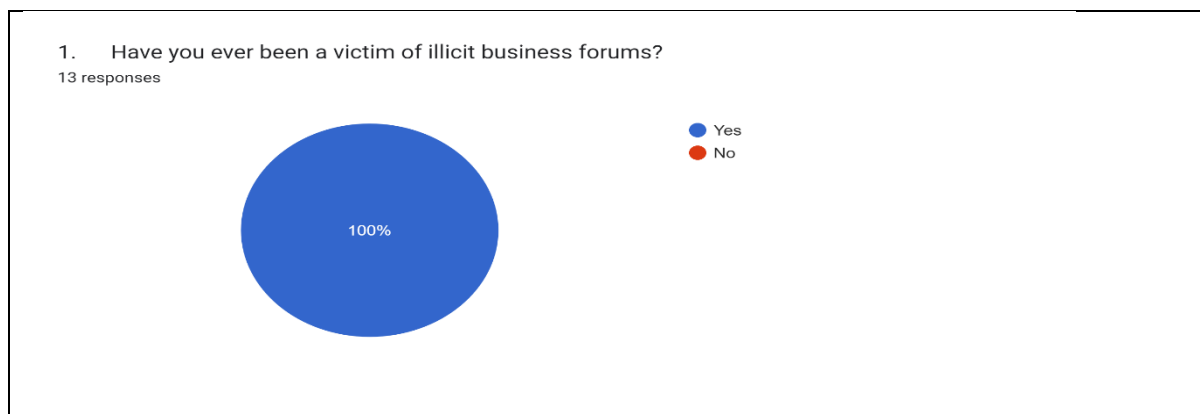


Figure 11.

All of the companies were victims of illicit business forums and at multiple sites simultaneously, as seen below.

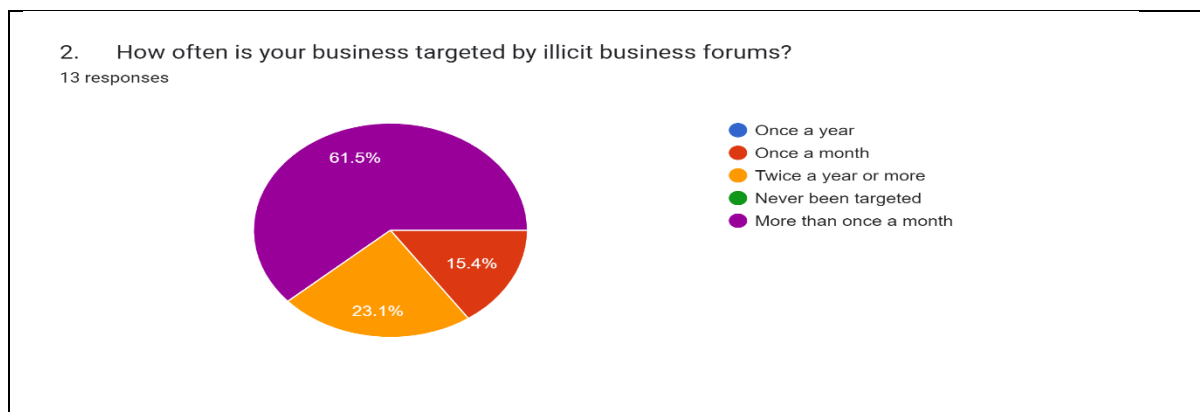


Figure 12.

61,5% of the participants were targeted more than once a month. During interviews some of the companies indicated that they are being targeted daily. These companies have multiple sites operating at the same time in different locations. Their companies are often targeted daily at different sites.

content/uploads/2018/11/BBBEE-Codes-Explained.pdf (visited 1 August 2022) (Werksmans 2018).

19 OECD “Data Enterprises by business size” <https://data.oecd.org/entrepreneur/enterprises-by-business-size.htm> (visited 1 August 2022).

20 Werksmans (2018).

21 Werksmans (2018).

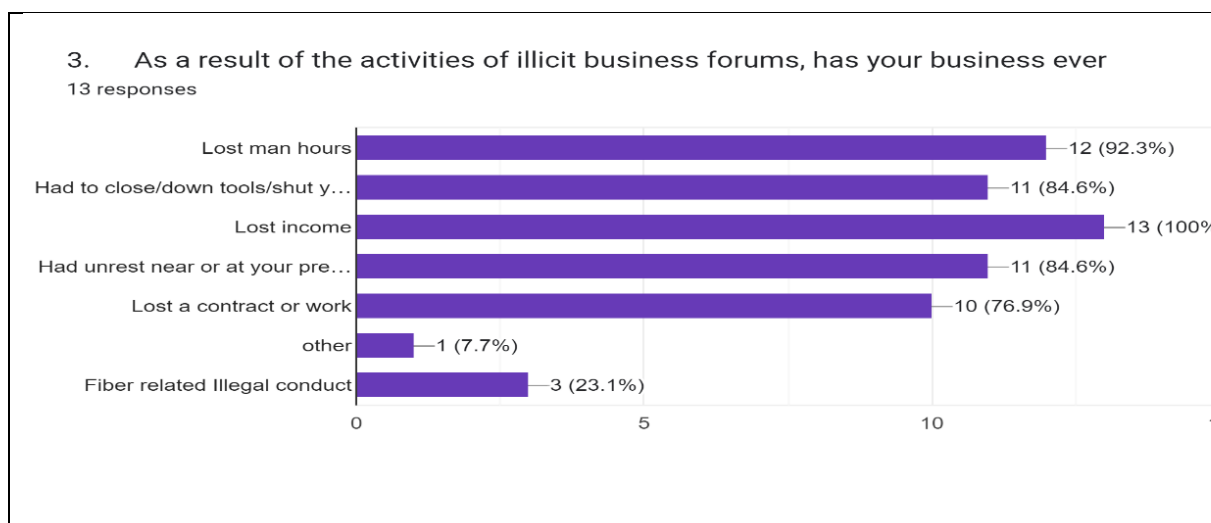


Figure 13.

92,3% lost manhours, 84,6% had to close down or shut down a site for a period of time, 84,6% had unrest near their sites, 76,9% lost contracts and all of the companies lost income.

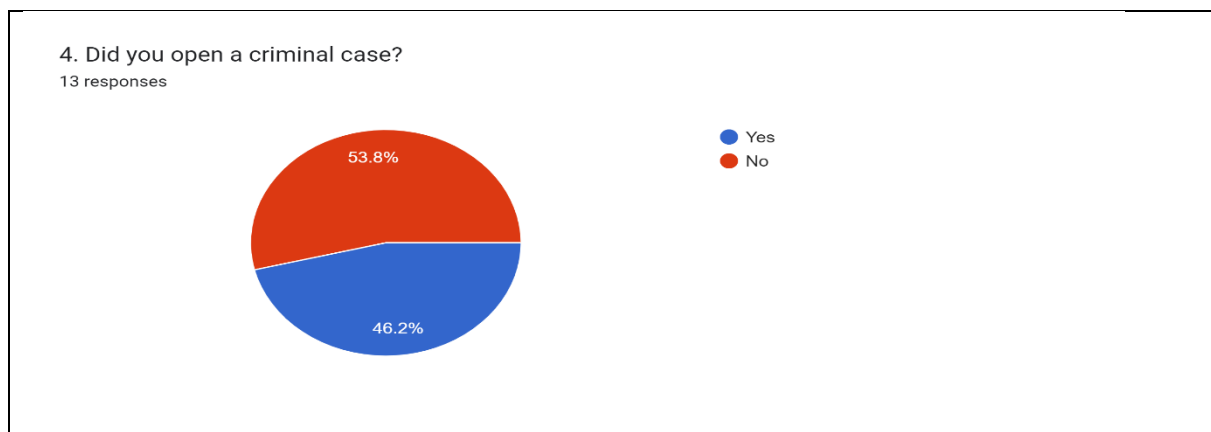


Figure 14.

5. If you answered 'no' – why not?

- Police did not want to help.
- Tried it before. Police refused to open a case. Said it was labour and we must talk it out.
- I will be targeted. .
- I tried it but it was dismissed as a labour issue. I just want my site open. I don't care about the case.
- Called the Police. They didn't help. Called xxxxxxx XXXXXX\* and the mafia was removed and my site opened.
- Tried it once. Police didn't help. Sided with strikers. Didn't waste my time after that. I just want my site open. Case is a waste of my time.

- I did in the beginning, but the cases take very long before going to court. By then the people are no longer working for us. We also waste a lot of time going to court only hearing it is moved to another date. I just want the work done. The police always take the side of the criminal. So, I'll rather pay. It's less of a hassle.
- XXXXX XXXXXX<sup>22</sup> assisted with opening the charge, opening the site and removal of the syndicate.
- We called the police, but the police did nothing. We saw the main guy giving the police money. The police then left. We lose more money by not being able to operate than we just pay the 30%.

53,8% of these large construction companies never opened criminal cases. 46,2% opened cases but the way the police dealt with the cases prevented them from opening cases in future. There are allegations of the police siding with the illicit business forums, taking bribes and advising the companies to negotiate with the illicit business forums. All the owners felt that it was a waste of time to open a case. The cases take a substantial amount of manhours, and it is therefore more cost effective for them to pay the extortion money.

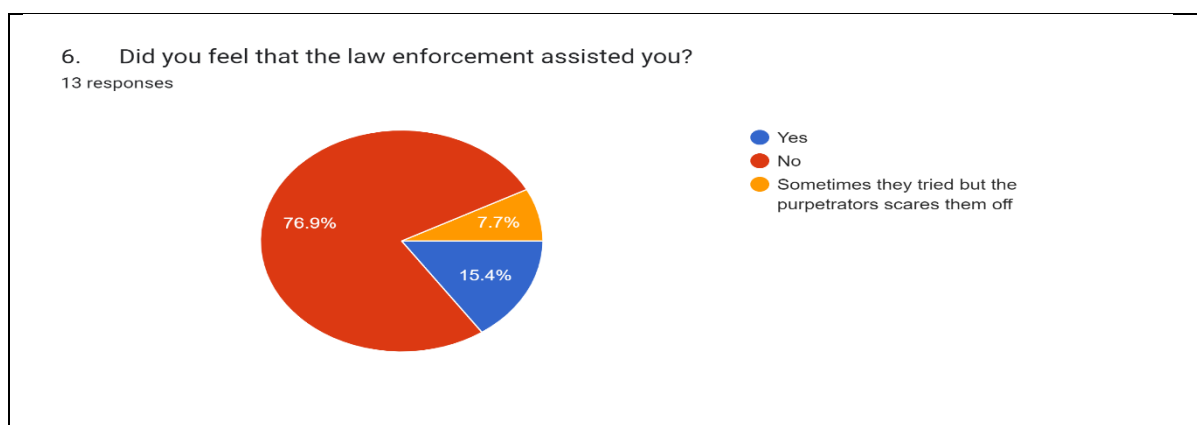


Figure 15.

76,9% of the respondents did not feel that law enforcement assisted them. They were asked to give reasons for their answer.

- Refused to assist. Chatted with the group. Said it was a labour issue and left.
- They refused to open a case and took the side of the strikers.
- Had to use private security.
- Not pitched up at site.
- I wanted the site open and wanted the police to chase the people away. Instead, they befriended them at our expense.

<sup>22</sup> Names were removed for protection and anonymity

- They claimed it was radical transformation and we need to negotiate with the community. They told us to pay 30%.
- They don't realise how serious this is and that we lose tons of money, contracts and jobs.
- They seem to think we are in the wrong and should pay. They are not trained to deal with the crowds when they block sites. They open stupid cases that doesn't reflect what happened on sites.
- Didn't know what they were doing. Needs training.
- They took money from the criminals and left while our trucks were set alight and the site office vandalised. They left the mob to keep us hostage and left.

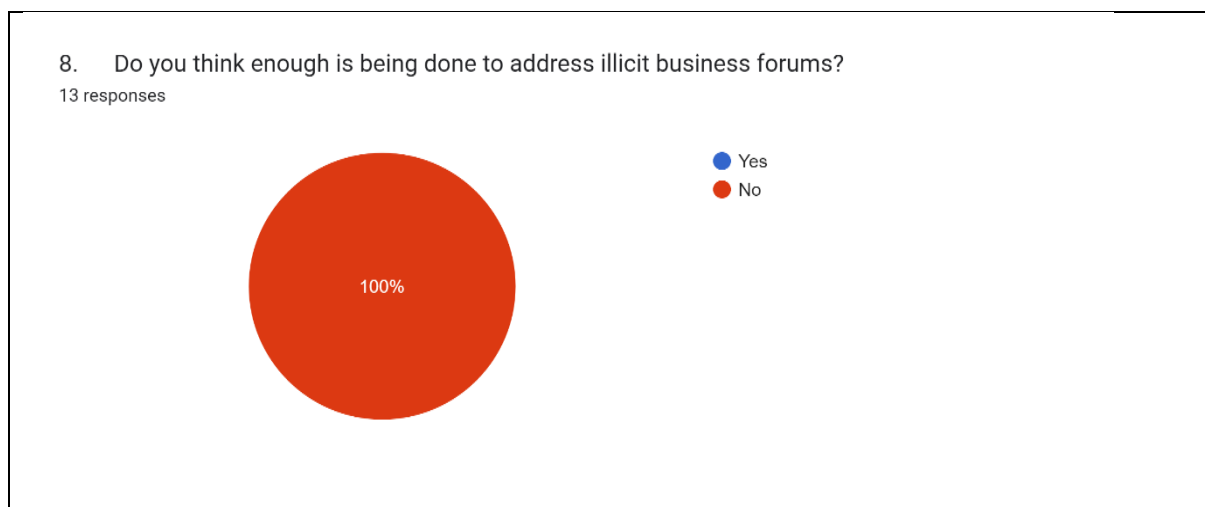


Figure 16.

All the respondents felt that not enough is being done to address the illicit business forums.

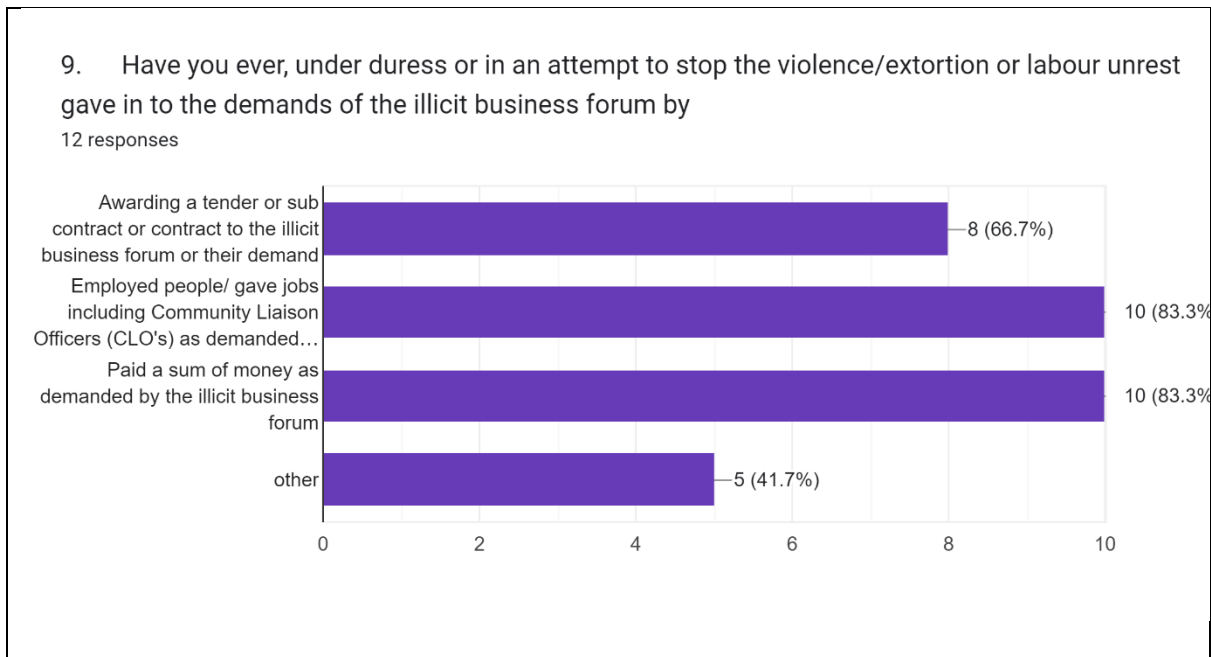


Figure 17.

66,7% of the respondents awarded a tender or subcontract to the illicit business forum under duress. 83,3% employed people, appointed a community liaison officer and/or paid a sum of money as demanded by the Illicit business forum under duress.

They further remarked:

- All owners of the businesses did (paid) but they will never admit it.
- Cheaper for me to pay. Criminal case waste hundreds of man hours.
- We know that the syndicates are hiding behind non-profit organisations. We pay the non-profit organisation and that keeps the site operational.
- Paid the ward councillor and city council officials and donated money to the councillor's political party.
- We paid the ward councillor and some council employees in the city manager's office.

Paying ward councillors and council officials under duress seems to be a common problem too, which requires attention.

The companies were asked what the monetary value (money) was that their company lost per annum due to some activity of the illicit business forums. The following are some of the responses:

- Few million rand per contract.
- Millions.
- Difficult to determine. Potential customers walk away.
- We lose billions. We lost contracts and had to retrench people.



- Billions. Lost contracts. Paid penalties for poor workmanship after giving employment to these "community forums".
- Millions considering penalties, redoing of poor workmanship, and site stoppage.
- Billions and loss of jobs. We paid syndicates before and gave them jobs. After the first payment they run away and we had to pay the community who did the work. The work is bad quality and often we have to do it over. We also pay fines for deviating from schedules.
- Billions.
- A lot of Money. Probably Billions over the years. This includes manpower, damage to vehicles and equipment, loss of contracts, down time and fines. we also retrenched people.

From the comments of the participants, it is clear that great losses result, should they not comply with the illicit business forum demands. Retrenchment, loss of contracts, loss of manhours, fines for delays in contract deliverables, and poor workmanship are direct results of site stoppages. Instead of creating jobs, people are retrenched.

Contract costs skyrocket due to delays. The impact on the economy is devastating as increased cost of e.g., Government developments is recuperated again from the taxpayer. Companies reduce community outreach programmes and social investment in communities to absorb some of the losses.

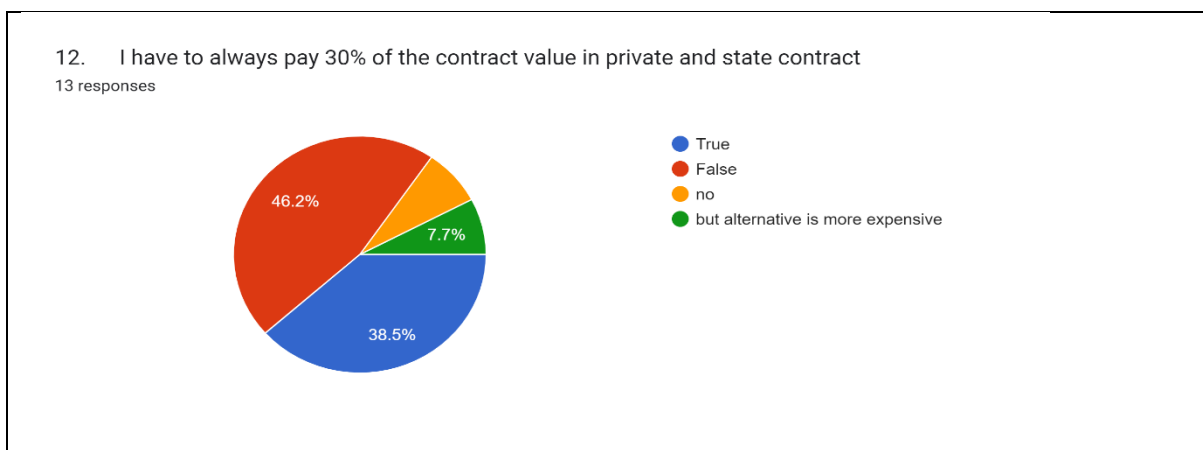


Figure 18.

The contractors understand that they are not obliged to always pay the 30% but are often forced as the downtime is more costly if the site is closed down for longer periods. The 'legal' route is paved with red tape and time delays.

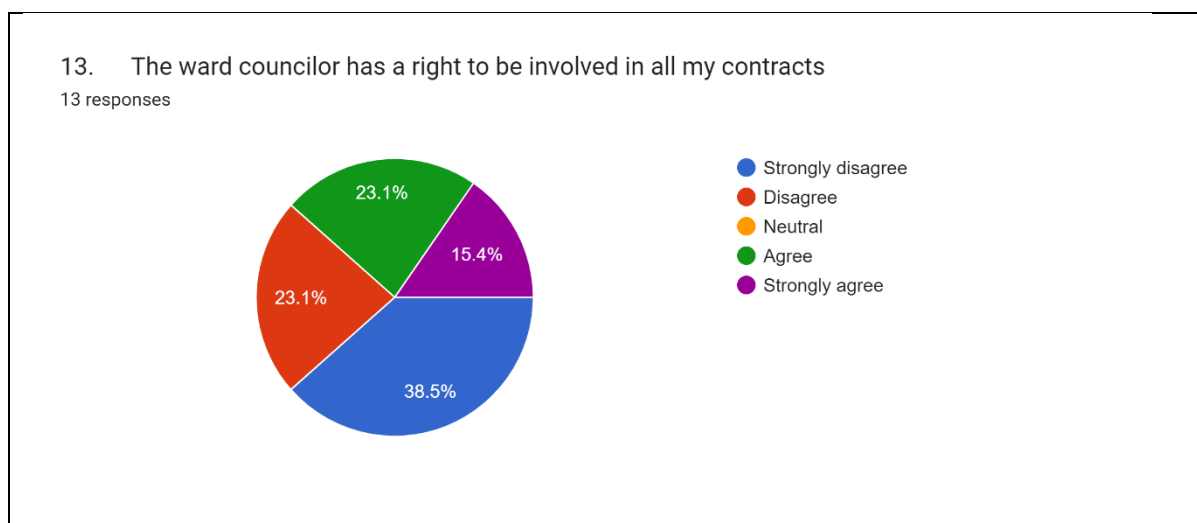


Figure 19.

Ward councillors seem to be a constant factor mentioned by all. The ward councillors and council officials may only get involved in Council or Municipal Contracts.<sup>23</sup> Ward councillors may not get involved in central and provincial spheres of government contracts and private development.<sup>24</sup>

The companies were asked how they think the issue can be resolved?

11 responses were received:

- Stop councillors from interfering. Police must arrest these people.
- By enforcing the law. Police must do their work.
- No councillor may be involved in any of the contracts. He only has oversight and reports such matters to the city or authorities.
- People are not being taught how to tender and run a business. As a black business owner this is wrong. The culture of handouts and getting everything for free do not teach smaller business owners skills. They will never be a big role-player or be able to learn how to tender or do business if we allow this culture of legal business and threats to get their way to continue.
- The ward councillors are in business with these criminals. They must draft a clear policy to prevent the role of councillors. The work and appointment of CLOs needs to be clarified as CLOs are nothing but agents of syndicates. The latest scam is the infiltration of non-profit organisations. Criminals are now using NPOs to con us into getting paid.

23 Dr Jaap de Visser “Local accountability: enforcing the Code of Conduct for councillors” <https://dullahomarinstitute.org.za/multilevel-govt/publications/enforcing-the-code-of-conduct-for-councillors.pdf> (visit 1 August 2022) (Code of Conduct for councillors).

24 Code of Conduct for councillors.

- Train the police. Arrest the people closing sites.
- Address the corruption within the city council and the ward councillors. Teach the police to be policeman and how to deal with crowds closing businesses.
- Get rid of corruption. Stop free handouts. Create jobs.

### 4.3 Illicit business forums

Five illicit business forums (groups) were willing to participate in the study. These groups consist of 5 to 10 members each of which the leader and at least three more members were found guilty on activities relating to illicit business forums. Their sentences varied from alternative dispute resolution, suspended sentences, admission of guilt fines, and incarceration of less than two years. None of the participants were in a correctional facility. The illicit business forums answered as a group.

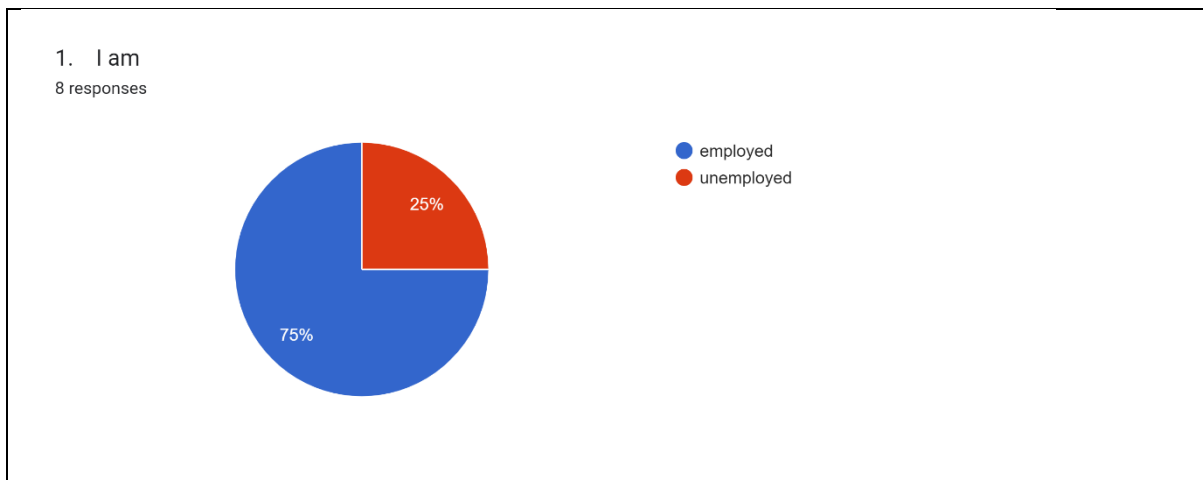


Figure 20.

The majority of participants had full-time employment, outside of their illicit business forum activities. Their responses create an impression that employment might not be the motivation for their actions. During interviews they explained that they seek employment for impoverish communities with high unemployment rates. They will take a percentage of the salary paid to the worker for the duration of the employment as a type of founder's fee and protection money. The illicit forum decides who is to be employed as part of their demands.

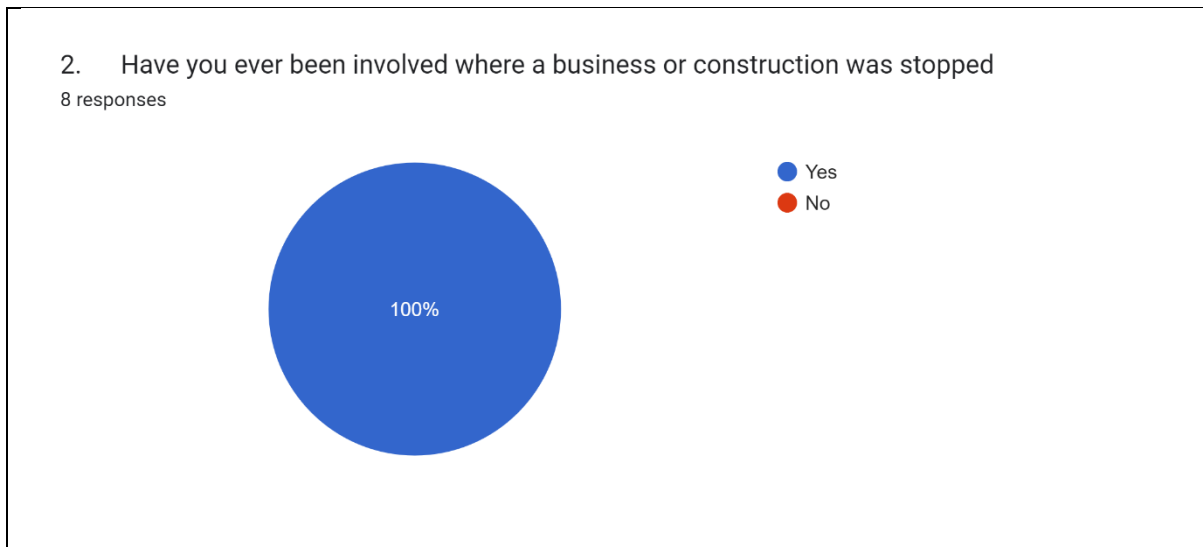


Figure 21.

All the participants were involved in action where construction sites or businesses were forced to close for a period of time, usually by means of threats, violence or protest action until their demands were met.

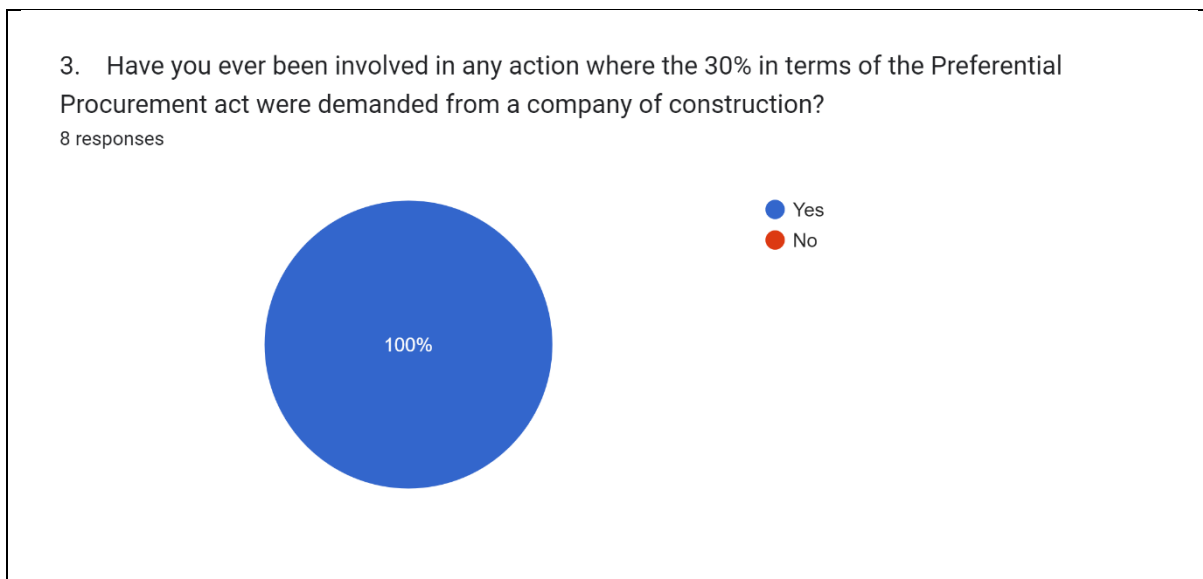


Figure 22.

All the participants were involved in action where 30% of the contract value of business or construction was demanded. During interviews, the participants indicated that they are often involved in several sites simultaneously.

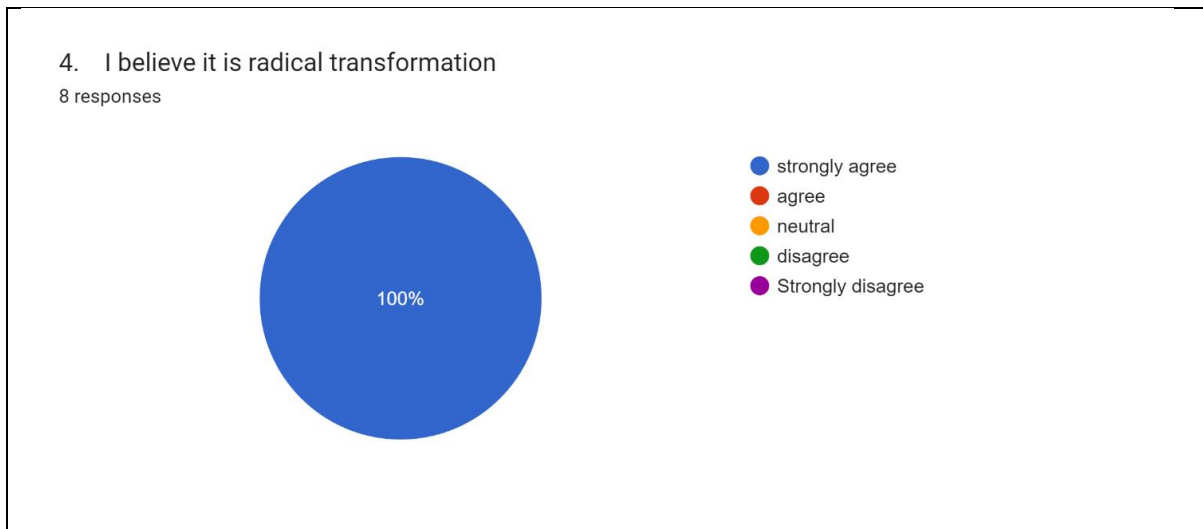


Figure 23.

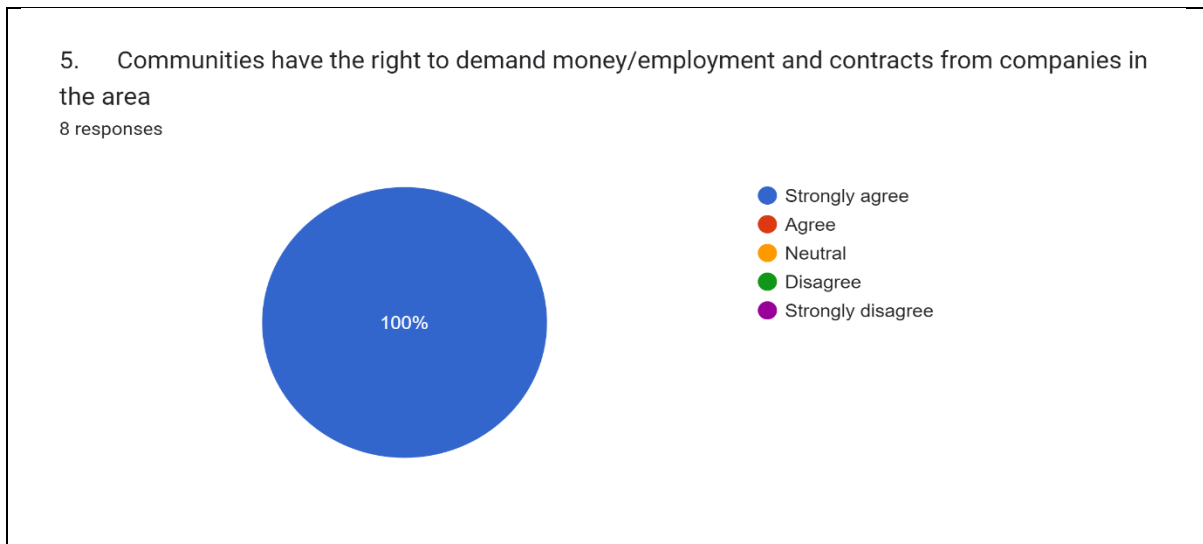


Figure 24.

All the participants believed that their actions were a form of radical transformation, that no harm was caused to the companies and that they had a historical right to be paid a percentage of the contract value.

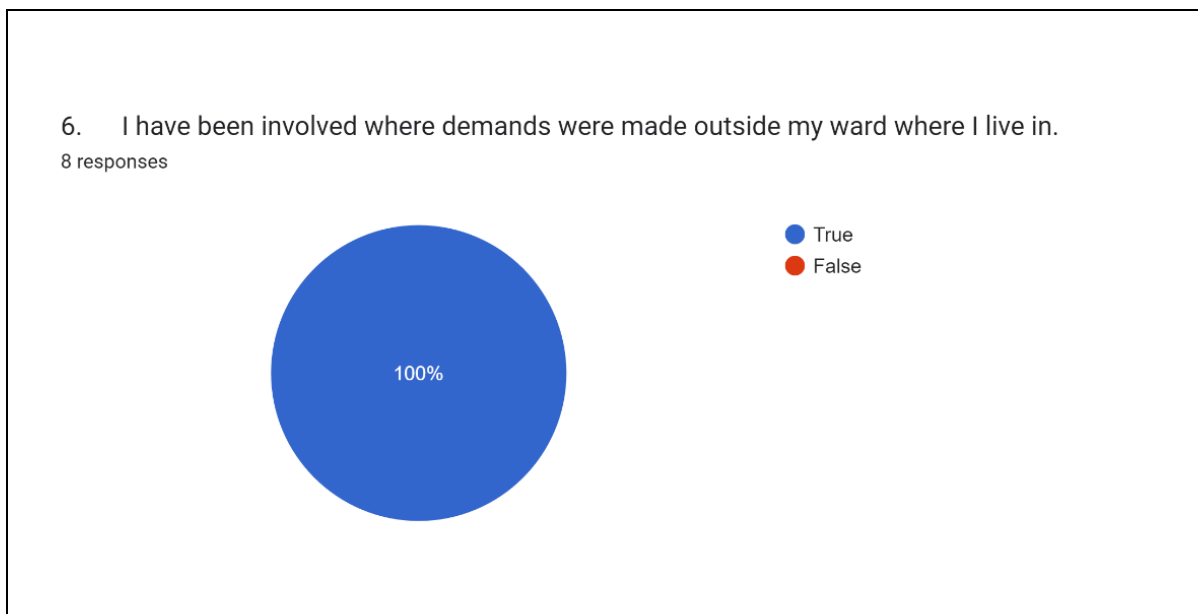


Figure 25.

Although the illicit business forum usually introduces themselves as members of the community of the area or municipal ward where the construction is taking place, and demand money or employment for members of the community, all the participants have been involved in several extortion incidents outside the area where they usually reside. It supports the hypothesis that impoverished communities are being exploited for personal gain by the illicit business forums and that very little community upliftment or development occurs.

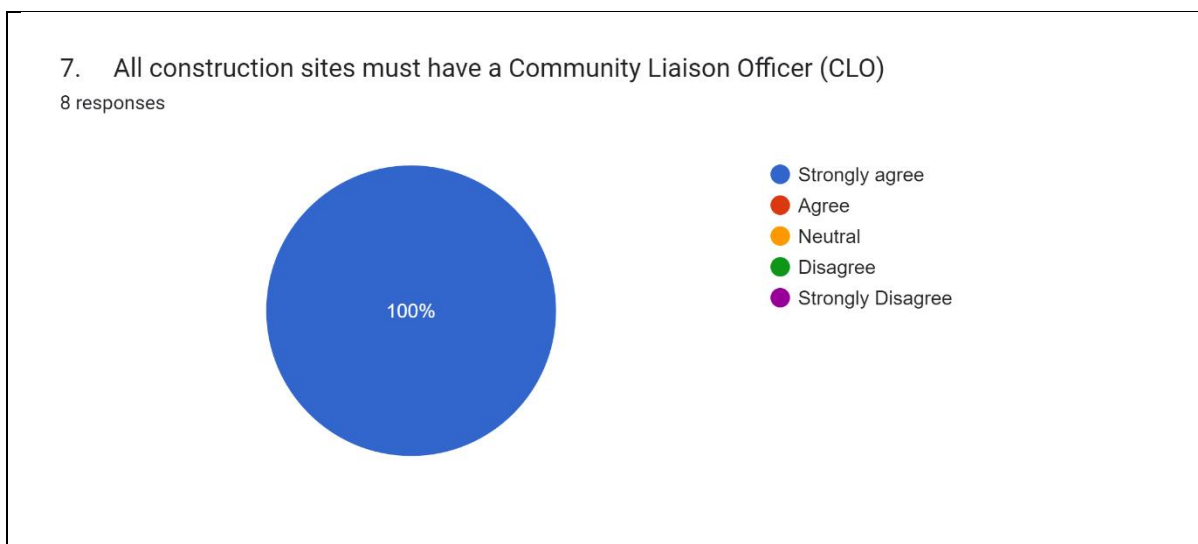


Figure 26.

All the participants were adamant that a CLO must be appointed by the illicit business forum. Although the appointment of a CLO is not a prerequisite in the Preferential Procurement Act, a CLO is usually appointed when a government contract, across all three spheres of

government, has been awarded to a contractor.<sup>25</sup> As the 30% of the contract value is usually paid in the form of employment opportunities for the duration of the contract to members of the immediate community, a CLO is appointed to liaise between the community and the contractor. The illicit business forums insist on the appointment of a CLO as the CLO is used as a point of entry for the illicit business forum to infiltrate the site. Once 'their' CLO is appointed, they control the awarding of subcontracts and all employment on the site, even who the security firm may be. Any attempt from the company to object is met with threats of violence and site stoppages, often including damage to property, expensive machinery, and assaults. Some groups have kept contractors and engineers hostage for extended periods of time.

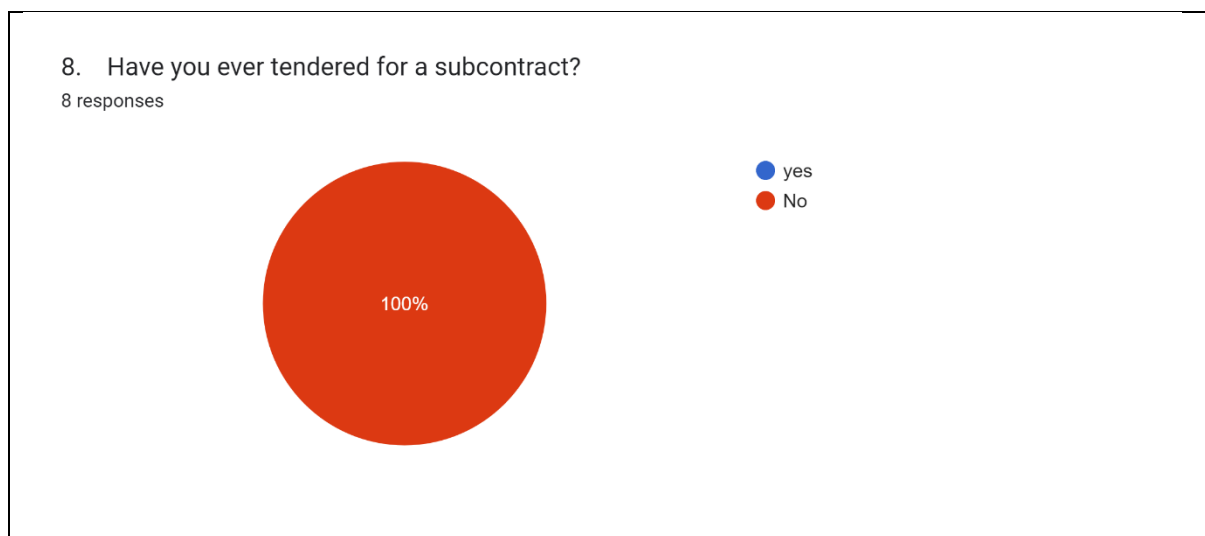


Figure 27.

None of the participants ever tendered for contracts.

9. If no – why not?

8 responses were received from the groups

- I don't need to.
- I don't know how.
- Don't need to.
- It's a long difficult process. I will be disadvantaged. Our way is easier. At least we get something.
- I don't think we need to tender. We make enough money from our demands. Big companies pay. If they don't, we stop the site until they pay.
- Too complicated. We getting paid in any case or we close the site.
- No need to tender. We stop the site. That's how we make money.

25 Interview with Lt Col Prem eThekweni Metro Police on 8 August 2022.

- It is too difficult. I think [I] will be disadvantaged. I don't want to pay tax.

The formulas used in the Preferential Procurement Act, to appoint subcontractors are by design to assist developing/new contractors. These same formulas are confusing and scare them off. The administrative processes are time-consuming and complex. None of the respondents understood the legislation relating to tenders and sub-contracting.

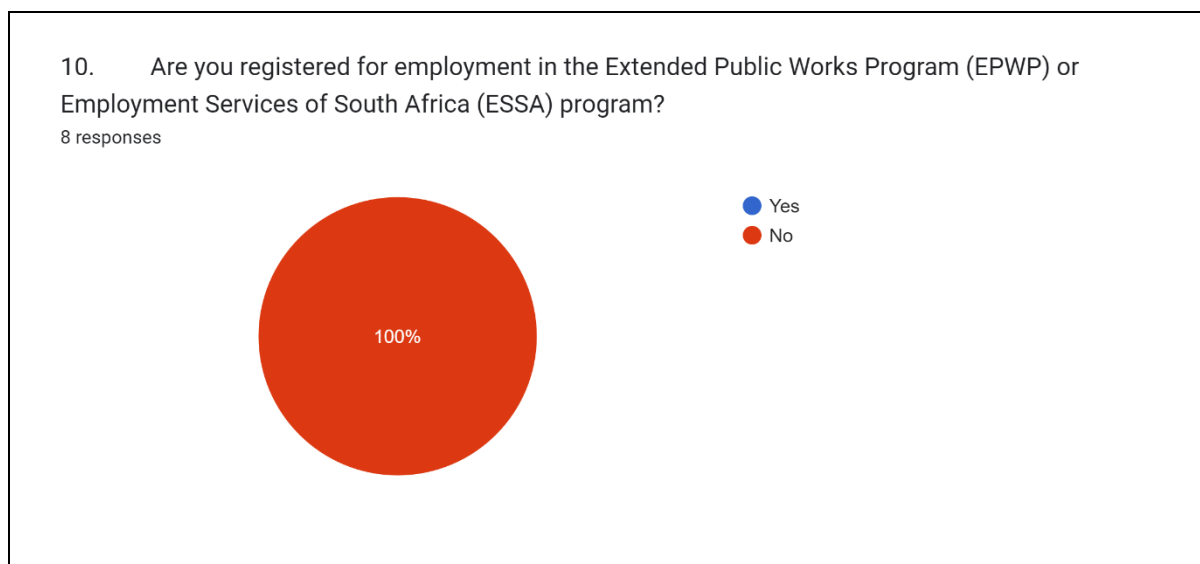


Figure 28.

None of the participants registered for the any of the governments employment programmes.

11. If no, why not?

8 responses, being the following:

- Don't need to.
- I don't know about it.
- Too much work.
- We getting money from non-profit.
- We don't want to register because it will take our business away. It will regulate our work. In most cases we don't stay in the area we stop the sites. These systems have too many rules.
- To many strict rules. Take our business away.
- That will kill our business.
- It's too difficult. Not many jobs available through these. It's controlled by the ward councillor for his friends.

Most of the respondents were employed. They, however, do not want the unemployed communities to register for the employment programmes, as it will undermine the very nature of their operations. The reluctance of constructors use these programmes,



unknowingly, gives support to the nature of the illegal actions of the illicit business forums. The communities are not familiar with the processes and do not trust the process. Little information is being shared with the communities about these programmes.

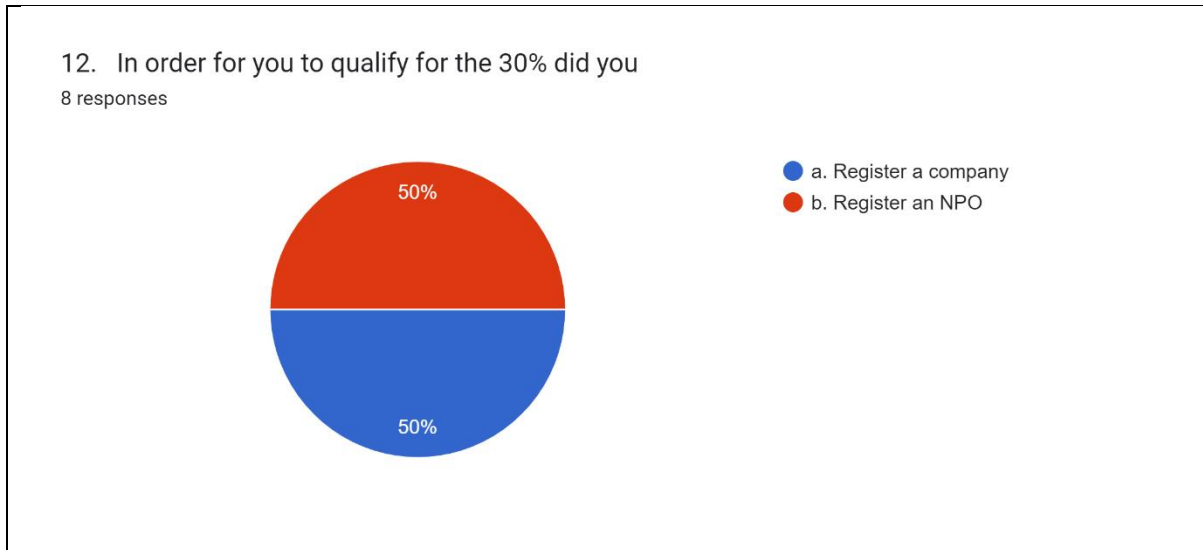


Figure 29.

A few construction companies mentioned that they are using non-profit organisations. Illicit business forums were asked if they registered companies or Non-Profit Organisations as a front for their illegal dealings. 50% of them registered companies, while the other 50% registered non-profit organisations. Funds extorted from companies are paid into these entities.

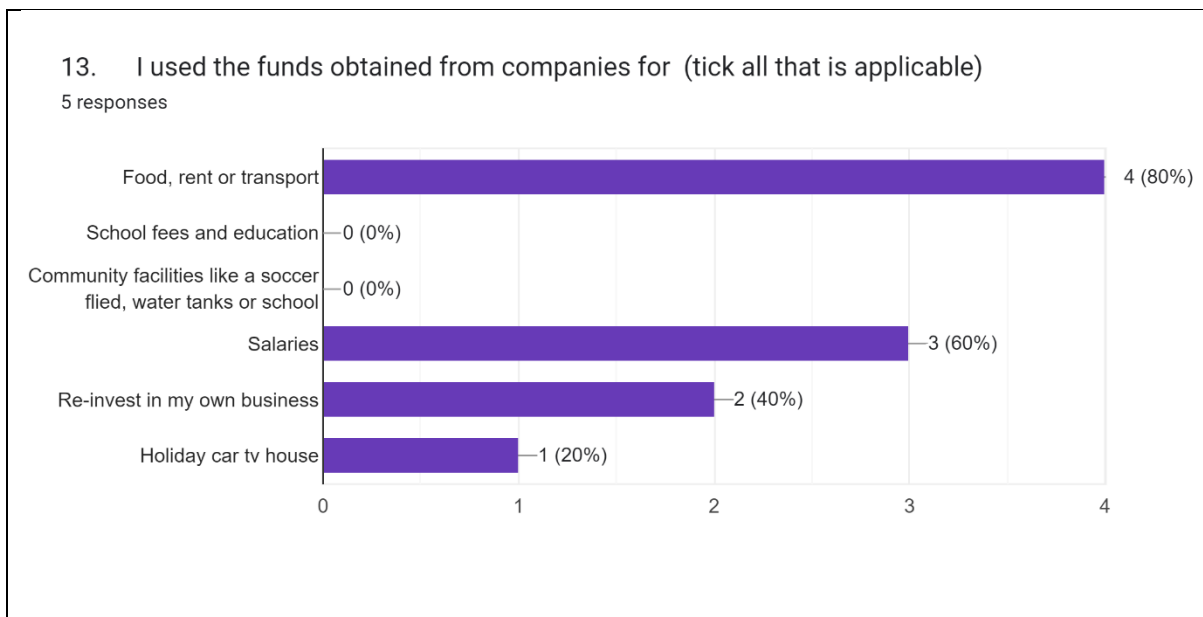


Figure 30.

14 If other please list below

The following are the 7 responses received:

- Tv, car.
- Clothes, holiday, car, tv.
- Car, tv, jewellery.
- The councillors want their cut. We have to pay the police. We have people that we pay so they come to sites, that cost money. We buy alcohol and houses with the money.
- Alcohol, perfume, jewellery. Paid the police and councillor.
- We bought land and built houses. We have expenses like giving the cops, the people working for the municipality and the ward councillor their share. The rest we bought cars and trucks and taxis. We have a side job of selling noape and heroin. We bought stock to sell.
- Built my own house. Bought a car. Bought liquor. Paid the police municipal office workers and councillor for us to stop site.

None of the funds were used for community upliftment. Money was spent on paying bribes to the police and ward councillors, paying salaries of the casual workers after a percentage was deducted, payment for people who helped to destabilise the site and even drugs to resell in quieter months when construction companies close over December. If the community members are not violent enough or cannot be forced into violent protest action, people associated with the illicit business forums will be brought in from other areas at a fee. Luxury vehicles and homes are also bought with the extortion money. There seems to be a link between the taxi industry and some of these groups, but that was not interrogated as the syndicates were reluctant to discuss it. The link between the drug trade was, however, confirmed.

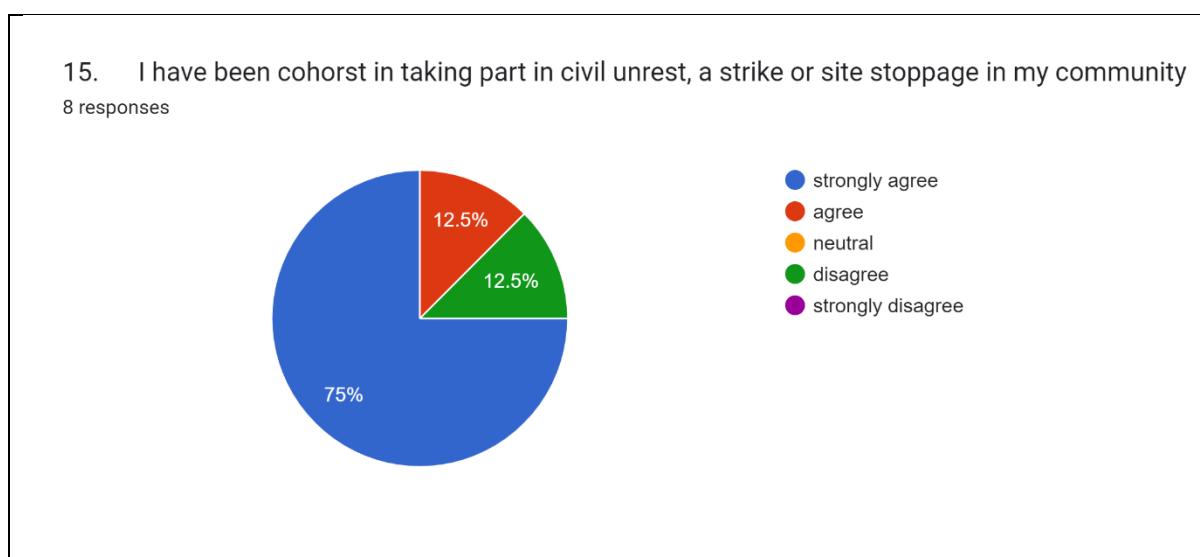


Figure 31.

Members of groups feel obliged to partake in unrest. There was no indication that any member of a syndicate was forced or threatened. Community members, however, are threatened to partake in protest action.

16. What is your opinion about companies, the community and stoppage at sites?

8 responses as per the below:

- It's our right.
- The company must pay.
- We do nothing wrong.
- They have money. They can give jobs and pay. We do nothing wrong.
- The companies pay. We give jobs to people and they pay us part of their pay. We will continue as long as these companies pay. I make more money that at my other job.
- While we getting paid, we should be allowed to continue.
- The communities are hungry. There are no jobs. These companies make lots of money. They only pay a little bit of what they make. The companies must pay.
- Companies must pay because they hire foreigners without papers while the community do not have jobs and go hungry. The municipality and councillors are corrupt and also take. A big part of our money goes to them and the police. We know nobody will stop us.

From the above three sets of questionnaires, it may easily be deduced that law enforcement agencies, both private and from the executive sphere of government requires training to enable them to adequately attend to these illicit business forums. Meanwhile the trust from the South African companies is beyond ebb and will rather give in to the extortion than to follow the long and costly legal route. The illicit business forums, under the guise of community upliftment, alone profit as they use the payments for their own gain. This will not end as legislation creates these uncertainties, as is discussed below.

## 5. LEGISLATIVE CONFUSION

Two pieces of legislation apply to tenders but are misused to extort companies. These are the Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and Preferential Procurement Regulations, 2017 (PPR).<sup>26</sup> What is more, the Intimidation Act 72 of 1982 (the Intimidation Act), Regulation of Gatherings Act 205 of 1993 (Regulation of Gatherings Act) and the Prevention of Organised Crime Act 121 of 1998 (Prevention of Organised Crime Act) create a *lacuna* misused on a *mala fidei* basis by the illicit business forums. To expound this, the constitutional duties bestowed upon South African law enforcement agencies via the

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26 Available at [http://www.thedtic.gov.za/wp-content/uploads/PPPFA\\_Regulation.pdf](http://www.thedtic.gov.za/wp-content/uploads/PPPFA_Regulation.pdf) (visited 1 August 2022).

Constitution of the Republic of South Africa, 1996 (the Constitution) provides a disconnect between their duties and societies' right to a safe and economically thriving South Africa. Below an explanation of these *lacunas* is provided

### 5.1 The Constitution of the Republic of South Africa, 1996

Metro Police was established in terms of section 205(1) of the Constitution.

The national police service must be structured to function in the national, provincial and, where appropriate, local spheres of government.<sup>27</sup>

Furthermore, the functions of the police on a national, provincial and local sphere of government are depicted in section 205(3):

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.<sup>28</sup>

Most of the protests linked to the illicit business forums occur in the local sphere of government. It is therefore imperative that the metro police with local development departments within the municipality develop a strong strategy within their mandate. A preventative strategy and strong policing reactive strategy are necessary if construction sites are prevented from functioning. Yet very few Metro Police Services and members are aware of their constitutional obligations, the possibility of extortion and how to deal with it within local spheres of government. The SAPS (National) may determine the policing and training standard to which Metro Police must adhere to, but may not reduce their responsibilities or interfere with Metro Police due to the separation of powers underpinning a federal government.<sup>29</sup> Operationally the SAPS is of the view that they are the only enforcement agency who are allowed to deal with these incidents. SAPS established a small reactive task force in a few provinces, mandated to investigate incidents where the illicit business forums are implicated.

The teams are small, however, and thus not able to respond to all incidents and they cannot manage crowds. They are highly effective as investigators. A force multiplier such as the metro police is needed to gain control of violence and extortion at construction sites under.

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27 The Constitution of the Republic of South Africa, 1996.

28 The Constitution of the Republic of South Africa, 1996.

29 South African Government "Structure and functions of the South African Government" <https://www.gov.za/about-government/government-system/structure-and-functions-south-african-government> (visited 1 August 2022).

It needs to be mentioned that the Dangerous Weapons Act<sup>30</sup> and the Firearms Control Act<sup>31</sup> also confer a duty upon the SAPS and Metro Police to protect everyone. Currently, however, cases are seldom opened by the police after public violence even after firearms were present during a protest.

### **5.1.1 Preferential Procurement Policy Framework Act 5 of 2000 and Preferential Procurement Regulations, 2017**

#### *5.2.1 Tender processes*

The illicit business forums use the provisions in the PPPFA and subsequent PPR to 'legitimize' their criminal enterprise.

Specifically, Regulation 9 of the PPR provides that, if feasible to subcontract for a contract above R30 million, an organ of state must apply subcontracting to advance designated groups, by advertising a tender. This tender must specifically provide for a subcontract of a minimum of 30% of the value of the contract to an EME or QSE; an EME or QSE which is at least 51% owned by black people. Sub-regulation 2 also includes an EME or QSE which is at least 51% owned by black people who are youth; women; disabled; living in rural or underdeveloped areas or townships; people who are military veterans; a cooperative which is at least 51% owned by black people, or more than one of the categories referred to.<sup>32</sup> In addition, Regulation 9(3) provides that the organ of state must make available the list of all suppliers registered on a database approved by the National Treasury to provide the required goods or services concerning the designated groups mentioned from which the tenderer must select a supplier.

The illicit business forums use the reference to a minimum of 30% of the value of the contract found in Regulation 9(1)(2), selectively, to place an enterprise 'on terms' to provide, in funding, employment or contracts, to the 'business forum', with 30% of the total contract value. If the company refuses, the site is prohibited from continuing to operate by mobilising the community to partake in a, usually, violent protest as is seen from the questionnaires above.<sup>33</sup>

The stipulations in the PPR above however states the following:

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30 Act 15 of 2013.

31 Act 28 of 2006.

32 Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA) and Preferential Procurement Regulations, 2017 (PPR), regulation 9 (2)(1) (a-h).

33 See Figures 13, 16 and 17.

A contractor who was awarded a tender, must subcontract 30% of the value of the tender to a designated previously disadvantaged group. However, it must be a state tender in other words funded either by a National or Provincial Department of State or a Municipality. Therefore, PPR is not applicable to private enterprises or private developments.

Another concern with the PPR is that it is not feasible. For example, where machinery is supplied to the value of R30 million, the machinery cannot be broken down in smaller parts; or the work might also be of such a specialised nature that it will be difficult to find a specialist from the designated group to subcontract. The contract value must be more than R30 million. Thus, any contracts less than R30 million are inviting to extortion by the illicit business forums.

Lastly and as seen in the questionnaires above from the participating companies and illicit business forums,<sup>34</sup> the 30% subcontracting which must be awarded subjected to the point system in the regulations during a competitive tender process, provides a lengthy and administrative process.

The illicit business forums selectively demand 30% but ignore the rest of the Regulations and do not distinguish between private and state developments. No formal tender process is followed. In fact, the illicit business forums demands that no formal process must be followed as the group usually do not comply with the minimum requirements stipulated in the regulations such as letters of good standing and tax registration. A formal tender process will therefor expose their criminal activities. This came afore in the questionnaires with the illicit business forums above.<sup>35</sup>

### *5.2.2 Employment of the local community*

The PPR is moot on lower-level operational matters. Subcontractors often need entry level general or ad hoc workers. This lacuna in the legislation is exploited by the brokers of the illicit business forums as they employ the local community by selling permanent employment to them and then demand that the contractor transfer 30% of the contract value to the illicit business forums. However, two employment initiatives need mentioning here.

The Department of Employment and Labour is legislatively mandated to reduce unemployment, poverty and inequality through employment creation, sound labour relations, eliminating inequality and discrimination in the workplace and alleviating poverty through employment.<sup>36</sup>

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34 See figures 18, 22, 28, question 9 and 11 under par 4.3.

35 See par 4.3.

36 <https://www.labour.gov.za/About-Us/Pages/vision-and-mission.aspx> (visited 1 August 2022).

This Department created a user-friendly web-based employment database where employment seekers and employment hunters can register. The system is known as Employment Services of South Africa (ESSA). The Department makes inspectors available to assist companies or communities to register employment seekers on site or in the community.

When an unemployed community member seeks employment or a contractor seeks an ad hoc, temporary or permanent worker or specialized skilled worker, the inspector will register the community member on the data base or place a worker at a company or contractor. Skills development takes place unlike with the illicit business forums where it is unregulated and not subjected to some form of control. Corruption and extortion are circumvented in the ESSA project. Community members who can prove residence is placed in a controlled manner subjected to labour laws. The illicit business forums are venomously opposed to the ESSA programme.

The second initiative, which Local Government mirrored the ESSA programme, is the Extended Public Works Program (EPWP). Municipalities register employment seekers on a data base and when a tender is awarded in the municipal sphere of government, contractors can access the EPWP database to source general workers, employment seekers or specialists. This employment programme is often driven by Ward Councillors.

On Local or Municipal level, the illicit business forums often infiltrate the ward councillor. Ward councillors have no authority over state, provincial or private tenders. A ward councillor may only get involved in Municipal funded tenders. In practice contractors are threatened on regular basis by ward councillors who join the criminal enterprise of the illicit business forums. Ward councillors demand employment for their community but refuses to use the EPWP or ESSA programme. The employment is often reserved for the benefit of relatives or political party members and money meant for the community, find its way to political party bank accounts. The community is incited to violence, if the constructor insists on making use of formal programmes such as the EPWP or ESSA programme as is stated by the companies questionnaire above.<sup>37</sup> In 2022 a former Mayor of one of the prominent Metropolitan Councils were charged with fraud, corruption, money laundering and racketeering. These cases were linked to amongst others, the construction mafia.<sup>38</sup> In 2021 a ward councillor was shot in Tshwane. His murder was linked to the construction mafia<sup>39</sup>.

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37 See Figures 11,12, 16 and 17.

38 Eyewitness News “Zandile Gumede, 21 co-accused plead not guilty to fraud, corruption charges” <https://ewn.co.za/2022/08/22/zandile-gumede-21-co-accused-plead-not-guilty-to-fraud-corruption-charges> (visited 1 August 2022).

39 IOL “Tshwane ANC councillor Tshepo Motaung gunned down in Mabopane” <https://www.iol.co.za/pretoria-news/news/tshwane-anc-councillor-tshepo-motaung-gunned-down-in-mabopane-94b24c11-d123-4536-9b95-abcb2006a5b0> (visited 1 August 2022)

There is no clear policy or nexus between the PPR and the ESSA or EPWP program currently and from the above it is clear that the lacuna in the PPR provide for extortion.

### 5.3 The Intimidation Act 72 of 1982

When an extortion victim opens a case, the SAPS often opens a case of intimidation instead one of extortion. In an extortion case, the victim is place under duress for the perpetrator to extort money, contracts, employment of interest in the contract from the victim. In criminal intimidation cases, the illicit business forums will threaten the victim to do or omit an act usually compulsory to the construction project. Both have an element of violence or the threat of violence.

The Intimation Act provides that any person who, without lawful reason and with intent, compel or induce another to commit or omit or abandon a standpoint by acts or threats of assault, injures or causes damage to that person or any other person; or in any manner threatens to kill, assault, injure or cause damage to that person or any other person may be found guilty of intimidation.<sup>40</sup> Such intimidator will be guilty of an offence and liable on conviction to a fine of maximum R20 000 or imprisonment to a maximum of 10 years or both.<sup>41</sup>

Intimidation is seen by the South African criminal justice system as a misdemeanour or lesser offence.<sup>42</sup> Moreover, as determined from the questionnaire from the law enforcement agencies, at operational level, it is seldom understood what the difference between intimidation and extortion is,<sup>43</sup> which includes a lack of understanding what the impact is of each. Intimidation is a Schedule 2 offence in terms of the Criminal Procedure Act,<sup>44</sup> whereas extortion of this nature is a far more serious Schedule 5 offence.<sup>45</sup>

### 5.4 Regulation of Gatherings Act 205 of 1993

The illicit business forums incite community members in the surrounding area of construction sites or developments to gather at the site of operation and disrupt all work.<sup>46</sup> The gatherings are often violent with damage to vehicles, equipment and offices and armed members of the

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40 Section 1(1) of the Intimidation Act 72 of 1982.

41 Section 1(1) of the Intimidation Act 72 of 1982..

42 *S v Munyani* 1972 (1) SA 411.

43 See Figures 4-7, 9 and 10,

<sup>44</sup> Criminal Procedure Act 51 of 1977.

45 Schedule 5 of the Criminal Procedure Act 51 of 1977..

46 See questionnaire completed by law enforcement agencies, illicit business forums and companies par 4.1-4.3.



Illicit business forum present. Legally employed employees of the companies are assaulted and even kept hostage. Cases of murder have been reported.<sup>47</sup>

The law enforcement agencies are hesitant to get involved after the Marikana massacre and the subsequent Farlam Commission.<sup>48</sup> The Farlam commission noted that the SAPS are ill equipped and poorly trained to deal with large crowds of people.<sup>49</sup> The Farlam commission has incapacitated the police to the extent where they have become mere bystanders when large violent crowds engage in criminal acts such as destruction of property and assaulting people.

### 5.5 Prevention of Organised Crime Act 121 of 1998: Racketeering

Common and statutory criminal law focus usually specific acts (or omissions) to secure a conviction. The purpose of the Prevention of Organised Crime Act is to focus on the network of criminal conduct. It focuses on the higher level of organisational structures of these illicit business forums and how they interlink with the individual on the operational level at the construction site. Its aim is to expose the criminal network of organised crime on a grand scale.

Specifically, the Prevention of Organised Crime Act provides that any person or group, either being a manager or employee, or who has reasonable knowledge of an employee who acquires or maintains any interest in or control of any enterprise through a pattern of racketeering activity is guilty of an offence.<sup>50</sup>

Corruption Watch defines a “pattern of racketeering activity” to be understood as “planned, ongoing, repeated or continuous participation” in any of the over 30 crimes listed in the law’s first schedule. These include corruption, fraud, extortion and murder.<sup>51</sup>

Interviews with law enforcement agencies and Proman<sup>52</sup> revealed that the same suspects or illicit business forums are active in several construction sites. A clear pattern of organised, planned, repeated, and continued criminal enterprise by means of extortion, is thus present. Yet no evidence of any racketeering cases or cases in terms of the Prevention of Organised

47 Organised Crime and Corruption Project “*GI-TOC Reports on South Africa’s Emerging ‘Construction Mafia’*” <https://www.occrp.org/en/daily/16447-gi-toc-reports-on-south-africa-s-emerging-construction-mafia> (visited 1 August 2022).

48 The Marikana Commission of Inquiry <https://justice.gov.za/comm-mrk/index.html> (visited 1 August 2022).

49 Research Unit “*An overview of the Farlam Commission’s Recommendations*” 19 August 2015 <https://static.pmg.org.za/15081919FarlamCommission.pdf> (visited 1 August 2022).

50 Section 2(1)(d) - (f) of the Prevention of Organised Crime Act 121 of 1998.

51 Corruption watch Tharin Pillay <https://www.corruptionwatch.org.za/making-a-racket-about-racketeering/> (visited 14 August 2022).

52 Interview with Lt Col Prem Ethekwini Metro Police on 8 August 2022

Crime Act were opened. Any illegal enterprise or system to acquire any undue monetary income falls within the ambit of racketeering. Corruption Watch defines “protection racketeering” as the offering of protection of companies for a threat created by the “protector”.<sup>53</sup> This is a common practise of the illicit business forums. Misusing non-profit organisation donations or falsely impersonating a community sanctioned business forum to disguise extortion money is money laundering and a type of racketeering, again methods commonly used by the illicit business forums to extort money.

Police and law enforcement agencies seemingly have not made the nexus to the various illicit business forums with their vast network of sites being disrupted and extorted. Alternatively, they might lack training in identifying the possibility of racketeering due to the isolated silo nature of crime reporting.

## 6. RECOMMENDATIONS

Extortion is an extremely complex crime to combat. The nature of the crime necessitates a multi-disciplinary proactive preventative program inclusive of the commitment of a vast number of role-players, if this type of extortion is to be rooted out. It is clear from interviews and questionnaires with business owners and construction managers that interventions were needed already, before it became such a well-established criminal enterprise.<sup>54</sup> Although the President declared the construction mafia and their criminal enterprises, a priority crime,<sup>55</sup> law enforcement is still battling with power struggles between the various law enforcement agencies, uncertainty who should be responsible for the combatting of the illicit business forums and understanding the crime and charges which need to be filed. This results in a reduced of response as the complainant and victims are being send from pillar to post to get immediate assistance. In the same vein, some law enforcement agency responds, the company usually had to stop work, close the site and suffered losses such as penalties for missed deadlines, damaged to vehicles and equipment and injury to employees or themselves.

Construction companies and developers and communities need to also take responsibility for their role in the growth of extortion within the construction environment. Often communities do not make use of programs such as the EPWP or ESSA programs, designed by Government to assist people with employment and upliftment. No attempt is made to tender for

53 Corruption watch Tharin Pillay <https://www.corruptionwatch.org.za/making-a-racket-about-racketeering/> (visited 14 August 2022).

54 See par 4.2.

55 Okuhle Hlati “*Bid for special police unit to tackle ‘construction mafia’ welcomed*” Cape Times, 31 March 2022 <https://www.iol.co.za/capetimes/news/bid-for-special-police-unit-to-tackle-construction-mafia-welcomed-2ca70e1d-ee9b-49ba-8550-a6fb7bbf57cd> (visited 14 August 2022).

subcontracting although the formulas in the PPR makes it extremely favourable for these impoverished communities and emergent contractors to obtain subcontracts. It is easier to support illicit business forums in closing sites for a fraction of the extortion money. No action is taken against these community members as it is commonly believed that they fear for their lives and were forced into participating in mass action. The community has the power to refuse to work with or for the syndicates and follow legal routes in obtaining employment as casual workers or subcontractors.

Companies are not without fault. They entertain the illicit business forums, give recognition to them by attending meetings with them and often pay them “protection” money, give employment to syndicate members, allow substandard work or award, without legal processes - subcontracts to them. They are themselves uninformed of the regulations of the PPR. Often subcontracts are awarded without a tender and competitive bidding process. This creates inconsistency in awarding of tenders, used at a later stage by the illicit business forums. This is in contradiction to the PPR. The illicit business forums are paid even if they deliver substandard work.

### **6.1 National, provincial and local spheres of Government**

The PPR should be amended to include the hiring of casual workers who is not linked to subcontractors. The amendments must clearly define the role of CLO’s and under which circumstances CLO’s must be employed.

There should be an integration of the ESSA and EPWP so that contractors are forced to make use of these structures to employ casual, *ad hoc* or specialist workers. This will eliminate the grip of the illicit business forums. It will further encourage community members to register on both these data basis. The role of ward councillors also needs to be clarified in the PPA. Separation of powers between the different spheres of Government must be emphasised. A ward councillor cannot interfere in Central Government, Provincial Government or Private Developments. Ward councillors must make use of the EPWP to introduce employees in municipal or local Government contracts.

Robust training and information sessions are necessitated to educate construction companies and community members of rights, responsibilities, and programs available for employment and skills development.

### **6.2 Law enforcement**

It is the legislative duty of both the SAPS and Metro Police to combat extortion, respond to complaints of site stoppage, hostage taking, unrest, damage of property and murder. Whilst

eThekweni/Durban Metro Police has taken a robust approach in eliminating these types of crimes, the rest of the Metro Police Services and SAPS are lagging in attending to complaints or in developing strategies to deal with these cases.

The SAPS and Metro Police at station or precinct level, need training in how to recognise and deal with extortion. Cases cannot be dismissed as labour related matters if extortion takes place. Even if the root cause of the problem is labour related, the moment that the disgruntled employees' resort to criminal conduct and extortion, it must be dealt with as such.

Civil unrest can be handled with tact and discretion but must be followed up with opening of cases. The recommendations of the Farlam Commission must be implemented, and video footage must be used to identify perpetrators. Cases of public violence, destruction of property and extortion must be opened by Metro Police and the SAPS as to deter individuals and community members from resorting to violence to raise grievances and to make it less attractive to support the illicit business forums.

Metro Police must take responsibility for crowd management and dealing with complaints. They are, in terms of the Constitution, equal in responsibility to the SAPS for prevention of crime and keeping citizens safe. This includes responding to cases of extortion and public violence on construction sites.

All complaints must be taken seriously and if a complainant wishes to open a case, the case must be opened. Care must be taken to not change complaints to lesser criminal offences. Protestors and members of the illicit business forum are usually armed with firearms or other weapons. This must be dealt with in terms of the Dangerous Weapons Act or the Firearms Control Act. Currently cases are seldom opened by the police after public violence even after firearms were present during the protest.

Private security agencies are a very important role-player when protecting the property of clients at construction and development sites. Whilst the SAPS incorrectly still regards the Metro Police as a lesser policing agency and private security as not a law enforcement agency at all, they cannot cope with crime on local level. The private security companies are the first responders when an illicit business forum storms a construction site. They are the primary role players to keep property safe and protect people's lives until one of the other law enforcement agencies arrives. They are vital as witnesses or even complainants in criminal cases. It is therefore imperative that they be included in a holistic crime prevention plan and be trained to deal with extortion and public violence.

Attention must be given to build partnerships amongst the three law enforcement agencies. Partnerships are essential between the law enforcement agencies on the one side and the community and construction companies on the other side if the war against the mafia style extortion is to be won. Trust and partnership will ensure a flow of intelligence which in return

can assist with preventative and corrective intelligence and evidence-based policing. A sound partnership will encourage community and construction companies to report extortion cases or illegal activities of the illicit business forums.

### **6.3 Culture of corruption and extortion**

Corruption and extortion have become the norm in the construction environment and awarding of tenders. There are reports of corruption and extortion almost daily in the news. The average citizen is no longer shocked by these reports which to a certain extent normalised corruption and extortion. Unless a united front is created against the illicit business forums, corruption and extortion will continue as an integral part of the culture of the construction industry. Business owners must be encouraged to take a stand against the illicit business forums and change their business practices by including a strategy to root out corruption and extortion.

### **6.4 Unemployment and economic interventions**

Illicit business forums use the underpinning poverty of communities. The lack of service delivery, unemployment and lack of basic services needs to be addressed. The EPWP and ESSA are two excellent initiatives but are largely unknown and under-utilized. Ward councillors need to communicate with impoverished communities on employment opportunities and future service delivery initiatives, as these communities are targeted by illicit business forums largely based on their unfamiliarity with business practises and unrealistic expectations. The illicit business forums mislead them with promises of employment and wealth sharing. Education is power. Communities needs to be educated on how the business world functions and how future opportunities can be accessed e.g., teaching communities how to tender for subcontracting. Simple integration of the EPWP and ESSA programs in the existing legislation of the Department of Trade and Industry will already assist to clarify uncertainty and limit the opportunity for syndicates for misappropriation of the system.