STRATEGIES FOR IMPROVING THE SUSTAINABILITY OF SMEs IN THE CONSTRUCTION INDUSTRY IN MALAWI

A thesis presented by

George Mwangi Bedard Kaggiah
Student No.1206308

Submitted in the partial fulfilment of the requirements for the degree of
Doctor of Philosophy

University of Bolton
Business School

Off-Campus Division

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Abstract

The Structural Adjustment Programme (SAPs) during the period 1980 to 2000 encouraged Governments to privatise non-strategic commercial activities, leading to the emergence of Small and Medium Enterprise (SME) sector, taking 95% of all trading entities and employing up to 40% of workforce in Sub-Saharan Africa. However, majority of SMEs in Africa fail within five years of starting and few last beyond 15 years and have no capacity to compete with International SMEs particularly in the construction industry. This research was to identify the leading factor in causing failure of SMEs in construction Industry in Africa; case of Malawi and develop a strategic legal framework to enhance sustainability of local SMEs. Literature reviewed confirmed a high frequency of failure and revealed twelve factors which cause negative impact on sustainability of SMEs generally. The National Construction Industry Council (NCIC) registers and regulates SMEs in the construction Industry and from their records there were 5,000 SMEs in 2015.

Mixed methods was adopted collecting qualitative and quantitative data in three stages. A survey by questionnaire administered to a random representative sample of 800No, and data analysed with Statistical Package for the Social Sciences (SPSS) established payment paralysis the leading factor in failure. 20SME failure cases were reached and responded to a questionnaire and interviews revealing the events and circumstances leading to payment paralysis. They posited that major drivers of payment paralysis are Corruption, Weak Contract laws, PEs skewing risks in their favour, poor bid evaluation and high bank interests. Interviews were then conducted with 5policy/opinion leaders who confirmed the major drivers of payment paralysis stated by the 20failed SMEs and gave their suggestions on contract and legal steps required to support the SMEs which were adopted in the design of the legal framework. The research findings were shared widely in awareness presentations in Malawi, Kenya and Zambia to Government, Academia, Legal Societies, SMEs MABCATA, MIE, IEK. . In 2015 Civil Engineering Contractors Association, (RACECA) appointed a team of lawyers and the author to seek solutions. In 2018 the author published these findings in the *Kenya Engineer* Journal. The concerted efforts of stakeholders resulted in 5No. Bills tabled in Kenya Parliament between May 2019 and October 2020 and happily, Bill No.5 was the Prompt Payment Bill sponsored by the Government. To date two of the five drivers were targeted. **Key words: SMEs failure, construction, corruption, sustainability, FIDIC, Pay-paralysis**

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LIST ABREVIATIONS

ACB	Anti-corruption Bureau
AU	African Unity
CABS	Common Approach to Budget Support
CBS	Canadian Broadcasting Service
CIDB	Construction Industry Development Board
CIPAA	Construction Industry Payment and Adjudication Act
CPAR	Country Procurement Assessment Report
CPD	Continuing Professional Development
CPI	Corruption Perception Index
CPP	Cumulative Proceeds from Privatization
CSA	Central Statistics Agency
DAC	Development Assistance Committee
DAC	Development Assistance Committee
DIFD	Department of International Development
EACC	Ethics and Anti-Corruption Commission
EBK	Engineers Board of Kenya
EoI	Expression of Interest
FC	Fixed Cost
FIDIC	Fèdèration Internationale des Ingèniuers Conseils (International Federation of Consulting Engineers)
FIEK	Fellow of the Institution of Engineers of Kenya
FMS	Flexible Manufacturing System
ICB	International Competitive Bidding
IEK	Institution of Engineers of Kenya
IMF	International Monetary Fund
ITB	International Competitive Binding
ITB	Invitation to Bid
LCS	Least Cost Selection
LDCs	Least Developed Countries
MABCATA	Malawi Building and Civil Engineering and Allied Traders Association

MDGs	Millennium Development Goals
MIE	Malawi Institution of Engineers
MSME	Micro, Small and Medium Enterprises
NAO	National Audit Office
NCB	National Competitive Bidding
NCIC	National Construction Industry Council
NRA	National Roads Authority
NTCCC	National Trade Contractors Coalition of Canada
NYS	National Youth Service
ODPP	Office of the Director of Public Procurement
PE	Procuring Entity
PEs	Procurement Entities
PSD	Private Sector Development
QBS	Quality Based Selection
QCQS	Quality- and Cost-Based Selection
RA	Roads Authority
RACECA	Roads and Civil Engineering Contractors Association
SADC	South African Development Cooperation
SAGAS	State Corporations and Semi Autonomous Agencies
SAPs	Structural Adjustment Programmes
SDGs	Sustainable Development Goals
SEDOM	Small and Medium Enterprise Development Institute
SMEDAN	Small and Medium Enterprises and Development Agency of Nigeria
SMEs	Small and Medium Enterprises
SPSS	Statistical Package for the Social Sciences
SSA	Sub-Saharan Africa
SSS	Single Source Selection
TEVET	Technical Entrepreneurial and Vocational and Education Training
TI	Transparency International
UN	United Nations
ZIMRA	Zimbabwe Revenue Authority

CHAPTER ONE

1. INTRODUCTION

1.1 Background

The majority of African Nations gained self-governance in the 1960 and celebrated 50 years of political independence in 2010 (Bierschenk AND Spies, 2010). In the last 50 years the countries have, with guidance and support from the International Monetary Fund (IMF) and the World Bank, pursued four development strategies with the first two running for 20 years each while the last two are for 15 years ending in 2015 (Bierschenk,T.& Spies, 2010) and 2030 respectively (Osborn, Cutter and Ullah, 2015).

Initially, from the 1960s to 1980s they pursued the “Basic Human Needs” development strategy, with the objective of ensuring that each family had adequate food, shelter, and clothing, and that the community at large had safe drinking water, sanitation, public transport, health, and education (Richard J., Emmerij L., 2009). The governments tailored and implemented policies and strategies to achieve the basic needs. However, poverty persisted. (Bierschenk, T.& Spies, 2010).

At the beginning of 1980 the Word Bank recommended Structural Adjustment Programmes (SAPs); (Easterly, 2005); (OECD, 2004); which (Adejumobi, 2006) finds had negative effects on economies in Africa when he states that “the most deleterious consequence of SAPs was that it depreciated the capacity of the state to govern by weakening state institutions. A weak state can neither protect the interests of the poor nor guarantee order and due process necessary for their empowerment”. This view arises because the states were forced or coerced to shed off several profit making non-strategic institutions in a privatization process (Dooley and Easterly, 2003). The strategy was effective in reducing the numbers of employees in government institutions and shedding-off of Various Government nonstrategic corporations, privatized leaving governments to manage their core business of strategy and policy formulation, international relations and governance. While this strategy may have set the stage for future economic growth, the savings in reduced Government wage Bill and the income from the sale or disposal of the nonstrategic corporations did not translate into immediately perceivable economic benefits. This plan came to an end after the Dakar 2000 meeting where "the participants called for a *"radical change in policies,"* total cancellation of the debt and an end to SAPs (Ismi, 2004, p23). The program was implemented in several developing countries all over the world.

The World Bank and the International Monetary Fund (IMF) with the support of United Nations (UN) developed a new development model, with a new set of economic growth priorities and measurements to monitor success of the new policies. This was the Millennium Development Goals development Model. In 2000, leaders of 189 countries endorsed the Millennium Declaration, a commitment to work together to build a safer, more prosperous and equitable world by setting out eight time-bound and measurable goals to be reached by 2015, known as the Millennium Development Goals (MDGs) (Osborn, Cutter and Ullah, 2015), (United Nations, 2015). The MDGs were simply stated and measurable achievements, intended to raise the standards of living and the quality of life for the people living in the developing countries, but with each government, expected to draw their own country specific policies to achieve the eight goals by year 2015. MDG No.1 is to eradicate extreme poverty and hunger and it has a big influence on all the others.

The current and the fourth global development policy is the Sustainable Development Goals (SDGs), which has identified and laid out strategies to achieve 17 Global Goals focusing on ending poverty, protect the planet and ensure that all people enjoy peace and prosperity. (Osborn, et al, 2015), (Uitto, 2016).

Table 1.1 below, developed in this research after exploring literature to establish the economic and development strategies adopted by African countries upon gaining independence from the European countries, which had colonized them from the nineteenth century to mid twentieth century. The table also details the sequence of changes in development policy and strategy, leading to the transfer of the role of employment generation from the Governments to the private sector and therefore to the Small and Medium Entrepreneurs (SMEs) who constitute over 95% of all the registered business entities.

Table 1.1 : Development Strategies and Source of Employment (Kaggiah G 2015)

PERIOD	**DOMINANT DEVELOPMENT STRATEGY**	**MAIN EMPOLOYER**
1960s to 1980s (Lopez et al., 2009) (UNECA, AU, ADBG, 2013)	ILO Basic Human Needs Strategy entailed development plans of three to five years (ILO, 2020) at World Employment Conference,	**Governments**
1980s to 2000 (Ismi, A., 2004, p23).	Structural Adjustment Programmes (SAPs) (Easterly, 2005); also referred as transition from command economies to market economies (Pyke, Robb and Farley, 2000), (Eichengreen and Tong, 2005), (Nuwagaba, 2015).	Transition from Governments to Private sector
2000 to 2015 (United Nations, 2015) (UNECA, AU, ADBG, 2013)	Millennium Development Goals (Achievement of 8No. measurable Goals) *Source*: (UN Secretary General, 2001) (Hulme, 2009)	**Private Sector** (Annual report, 2007)
2015 to 2030	Sustainable Development Goals (SDGs), Aims to achieve 17 Global Goals focusing on ending poverty protect the planet and ensure that all people enjoy peace and prosperity. (Osborn, Cutter and Ullah, 2015), (Alliance, 2015), (UNDP, 2015)	**Private Sector** (IFAD Annual report 2007)

In most developing countries, the private sector is now responsible for creation of the majority of employment and income-generating opportunities. The private sector, has become the driving force for poverty reduction since the closure of SAPs in 2000, as shown in Table 1.1 above. SAPs played the most significant role in this change.

In Africa and developing counties in other continents, governments used to play a key role in the organization of economic activities such as railways and harbors, power supplies and other commercial activities but following the implementation of SAPs they have now largely withdrawn from productive activities and the private sector now leads in production (IFAD, 2007). This change is also referred to by some scholars as the transition from command economies to market economies (Pyke, et al, 2000), (Eichengreen and Tong, 2005), (Nuwagaba, 2015)

In Malawi, before SAPs policies, the government had in its ownership and was involved in the operation and management of about one hundred and forty public enterprises and 30 assets managed by different ministries.(Kafka, 2000), (Dye Mawindo, 2000) . In line with the requirements of the World Bank sponsored Structural Adjustment Program (SAPs), the Government prepared a privatisation policy with the objectives below, whose achievement were intended to create an economic environment conducive to private sector development.

- Increasing efficiency in the economy
- Removing monopolies to increase competition in the economy
- Promote participation by the Malawian public in the enterprises and
- Raise revenue for the government (Dye Mawindo, 2000).

The following are some of enterprises, privatized:

Electricity Supply Corporation of Malawi Limited
Malawi Railways
Malawi Lake Services
Import and Export Malawi Limited
Malawi Telecom
Small Holder Coffee Authority
Small Holder Tea Authority
Small Holder Sugar Authority
Soche Tours and Travel Limited
Plastic Products Limited
Mchenga Coal Mines Limited
Malawi Rural Finance Company (with 199 branches throughout the country)
Air Malawi (Dye Mawindo, 2000)

Although the Public Enterprise (Privatization) Act was enacted by Parliament in March 1996, (World INvestment NEws, 2000) in their interview with Mr. Dye Mawindo, recorded that the government started privatization earlier. At the time of the interview, the Governmet of Malawi had already realized Cumulative Proceeds from Privatization (CPP) during the Period 1988-1997 of US$ 56.7 million (Cook, *et al,* 2001). The privatization process has continued over the years and was still continuing at the time of this study.

The current Global policy as embodied in the Seventeen Sustainable Development Goals (SDGs) which was launched by the UN, for the period 2015 to 2030 also supports the position where governments focus on governance and limits its involvement in commercial activities (Pisano, *et al*, 2015)

1.2 Emergence of private Sector enterprise as a key player in Development

The shedding-off, of commercial institutions from the governments by privatization in the SAPs and the downsizing of government departments in the quest for improved efficiency and reduction in recurrent budgets replaced the Governments, in the developing countries, from the position of the leading employer with the private sector. The achievement of majority of the eight Millennium Development Goals (MDGs) as spelt out in the Millennium Declaration, endorsed in 2000 by leaders of 189 countries who made a commitment to work together, focused on the improvement of the individual and family and therefore, the core policies to deliver the objectives focused on empowerment and employment (McArthur and Ramussen, 2018).

The OECD Development Assistance Committee (DAC) on poverty Reduction (Povnet) recognized that the quantity and quality of growth in the production sectors would have an important bearing on the achievement of the Millennium Development Goals (MDGs) and in 2003, Povnet recommended focus on agriculture, infrastructure and Private Sector development (OECD, 2004). Povnet also identified three parts of society responsible for generation of institutions and policies as the Government, the private sector and civil society. Private sector development fundamentally about people releasing and harnessing their productive potential and

satisfying their human needs (OECD, 2004). This view issupported as available evidence suggests that SMEs have played a major role in the growth and development of all the leading economies in Asia (UNCTAD, 2005). DFID (2011), and Lusardi and Mitchell, (2011), confirmed this position when they posited that the private sector is the engine for development and prosperity for the poor all around the world. The private sector is driving development and poverty reduction and it is therefore necessary to create conditions in which enterprises flourish.. It is therefore clear that there has been a paradigm shift with the private sector given more space, taking a more proactive role and viewed as a partner at the national and global level in finding solutions to development challenges. (Küblböck, et al, 2015)
Miyamoto and Chiofalo (2017) confirm the importance and the strategic accuracy of engaging and investing with the private sector, in the developing countries, since the private sector constitutes a key source of livelihood, providing 90% of all jobs.

1.3 The SMEs contribution to the national economy

To eradicate extreme poverty and hunger, it will be necessary to create employment and have the “working age” which is defined in Eurostat, (2012, p40) as ages 15-64. If the “working age” is productively employed, they will create wealth for the country and earn wages to support families at levels above the poverty line. On Conclusion of SAPs in 2000, the governments of the developing countries in Africa were no longer the major employers and the responsibility of creating employment had shifted to the private sector where the Small and Medium Enterprises (SMEs) are key players. Employment data in Malawi is sporadic and sometimes contradictory but in 2008 it was recorded that Malawi had a 6,100,000 strong labour force of which 222,000 were in the private sector 220,000 were in the public sector and the rest were in the informal sector (ILO,2010).

In the developed world, Construction industry is one of the most effective sectors for creation of employment and creation of wealth. In the United Kingdom, construction industry contributed above 6.0% of the GDP between 2010 and 2016. “In 2014 the construction industry in the UK contributed £103 billion in economic output, which was 6.5% of the National output”. (Rhodes, 2015, p 3). In India, construction industry contributes 10.0% of the GDP from 2012 to 2017 and provides 35Million jobs (dmg events, 2015, p6). It is observed that in situations of economic recession, construction is usually used to spur economic growth because money spent in construction has the desired ripple effect as it is distributed to materials suppliers, transporters and labour force and it quickly trickles to all players in an economy. It is therefore very important for an economy to maintain a vibrant construction industry as in the UK where 18% of all the businesses are in the construction industry (Rhodes, 2017), which is the desire of developing countries.

The entrepreneurs in the developing countries are keen to start construction companies and they normally use all the resources at available to *them* to register an SME and to start. However, majority of SMEs in the construction industry in African countries close down after running bankrupt or remained at the infancy stage of their life cycle. The failure of the SMEs to grow and build working capital in finance, personnel and equipment deprives the SMEs of the exposure and experience they would otherwise gain if they carried out increasingly complex works if they stayed in the business and were continuously engaged in construction works. The lack of experience in the execution and management of the works renders the local contractors less competitive for the more complex projects and they eventually deplete their resources and exit the sector.

The Author has been in the industry for over 38 years and observed the entry and exit of a number of SMEs in the industry. Generally the landscape of key players in the industry has been very slow to accommodate local SMEs and for some time the author has wished to make some contribution in the improvement of the sustainability of the SMEs in the construction industry in Africa and particularly Malawi. This regrettable situation provided the motivation and the subject of this study.

Job creation is the sum of entry of new firms in the market and expansion of incumbent firms, and job destruction is the sum of exit of firms from the market and contraction of other firms (Klapper et al, 2011). Fatoki Olawale and David Garwe (2010) assert that the creation and sustainability of new SMEs are therefore vital to economic prosperity of Africa.

SMEs are relatively new in the marketplace and often, their definition varies from one author to another and the scholars have not found it necessary to unify the definition. This state is manifest in the Works of Gertrude Mwandumba (2007) where Small and

Micro-size Enterprises share the acronym (SMEs) with the Small and Medium sized Enterprises and similarly defined in the text.

Various definitions for SMEs have been put forward. Buckley G. (1997) defines the smallest SME, as having 10-50 employees while micro-enterprises have 0-10 Employees. The most frequent upper limit is 250 employees, as endorsed by the European Union, however, some countries set the limit at 200 employees (OECD,2005), while the United States considers SMEs to include firms with fewer than 500 employees (Hammer, 2010) and the Government of Uganda uses 5-50 people (UNIDO, 2005). Vedanthachari (2007) defines SMEs as enterprises, which employ fewer than 250 people and an annual turnover not exceeding 50 million Euros, and/or an annual balance sheet total not exceeding 43 million euro. This is the accepted definition of SMEs in the European Union (European Commission, 2005).

In regard to Government involvement and policy, Celine Kauffmann (2005) found that very few countries have working definitions of SMEs, so related data is hard to compare. Bill Kendrock and Jason Agar (2007) who found that there was no universal definition for SMEs support this view.

According to Ayyagari, Beck, and Kunt (2005), the term SME covers a wide range of definitions and measures, varying from country to country and varying between the sources reporting SME statistics. Some of the commonly used criteria are the number of employees, total net assets, sales and investment level. Kauffmann C. (2005) found that very few countries, in Africa, have working definitions of SMEs, which made related data hard to compare.

Gibson and Vaart (2008) who are practitioners in SME finance supported this position from a point of experience and observed with the SMEs play a central role in promoting economic growth within the host communities in developing countries. The role, performance and importance of small and medium enterprises (SMEs) remains a topic of debate. Sadly, due to the numerous and widely varying definitions, each of which would represent the position held by groups of the numerous contributors, this debate has been badly served by the faulty definitions making participation nearly akin to many groups talking in many tongues without the benefit of an interpreter. They concluded by summarising the weaknesses of using a blanket definition of all SMEs while highlighting negative outcomes and distortions that arise by categorising the SMEs as below:

a) *The inadequacies of current conventions in defining SMEs and the inconsistencies among official SME definitions can lead to serious distortions in the allocation of donor spending for private sector development.*

b) *The volume of turnover of a business is in general a more appropriate measure of its relative size than either the more conventional measurements by number of employees or value of assets, when adjusted as described in the text.*

c) *The use of any single definition of SMEs for multiple countries in diverse stages of economic development leads to additional distortions.*

Berisha and Pula (2015) posits that the OECD estimated that small and medium enterprises account for 90% of firms in the world and account for 63% of the workforce.

Hatten (2011) makes a more interesting proposal that SMEs size standards are dependent upon the sector in which they operate such as construction, manufacturing, mining, transportation, wholesale trade, retail trade, and services. Berisha and Pula (2015) concluded that with acknowledgement from economists, the world organisations and governments that the SMEs are of such economic importance, the “Arbitrariness” adopted in defining them is “senseless”.

Literature reviewed also reveals that some scholars and institutions do not find the widely accepted definition of SMEs satisfactory and there is a clear cross purpose in the quest for a suitable definition; with one school of thought seeking a criterion that would clearly classify a particular SME universally and the other seeking locus oriented definitions.

The first group supports the view that the number of employees in an organisation should be the basis for identifying and defining SMEs and all those prescribing to any of the definitions focusing on numbers of employees fall in this group.

Gibson and Vaart (2008) belong to the group requiring a locus-oriented definition as they propose for consideration a new quantitative formula for defining SMEs with the size parameters of SMEs scaled relative to their home base. In their view, “any single definition of SMEs for multiple countries in diverse stages of economic development leads to additional distortions”.

Ayyagari, et al (2007) have taken a third approach where they propose that the size of an SME is classified using the median of the range of employees a firm has thus; SME250 classification would mean that an SME in that category would have a range from 200-300 employees.

Literature review on Malawi specific works indicate that even in Malawi several definitions with (Chris Darroll, 2012, p8) defining SMEs as organizations with 5 to 100 employees, while (Byson Majanga, 2015) notes that in PECC Finance Forum (2003) it was proposed that an entity with only 20 employees could be considered an SME in small economies such as Malawi.

These views confirm that there is a general lack of a clear definition of an SME. This lack of clarity becomes more evident when one notes that in 2012 (Wymenga, *et al,* 2012), considered firms with fewer than 10 employees to be SMEs, in the EU 2011/12 annual report on SMEs. This was an important report as it resulted in a declaration that, SMEs retained their position as the backbone of the European economy, with some 20.7 million SMEs across the EU-27 accounting for more than 98% of all enterprises. However, the lion's share forming the 98% of all enterprices across the EU-27 were 92.2% of firms with fewer than ten (10No.) employees (Wymenga, 2012, p9)

Mahembe, (2011) in agreement with (Hatten,2011) found that SMEs from different sectors differ in their levels of capitalization, sales and creation of employment when compared based on size e.g. number of employees, turnover, profitability and net worth. When ony one of the size definations described above is applied to SMEs in one sector it might lead to all the firms being classified as small, while the same size definition when applied to a different sector might lead to a different result.

Berisha, & Pula (2015), confirm that scholars and stakeholders have not agreed on uniform and accepted definition of SMEs and that functional Small business entities standards size vary by the industry in which they are domiciled as in construction, manufacturing, and others

This lack of universally agreed definition of SMEs leads to lack of coordinated and comparable data as evidenced by (Wymenga*, et al*, 2012) advising that *the data for the performance of SMEs in Malta, is very limited and so the estimates presented in "EU SMEs in 2012" should be treated with caution (* Wymenga*, et al*, 2012, p9 p14, p18)

This research will align with the first school of thought and regard employment as the major indicator and will consider the definition of an SME to be a firm with a maximum of 250 employees as defined by the European Union and in agreement with (Verheugen, 2005) and (Vedanthachari, 2007). The turnover and the balance sheet were not included as criteria in the definition of SMEs in Africa because the minimum limits set in the developed world are beyond the upper limits of the majority of the SMEs in Africa.

1.4 SMEs in the construction Industry

The World Bank views the first step to support the poor is to promote the efficient use of the poor's most abundant asset: labour. It is established that construction processes throughout Europe are generally still based on manual labour in the field (Girmscheid and Scheublin, 2010). Labour is one of the major inputs in the construction industry, hence SMEs particularly those in the construction industry are a direct response to this view as they employ the uneducated and untrained persons. The construction industry offers opportunities to the uneducated and untrained persons considered as the less privileged because they have fewer opportunities available in other sectors (Thwala and Mvumbu, 2009). SMEs are therefore quite important in the growth of the most developing countries including those in East and Central Africa. (The World Bank,1990).

The European Construction industry is one of the largest industries in Europe. With more than 15 million workers, the construction industry is the largest industrial employer in Europe, responsible for 30% industrial employment. In Europe, construction remains primarily a local industry with a majority of small and medium-sized enterprises, the competition with companies outside Europe is negligible. According to the European Construction Industry Federation (FIEC, 2009, p.3), the construction sector accounted for 10.4% of the GDP in 2008 (Martinuzzi,*et al,* 2011). This reduced to an economic output of 10% of the GDP in 2014, generating 20million jobs in the European Union (EU, 2014). In the UK construction industry generated 2.1 Million jobs representing 6.2% of the total jobs in the UK while contributing 6.5% of the GDP in (Rhodes, 2015) The UK construction sector has continued to grow and is ranked as the sixth largest in the world, with about 3million employees at 10% of total (Business Sweden, 2017).

Construction sector is considered to be of strategic importance to the EU as it delivers the buildings and infrastructure needed by the rest of the economy and society. It represents more than 10% of EU GDP and more than 50% of fixed capital formation. It is the largest single economic activity, and it is the biggest industrial employer in Europe (Ecorys Scs Group, 2010). This was confirmed in the Strategic Forum for Construction (2008) which asserted that the construction industry makes an important contribution to the competitiveness and prosperity of the UK economy.

Construction Industry is also a major economic driver in India, as confirmed by a National survey on Employment (2009-10) which showed that the vast majority of new jobs created between 2004-05 and 2009-10 were in casual employment, mainly in construction. The National survey on Employment (2009-10) also observed that the main burden for providing additional jobs to the growing labour force rests on manufacturing, construction and the services sectors. Construction has maintained an average growth rate of 9.8% over the previous 10 years and having a peak of 11.8% (Government of India Planning Commission, 2011) over the period 2012 to 2017, the construction industry maintained an economic output of 10.0% of the GDP and generated 35Million jobs (dmg events, 2015, pp6).

1.5 Problem statement

The EU 2011/12 annual report on SMEs, observes that SMEs are the backbone of the European economy with more than 98% of all enterprises in the EU and accounting for 55% of GDP and 70% of Employment. Maserira & Msweli (2013) find that SMEs sector is the powerhouse for economic stimulation and growth. (Evbuomwan, *et al,* 2012, p81), (OECD, 2017), (WTO,2016), (Muriithi, 2017).

All developing countries aspire to improve their economies to similar levels as those of the developed countries where the construction industry has been identified as an important sector, providing sustainable employment and creating wealth. Growth of SMEs in the construction sector in the developing countries is therefore important in achieving vibrant and thriving competitive private construction industry is crucial for poverty reduction (UNIDO, 2008).

The Malawi Government recognized the importance of SMEs early and formed the Ministry of Trade and Private Sector Development. The ministry prepared a Policy statement on Micro, Small and Medium Enterprise (MSME) in October 1998., which was reviewed in 2012, with the support of the Common Wealth Secretariat, and strengthened to a Policy Strategy entitled *“Enabling Enterprise Growth in Malawi: 2012-2017”* (Chris Darroll, 2012, p2). The Policy Strategy was to provide a policy framework to encourage initiatives that would support and create an environment that is conducive to development of SMEs.

Kayanula Dalitso & Quartey Peter (2000) documented the achievements made in the SMEs’ sector in Malawi and noted that Malawi implementation of SAPs sought to urgently reverse the trend of balance of payments and widening fiscal deficits which had deteriorated due to prevailing government policies in the years 1985 to 1985. Trade liberalization and reduction in government spending were among the key solutions, which demanded a paradigm shift for the Government from command economy to a market economy, which required a transfer of all commercial activities hitherto in the hands of the government to the private sector that is mainly composed of the SMEs (Darroll, 2012, p4).

Byson Majanga (2015) records that upon gaining independence in 1993, the Malawi government allowed free trade and made the business environment so conducive to SMEs that at least 80% of businesses in Malawi are SMEs. Drawing from the World Bank (2007), Edmore Mahembe (2011) finds that SMEs in Malawi, contributed 38% of the national employment. This position is confirmed by (Fjose, S., et al, 2010) in their assertion that SMEs in Malawi contributed 39 % of the total employment; which is rather low when compared to SMEs in the developed World who employed about 80% of the workforce according to Richard Zidana (2015, p2).

Edmore Mahembe (2011) and (The Danish Trade Union, 2014) record that update data on SMEs is not available in Southern Africa as there are no tracking systems particularly to follow growth of entities through the growth stages from micro, small, medium to large enterprises or the number that fold up. This position is supported, particularly concerning Malawi by (Fin scope, 2012) and (Gobbi, 2013, p xii), in ILO Employment Report of 2013, who observes that there is limited data on employment in Malawi.

The Government has continued to address the challenges and to respond to the gap on management of data on sprouting SMEs, and to apply policies on SMEs, which offer support to the enterprises. The Government formed a parastatal; the Small and Medium Enterprise Development Institute (SEDOM), in 2013 under the Ministry of Trade registered under the Trustee Incorporation Act (cap 5:3) of the laws of Malawi.

Resulting from these initiatives and enabling policies, the SMEs have grown both in numbers and in importance as corroborated in (UNDP, 2012); (Maserira and Msweli, 2013); (Byson Beracah Majanga, 2015) and (Danish Trade Union, 2016). The SMEs have been of benefit to the economy of Malawi generally because they contribute to employment of the individuals who would not otherwise, have been employed by the government and they increase the revenue as they pay taxes from their profits and remit taxes charged from their employees to the Malawi Revenue Authority. All these outcomes demonstrate how important the SMEs are in the role of creating employment and reducing poverty.
This view is supported by (Villager and Berge, 2015) who believe and advised that the Norwegian government should direct its development Aid through the private sector to reduce poverty in Malawi and other developing countries.

However, the SME performance data is a paradox. (African Development Report, 2011, p12) records that the private sector is the prime mover of economic growth and reduction of poverty in Africa having matured to account for over 80% of total production, 67% of total investments and employing 90% of total work force, yet SMEs were recording very high numbers of failure of individual entities.

The rate of growth and sustainability of the SMEs has not been satisfactory. Adeniran and Johnson (2011) as confirmed in (Olwale Fatoki, 2014) projected that between 70% and 80% of SMEs in South Africa fail. Theyalso assertrd that South Africa has experienced a closure rate of about 90,000 businesses per year from 2007 to 2011 with very few start-ups between 2002 and 2012; a situation that is feared to imply that the gains that the country had made in increased employment and income generation could be reversed.

Tendai Chimucheka and Fortunate Mandipaka (2015) confirmed this position in their work where they find that over 75% of start-up SMEs in South Africa collapse within the first three years of operation. Lefa Kalane (2015) found that 63% of SMEs fail in the first two years and that 75% fold up within five years of their existence. Eliot Mumba (2017) agreed with this view when he finds that majority of SMEs fail within the first five years of operation and (Alfred Nuwagaba, 2015) findings that 70% of SMEs in Zambia fail within the first two years of their existence. The problem manifests itself in a similar pattern in all sub-Saharan Africa with the Kenya Bureau of Statistics recording a general failure rate of 60% of SMEs within the first two years based on the data collected up to 2007 (Kamunge, S.M., et al, 2014)

Bryson Majanga (2015), in agreement with the works of Bowler, Dawood and Page (2006), concludes that the growth of SMEs in Malawi, have not been sustainable and that SMEs have actually collapsed at an alarming rate with 40% of new SMEs failing within the first year and another 20% in the second year. Bryson Majanga (2015), also finds the the remaining 40% who survive the second year, a total of whom 30% fail before their 10th anniversary and only 10% are in operation beyond 10years of their entry in the market. This data leads to the conclusion that 90% of all SMEs in Malawi fold up within ten years of operation.

It is therefore clear that, the majority of SMEs in the construction industry in African countries close down after running bankrupt or have remained at the infancy stage of their life cycle. Local SMEs in the contractruction industry do not therefore grow in human capital, resource and knowledge and are therefore not considered competitive for the more complex donor funded projects which are usually awarded to foreign contractors, who have the capacity and experience to carry out the works and manage the associated risks. In 2014, out of the 2240 local SMEs who had renewed their licenses with the NCIC only 14 had achieved the resource base to qualify for registeration in the "unlimited" category for SMEs with capacity to participate in the International Competitive Bidding (ICB). More significantly, NCIC records that ten foreign SMEs, carried out construction works valued at 83% of the value of the total contracts awarded during the year 2014 while the local SMEs were responsible for only 17%.

Sustainability of local SMEs and their growth is the expectation of all developing nations since it will lead to the following benefits.

a) Generate sustainable employment and contribute to poverty alleviation.

b) Facilitate transfer technological expertise from multinationals in the region to local SMEs

c) Improve the retention level of foreign currency from donor funding within the developing nations.

Achievement of above goals would lead to the African states approaching the desirable current status of SMEs in Europe where as (Martinuzzi, 2011,p4) stated *"the Construction industry has more than 15 million workers, and is the largest industrial employer in Europe, responsible for 30% industrial employment".* Construction also remains primarily a local industry, with a majority of small and medium-sized enterprises and competition with companies outside Europe is negligible (Martinuzzi, *et al,* 2011*, p1)* According to the European Construction Industry Federation (FIEC, 2009, p.3), the construction sector accounted for 10.4 % of the GDP in 2008.

This research problem refers to a practical situation presenting a difficulty, which the Governments, the construction industry, planners, economists and the society are generally aware of, and it calls for a thorough investigation and understanding leading to possible solution or mitigation measure. Saunders et al (2007) observes that knowledge development may not involve development of a new theory but if the research answers a specific problem in a particular field, it has developed new knowledge. Consolidating information and highlighting new parameters that will lead to improvement of the performance, competitiveness or profitability resulting in sustainability and growth of SMEs in the construction Industry will be a significant contribution to knowledge.

The motivation to carry out this research was to respond to the most frequent question, asked by many players and observers in the industry, including the author, which is: 'What are the reasons for the poor sustainability and poor growth of SMEs in the construction Industry in developing countries? It is believed that the answers shall benefit Malawi as well as in East and central Africa where the author has had working experience, and observed similar challenges and treads, in the growth of SMEs. The follow on question is; "What can be done to improve sustainability and growth of SMEs in the construction Industry in developing countries"?

1.6 The aim of this Research

The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

Kauffmann (2005) found that, at the time, very few countries in Africa had working definitions of SMEs and (Woldie, 2008) found that the (SMEs) had only just emerged, as a field of study and SMEs specific literature was not available. Gibson and Vaart (2008) support this position observing that the importance of (SMEs) remains unclear. Kulunga (2012) also found that at the time of his work, literature on SMEs in the construction Industry in Malawi was limited.

Shynet (2014) shows that the definition of SMEs varies by country, by region within the same country and sometimes by the intended use of the qualification and data collected. An example is in the case of the Ministry of SMEs and Cooperative Development in Zimbabwe. The Ministry defines all registered enterprises which are not categorized as large companies as SMEs, while the Zimbabwe Revenue Authority (ZIMRA), considers SMEs as enterprises with 10-75 employees and a turnover between USD 50,000 to USD2,000,000. In the same country, the Zimbabwe Association of SMEs defines SMEs as entities with a turnover not exceeding USD1,000,000.00 and an asset base not exceeding USD2,000,000. (Shynet, 2014).

Bouazza (2015, p7) states that “SME” has no standard definition and have been identified differently, such that an enterprise that is considered small and medium in one country is viewed differently in another country. Even within a country, the definition changes over time. More importantly, there has been no effort to standardize the measurable indicators employed to define SMEs, such as total assets, labor force, annual turnover and capital investments. New factors are introduced at random into the evaluation matrix such as annual turnover, years of existence in business, and number of branches or locations (Bouazza, 2015).

Definitions of SMEs worldwide have varying viewpoints, environment and measurable variables which make it difficult to reach a common definition (Muriithi,S.M.,2017). There is a gap in literature and a general lack of consolidated information as to the reasons for the limited number of successful SMEs in the construction industry and the reasons for the poor sustainability and growth which has been generally observed. Substantiated data from NCIC of Malawi indicate that while an estimated 3,000 local SMEs entered into the industry between 2001 and 2014, the number of SMEs qualified for international competitive bidding (ICB) over the period of 13years, effectively increased by only 2 while foreign companies in this category increased by 10.

1.6.1 The Research Questions

The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

To achieve the aim of this research author developed the objectives of the research, which are the clearly defined steps that needed to be taken to answer the research question (RQ) which was considered as most suitable to guide the research to successful conclusion. (Doody Bailey, 2016).

The research question (RQ) for this research was:

What is the leading factor in Africa and particularly in the Malawi market that is causing the most negative impact on the local SMEs in the construction industry thus affecting their sustainability and inhibiting their growth?

What are the drivers of this cause of un-sustainability of SMEs in the construction industry in Malawi?

In order to understand the dynamics of the “leading factor” it was of strategic value to collect available data in the market environment regarding the constitution of the leading factor, and its prime movers or drivers.

The author considered that the drivers of the leading factor in impacting negatively on SMEs in the construction industry shall form the main entry points for development of the legal framework to improve the sustainability of SMEs in the construction industry in Malawi.

The objectives below were tailored to respond to the needs of this research, which are outlined above.

1.6.2 The Objectives of this Research and Methods Adopted

The objectives of the research are the steps or milestones that have to be reached towards the achievement of the aim of the research. The objectives of this research are stated below and the research methods adopted have been briefly described.

The Objectives of this research are as follows:

a) To discover the leading factor in impacting negatively on sustainability of SME in the construction industry in Africa: case of Malawi

b) To establish the major Drivers of the leading factor discovered in a) above

c) To develop a strategic legal framework to eliminate or weaken the identified drivers towards reducing the incidence and severity of leading factor identified in objective i. above.

d) To have the findings and recommendations of this research practically applied and have the various elements of the strategic legal framework enacted into actionable laws towards improvement of the sustainability of SMEs in Africa.

The Research was conducted in an environment with limited literature and records on the subject of research and it therefore was exploratory in nature and relied on information available with the players in the construction industry.

The Archives had little information since the National Construction Industry Council NCIC of Malawi was established by an Act of Parliament in 1996 (Brushett, *et al*, 2005) and commenced operations in 2000 when it started collecting base line data on the market laying down the rules and procedures for registration of players in the industry. The NCIC has therefore been collecting data on SMEs in the construction industry in Malawi for only the last 5 years, which is within the inclusion criteria set for this research to ensure that the latest data and research on the topic of study were latest and most update.

The information available from the literature review provided the baseline information of this research and provided the basis for development of the questionnaire used in the survey.

1.7 Methodology

This research had a methodology and activity sequence ordered to start with the (Burrel and Morgan, 1982) "four paradigms of Social theories" as presented in Figure 1 (page 85) below, which defines the point of entry into the Saunders's Onion. The aim and the objectives of the research then guided the author navigate the onion and consolidate the research method.

1.7.1 Research Philosophy and Methodological Choices

The methodology of this research was developed in agreement with views of (Mary Holden and Patrick Lynch, 2004) who put emphasis on the importance of choosing an appropriate philosophical stance for proper design and utilisation of a research methodology. They argued that it is the only way a researcher can ensure that their methodology is appropriate for the problem under research. This this view led the author to the conclusion that the (Burrel and Morgan, 1982) four paradigms of Social theories which address the choice of an appropriate philosophical and paradigm stance considering the nature of the research is the beginning of research design.

The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

Implementation of the recommendations of this research is expected to result in changing the operational environment of SMEs in the construction industry to ensure their sustainability and growth. In this respect, radical change was the desired outcome and as detailed by (Saunders, *et al,* 2009, p120) the philosophical stance of radical change was found most appropriate, and the radical structuralism paradigm (Mark Saunders, 2008) was the best match for the governing philosophy as determined.

Saunders et al (2009) assert that there are two approaches to research; the deductive and inductive approaches. This position is supported in the works of (Soiferman, 2010) which discusses the works of (Trochim, 2006) and that of (Plano Clark and Creswell, 2007) in respect to the considerations researchers need to make in the process of research design and choosing the appropriate methodology.

Trochim, (2006) and (Creswell and Plano Clark, 2007) and (Soiferman, 2010, pp3) agree that there are generally two "broad methods of reasoning which are the inductive and deductive approaches. They define induction as moving from the specific to the general, while deduction begins with the general and ends with the specific. They found that arguments based on experience or observations are best expressed inductively, while arguments based on laws, rules, or other widely accepted principles are best expressed deductively".

Creswell and Plano Clark (2007) view the deductive researcher as one who moves "top down", and the inductive researcher as someone who has a "bottom-up" approach. This is the same view held by (Burney, 2008, p4) who agrees but refers to inductive approach as "hill climbing" and deductive approach as a "waterfall" with the Theory at the top of the hill and observations (or confirmations) at the bottom of the hill.

This research is based on general observations and experience over some years that SMEs in the construction Industry are not sustainable and the aim of the research was to discover the specific factor that is causing the unsustainability of the SMEs. This is therefore a case of arguments based on experience and observations, which are best, researched inductively. Inductive approach is defined as starting at a specific and moving to the general or "bottom-up" which is moving from specific to general (Soiferman. 2010, p3). The inductive approach takes advantage of observing limited cases of specific circumstances and deriving a conclusion which covers the general conditions (Zalaghi, 2016). This science (or research) is the process of transforming things believed, into things known (Alolo, 2007).

The author's observation and experience are that "some factors" in the market environment are affecting the sustainability of SMEs in the Construction industry in Africa negatively leading to stunted growth and eventual bankruptcy and closure. The research therefore focussed on discovering the single factor leading factor in impacting most negatively on sustainability of SMEs in the construction industry in Africa; case of Malawi.

Thwala et al, (2009) found that in Swaziland, no local SME in construction had been in business for over 15 years and that intense competition forced the SMEs to work on contracts with a profit as low as 2% leading to financial failures of emerging SMEs.

Olwale Fatouki (2014) found that in South Africa, the estimated failure rate of SMEs within the first five years of starting is between 70% and 80%.

In Botswana a failure rate of start-up SMEs in the construction industry of 80% has been estimated and the (OECD, 1996) reported that, "less than one-half of SME start-ups survive the first five years. Kauffmann (2005) and (Atsede Woldie, 2008) found that there was limited research on SMEs, and none was available on the subject of SMEs in the Construction Industry in Malawi. Little or inadequate effort has been made to identify the causes of failure among the local contractors in Swaziland" (Thwala et al, 2009).

Kulunga (2012) found that, literature on SMEs in the construction Industry in Malawi was limited a situation which was confirmed by Emuze, F. and Kandangwe,S. (2013) who stated that there was scarcity of literature on SMEs in construction in Malawi.

Observations revealed that the National Construction Industry Council (NCIC) of Malawi through established by an Act of Parliament in 1996 but they had no information on incidence of failure of SMEs in the construction industry. The observation made by the author is that local SMEs had not made significant mark since independence in 1961 and particularly so since 1980 when the IMF and World Bank through SAPs actively encouraged growth of SMEs through transfer of non strategic commercial activities from the Government. However, verbal testimonies by people in the industry in Malawi and the studies in other similar SADC states like Botswana OECD (1996) and the findings of Thwala et al, (2009) in Swaziland where the limited research carried out indicated a failure prevalence rate above 80% is in the short run and 100% in 15 years of starting.

Table 1.2 below summarises the design of the most suitable research method for this research and adopts Saunders research onion observing its development in (Saunders, M. 2008), (Saunders et al, 2009) as confirmed an complemented by the works of other scholars as (Soiferman, 2010), (Saunders et al, 2011) and (Saunders and Tosey, 2012)

Table 1.2: **Summary Table for Design of a Suitable Research Method**

Item	Characteristic	Options available in literature reviewed	Applicable choice for this research
1	Research philosophical	Radical change, objectivism, realism Regulation, positivism, pragmatism, Interpretive (Saunders *et al,* 2009, pp120)	Radical
2	Paradigms	Positivism, Realism, Interpretivism, Regulation, Pragmatism, Radical structuralist *(Saunders, M. 2008)*	Radical structuralist
3	Reasoning approach	Inductive, deductive (Soiferman,2010)	inductive
4	Strategy	Archival research, survey, experimental, case study, action research, grounded theory, ethnography.	Archival research + survey
5	Methodical Choices	Mono-methods, mixed methods , multi methods	Mixed methods
6	Time Horizons	Cross sectional (snapshot), longitudinal	Cross sectional (snapshot)
7	techniques and procedures	Data collection and analysis Sampling, structured-Interviews Questionnaires, focus group	archival research questionnaire and interviews
Developed by George Kaggiah 2018			

1.7.2 Research Structure

The research structure has been designed to fit in the research philosophy and the recommended approaches towards development if theories as universally accepted by researchers as manifest in literature reviewed by the author. Literature reviewed guided the design of this research structure and was particularly influenced by the interaction of the four paradigms of Social theories described by (Burrel and Morgan,1982) Saunders's Onion and the objectives of this research.
The interplay of social science theories, the aim and objectives of the research, resulted in the design of the research method summarised in Table 1.2 below. The research design and choice of methods adopted at various stages of this research yielded the suitable research methods. The research design adopts Saunders research onion observing its development in (Saunders, 2008), (Saunders et al, 2009) as confirmed a complemented by the works of other scholars as (Soiferman, 2010), (Saunders et al, 2011) and (Saunders and Tosey, 2012).

The Objectives of this research are as follows:

a) To discover the leading factor in impacting negatively on sustainability of SME in the construction industry in Africa: case of Malawi

b) To establish the major Drivers of the leading factor discovered in a) above

c) To develop a strategic legal framework to eliminate or weaken the identified drivers towards reducing the incidence and severity of leading factor identified in objective i. above.

d) To have the findings and recommendations of this research practically applied and have the various elements of the strategic legal framework enacted into actionable laws towards improvement of the sustainability of SMEs in Africa.

The author developed a research structure summarised in the Research Flowchart in Figure 1a) here below, showing the linkage between the research aim, objectives and the Methodology adopted.

Figure 1a) Research Flow

Aim of Research

The aim of this research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi, and develop a strategic legal framework for eliminating or reducing the incidence and severity,of the effects of the leading factor in impacting negatively on SMEs to improve sustainability of SMEs in the construction industry.

OBJECTIVE a)

To discover the leading factor impacting negatively to the growth and sustainability of SME in the construction industry in Africa: case of Malawi

RESEARCH METHOD (Mixed)

Exploratory, archival Research and Literature review to establish known factors that impact negatively on SMEs in the construction industry in Malawi. Mixed Methods of Data Collection were adopted with both qualitative and quantitate data, Questionnaire on a random Sample of 800 was administered.

OBJECTIVE b)

Establish the major Drivers of the major factor identified in a) above and collect information on experience of the 20 failure cases and receive on suggestions and recommended measures eliminate or weaken the drivers stated.

RESEARCH METHOD (Qualitative)

Questionnaire and one-on-one interviews on a target group of 20 SME failure cases

OBJECTIVE c)

Establish the major Drivers of the lead negative factor identified in a) above and collect expert and professional information of the major drivers, suggestions, and recommendations on the best measures to eliminate or weaken the identified driver.

RESEARCH METHOD (Qualitative)

Interviews on a target group of from 5 policy/Opinion Leaders in the industry. This Data shall be applied in development of the Strategic Legal Framework

OBJECTIVE d)

To determine the considerations to be addressed in the process of the Design and development of the strategic legal framework to improve sustainability of SMEs.

RESEARCH METHOD (Qualitative)

Collect data in interviews and literature review of comparable situations and processes in the world and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered in a) above.

1.8 Data Collection and analysis

Mixed method of data collection was considered best for this research to provide quantitative and qualitative data to establish population and economic strength of the industry and to explore nature, strength and frequency of the factors affecting the SMEs in the sustainability of SMEs in the construction industry in Malawi.

A questionnaire with 50 questions covering the particulars of each respondent from their inception, work experience, turnover, successes and challenges was the main tool of data collection. The questionnaire was administered to a representative sample of 800 out of the 5,000 SMEs picked at random to SMEs who had renewed their practicing licenses with NCIC as of June 2015 when data collection started, in accordance to recommended sampling procedures and possesses (Sekaran and Bougie, 2010)

The research was a cross-sectional, snapshot, time frame because the period set for carrying out the research was specific and the research question could be adequately answered without following respondents over a period of time collecting data as would be the case in a longitudinal time frame. The data was complimented with general archival data covering a period of over 10 years which was the duration NCIC was in operation.

The author subscribed to “monkey Survey” and posted questionnaires to several SMEs falling in the random sample which was simply picking every fourth SME on the list. This method either did not work well because majority of the SMEs did not have the emails address in the NCIC register working or for those maintaining connection experienced difficulties using the link provided to access the questionnaire and forward it using the “Survey monkey.”

As these challenges were being experienced, the author was advised by the supervisors that survey monkey was not the recommended software for collection and analysis of data for a research of this nature and that IBM 16 or 20 Statistical Package for the Social Sciences (SPSS) was the approved software. The University of Bolton (UoB) provided training on data processing and inputting into a UoB Licenced IBM SPSS and provided the necessary support.

The data collection method changed significantly, requiring an initial contact, introduction, explanation of the purpose of the research and a brief on how to fill the questionnaire, which was hand-delivered to each of the SMEs in the sample.
The author also reviewed the sample size considering the time it would take to deliver, the costs and the inconvenience of the risk of having to return to the field to administer more questionnaires, and increased the random sample from 550 to 800.

The NCIC assisted the author to obtain the particulars of additional 250 SMEs. The author, with the assistance of four enumerators carried out the processes of distributing the questionnaire to 800 SMEs. The research team observed the ethical protocols set by the University of Bolton and the NCIC and prospective respondents agreed to fill the questionnaire and agreed on subsequent pick-up date. Follow up communications or visits were made in cases where the questionnaires were not returned on time.
This method improved the return rate tremendously compared to the “monkey survey” software process. The enumerators stayed in their designated area for three to five weeks. Most of the SMEs were in the four cities in Malawi; Mzuzu, Lilongwe, Zomba and Blantyre where majority of the respondent SMEs have offices. A few of the respondents had offices in the smaller towns near the cities.
Seven hundred and fifty 750No.respondents completed and returned questionnaires which were received and the processed through data coding and entry into the IBM SPSS carried out the analysis and presentation of the output.
As set out in the research objectives, the author, with the assistance of NCIC identified and sampled twenty SMEs which had stopped operations and conducted one-on-one interviews to confirm whether they had suffered payment paralysis and whether it was indeed the cause of their cessation of commercial operations. Data available with NCIC provided, at random, the names and contacts of 20No. SMEs who had not renewed their operating licenses for the previous 3years, which implied that they had not been in operation, and these constituted the sample for the one on one non structured interviews conducted individually with each one of them. This target group was difficult to find because they had closed their offices and were reluctant to hold interviews.

The author also conducted one-on-one non-structured interviews with five experts who were or had been policy makers and opinion leaders in the construction industry to get their feedback on the conclusions reached based on the questionnaire survey and to provide some insight in the best approach to reducing the negative effects of payment paralysis.

In compliance to Ethical issues, permission to conduct this research was sought from all concerned clients and authorities. The author disclosed the nature of this research to the Director of Studies by submitting and obtaining approval for the questionnaire and all other tools used in interviews conducted in the survey. The author filled Form RE1 and in application for ethical approval of the research from the University of Bolton for ethical compliance. Approvals were issued as attached in appendix B1b) and B1c).

A letter of introduction and the intent to collect data was submitted to Management bodies of NCIC and an authorization letter was provided introducing the research team to all stake holders.. In addition to that, any participant in the research was given information on the purpose of the study and the reason why the researcher chose them to be participants. All the participants were assured of confidentiality, they were also informed of their right to take part throughout the whole study or withdraw at any time, and that their participation was voluntary and would attract no consideration. The University of Bolton ethical procedures were followed at all stages while conducting this research.

1.9 Research Summary

1.9.1 Growth in number of SMEs in Construction Industry in Malawi.

The Findings of this research supports the view that there is indeed significant interest in the construction industry in Malawi as the data collected and analysed is clearly conclusive that the Construction Industry attracts a large number of new entrants every year. SMEs in the construction industry in Malawi registered with the NCIC during the period 2001 to 2015 established that the market was very dynamic with the local SMEs increasing from 573 to 2206 (385%) the Foreign SMEs increased from 6 to 40 (667%).

The number of foreign companies, however, remained modest only increasing from 1.0% to 2.2% of the local SMEs in the 10 year period. (See Table 5.1)

1.9.2 Market share between Foreign and local SMEs

Data collected and analysed in respect to the market share of the SMEs indicated that 5 l foreign firms won contracts worth 83.23% of the total value while the leading 5 local SMEs won 8.87% while the remaining 81.1% registered local SMEs won 7.9%.of the total value of contracts awarded during the 2014/2015 financial year. (See Table 5.3 section 5.3)

Data analysed reveals that out of a total of16 foreign SMEs, 14 (87.5%) were in the "unlimited category while out of 824 local SMEs 14 (1.7%) were in this category, which qualifies to tender for projects with budget value above USD 210,000.00. (See Table 5.5 section 5.4)

Local SMEs were not demonstrating significant growth to support their sustainability. This was revealed by the fact that only two SMEs managed to upgrade into the "unlimited" category (Table 4.1 section 4.4.1) over a period of 10years (2001/2 to 2013/14) During the period, 14No. foreign SMEs qualified into that high end category, increasing their number from zero to fourteen in the same period and captured a staggering 87.5% of the market niche'.

1.9.3 The drivers of Payment Paralysis

The drivers of payment paralysis were established by interviewing leaders in the construction industry particularly those who had served in Government, Contractors and heads of parastatals as detailed in Chapter 5.section 5,5. Upon analysis it was established that the leading drivers of payment paralysis are:

a) Corruption and political bias.
b) Procurement Entities (PEs) arbitrarily adjust the Conditions of Contract..
c) Interest rates in Malawi higher than those of the countries of origin of foreign SMEs
d) Contracts have no Penalties to entities defaulting on payment and provides meagre compensation to offended entrepreneurs

e) Incorrect interpretation and application of World Bank Procurement Model as emphasis is put on least cost instead of properly balancing between cost and quality as measured by the technical experience and capability.

1.10 Strategic Legal Framework to reduce the impact of pay paralysis

The Strategic Framework for reduction of the impact of payment paralysis is anchored in the introduction of legislation to reduce delayed payments within the industry which is the direct cause of payment paralysis by requiring prompt payments and imposing deterrent penalties to defaulting individuals or entities.

The second level of the strategic framework is to weaken the five main drivers of delayed payments, established by this research, which are indirect, causes of late payments as they help create an environment, which encourage and enable defaulters.

The Strategic legal framework shall focus on legislation that would eliminate or reduce the incidence and severity of Pay-paralysis legislation targeting the following.

- Eliminate or weaken the five drivers of pay-paralysis
- Strengthen or shield the SMEs against pay-paralysis

The Strategic legal framework to eliminate or reduce the incidence and severity of pay-paralysis be structured as below:

1.10.1 Legislation to Prohibit Pay paralysis

a) Stop arbitrarily adjustment of the contract Documents.

b) Apply Least Cost" World Bank Procurement Model is correctly

c) Eliminate Corruption and political bias in the country

d) Accurate preference margin to address high Interest rates in Malawi

e) Introduce penalties to entities defaulting on payment and procurement

1.10.2 Contributed to Knowledge

The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

The findings, conclusion and recommendations arising from this research shall contribute to knowledge by filling the gap in knowledge in regard to the cause of negative effects on sustainability of local SMEs in the construction industry in Africa; case of Malawi.

1.10.2.1 Identification of the Lead Negative Factor and its Five Drivers

The research identified the major factor impacting negatively on SMEs as "Payment Paralysis" , The research has also established the five lead drivers of payment paralysis and proposed ways of weakening the five drivers in a Strategic Legal Framework which is new and useful information on improving sustainability of SMEs in the Construction Industry.

The most exciting result in this research was the success of the campaign for dissemination and sharing of the research findings and recommendations with the stakeholders and the Government in Malawi and Kenya,. The effort culminated in finding sponsors to support elements of the recommended Strategic Legal Framework to be enacted into actionable laws for the sustainability of SMEs in the Construction Industry are in the processes of being enacted.
The following are the Bills already tabled in Parliament in Kenya

a) **The Public Procurement and Asset Disposal (Amendment) Act 2019;** (Hon, Moses Kuria Bill (May 2, 2019)

b) **The Public Procurement and Asset Disposal (Amendment) Act 2019;** (Hon. Rigathi Gachagua, May 13, 2019)

c) **The Prompt Payment Bill 2020** (Senators Farhiya Haji and Johnson Sakaja February 28, 2020)

d) **Public Procurement and Disposal (Amendment Act 2020)**
. (Hon Richard Tongi Bill; October 13, 2020)

e) **The Prompt Payment Bill, 2020**

The Constitution of Kenya (Amendment) Act, 2020,

Public driven,

1.10.2.2 Six Leaders who Fostered the Construction Industry

The literature reviewed revealed six leaders and professionals who contributed immensely in the promotion, and entrenchment of construction industry worldwide as the leader in distribution of wealth through employment, supply of materials and purchase of consumer goods. The author acknowledges that his attitude and approach towards problem solving in this research was influenced a great deal by their stance and actions in choosing and promoting construction industry as their tool for reviving economies in times of economic slowdowns or economic depression . These distinguished promoters of construction industry are listed here below. The author declares that their contribution and importance does not necessarily follow the order in which they appear, which is simply time based. Their merits are briefly stated in section 6.2.4,

a) Hammurabi the law giver (1810BC to 1750BC),
b) Benjamin Strong Jr. (December 22, 1872 – October 16, 1928).
c) Judge Lord Alfred Thomson Denning (1899 to1999).
d) Robert Strange McNamara (1916-2009)
e) Sir Michael Latham (1943-2017)
f) Rolffe W.Peacock

1.10.3 Economic Benefits of the research

Elimination of Payment paralysis would create a suitable environment for the transformation of the SMEs into sustainable and growing organizations which shall build capacity and become competitive in the arena of International Competitive Binding (ITB).

This will enable local SMEs qualify for projects funded by the Multilateral Banks, thereby enabling creation of sustainable employment, Financial and Technical Capital which would lead to the desired retention of larger components of the foreign funds entering the National economy as loans or grants for projects construction industry.

CHAPTER TWO

2. LITERATURE REVIEW.

2.1 Brief

A literature review is a discussion of the published information in a particular subject area. The author has used this chapter as a summary of sources and content of the subject matter of the factors affecting growth of SMEs in the construction Industry, while also taking a critical, evaluative approach, showing the relationships between the various views and their informance to this research. (Rickert, 2008)

The purpose the literature review is to position this research topic in relation to previous research and highlight its spot and contribution to knowledge in the subject matter. Literature review will accomplish the following goals:

a) Provide background of the topic using previous research.

b) Establish familiarity with previous, relevant research.

c) evaluates the depth and breadth of the research in regard to this topic

d) Confirm that this research answers remaining questions or aspects of this topic in need of research. (University of Ottawa, 2007)

2.1.1 The subject of Research

Majority of SMEs in the construction industry in African countries have remained at the infancy stage of their life cycle and the local contractors are not considered competitive for the more complex donor funded projects which are usually awarded to foreign contractors, who have the capacity and experience to carry out the works and manage the associated risks. Zawdie and Langford (2001) found that “in many sub-Saharan countries, the construction industry has not evolved sufficiently to produce sustainable infrastructure” and as a result the African states have not taken advantage of creating wealth using the products of the construction industry which are considered capital goods. In Uganda, the capacity, level of growth and performance of many local SMEs in the construction industry was still very low which affected their competitiveness negatively and the foreign based SMEs are awarded the big construction projects (Ocen, *et al*, 2011) .

Sustainability of local SMEs and their continued growth is the expectation of all developing nations since it will lead to the benefits below

a) Generate sustainable employment and contribute to poverty alleviation.

b) Facilitate transfer technological expertise from multinationals in the region to local SMEs

c) Improve the retention level of foreign currency from donor funding within the developing nations.

d) Creation of wealth

a) Creation of human and fixed capital resources in the construction industry

Achievement of above goals would lead to the African states approaching the desirable current status of SMEs in Europe where Construction industry has more than 15 million workers, and is the largest industrial employer in Europe, responsible for 30% industrial employment. Construction also remains primarily a local industry, with a majority of small and medium-sized enterprises and competition with companies outside Europe is negligible. According to the European Construction Industry Federation (FIEC, 2009, p.3), the construction sector accounted for 10.4 % of the GDP in 2008 in the EU, 16.2% in Portugal in 2014 (ECSO, 2018) while (KPGM, 2017) estimates that the contribution to the GDP from the construction industry of Malawi in 2016 at 3.4%.

The GDP contribution of the construction sector remains very low at 3.4% and the national expectations stated above have not been realized and stunted growth and the high frequency of closure for start–up SMEs in the construction industry in African countries. It is estimated that between 70%and 80% of the start-up SMEs I the construction industry closedown within the first five years of their entry in the industry (OECD, 1996), (Thwala, 2009), and (Fatouki, 2014)

In Botswana no local SME in the construction industry has been in business in the construction industry for more than 15 years (Thwala, 2009). This high rate of failure has condemned the local SMEs in the construction industry in Africa to the infancy stage of their corporate life cycle denying the local SMEs the opportunity to grow and have the capacity to compete for the more complex donor funded projects and enhance their expertise, income and their capital resources.

The general consensus is that there is limited literature and research on the subject. Atsede Woldie (2008) finds that (SMEs) have only just emerged as a field of study in its own right, as a result of the innovations and the solution they provide to different economic problems, particularly in terms of employment.

This Research will contribute to filling the knowledge gap which exists in this field as manifested by the high rate of failure at between 70% and 80% due to insolvency of numerous start-up SMEs in the construction industry in the developing countries with reference to Malawi. The research will seek to establish the factors that affect the performance and the growth of SMEs. Literature review is the major source of information and grounding for the study in regard to the current courses of the stagnation of growth and failure of small and medium entrepreneurs (SMEs) in the construction industry. Contribute to knowledge shall be made by filling the gap on the scanty information on this important subject with particular reference to developing countries and least developed countries case of Malawi.

2.1.2 Literature *Inclusion criteria*

It was not considered necessary to set a literature inclusion and exclusion criteria particularly because of the limited volume of literature available, and therefore any literature that was found relevant and that was found as contributing to the research has been included.

2.2 Definition of SMEs

Majority of scholars and institutions do not find the currently accepted definition appropriate and there is a clear cross purpose in the quest for a suitable definition with one school of thought seeking a criterion that would clearly classify a particular SME universally and the other seeking locus oriented definitions.

The definitions discussed above support the view that the number of employees in an organisation should be the leading criterion for the definition.

Gibson and Vaart (2008) belong to the group pursuing a locus-oriented definition as they propose for consideration a new quantitative formula for defining SMEs with the size parameters of SMEs scaled relative to their home base. In their view, “any single definition of SMEs for multiple countries in diverse stages of economic development leads to additional distortions”.

Mahembe, (2011) introduces a third view when he posits that SMEs should bbe classified by sector. He stresses that firms differ in their levels of capitalisation, sales and employment hence definitions which employ measures of size such as number of employees, turnover, profitability and net worth when applied to one sector, might lead to all firms being considered classified as small. While when the same size definition is applied to a different sector it might lead to all SMEs sampled being classified as large, Therefore, definitions of SMEs should be approached by sector and from the economic and statistical view. The economic definition will use criteria considering the market share the firm enjoys in their field of operation, the management structure and its degree of independence in ownership. The “statistical” definition, on the other hand, focuses on quantifying a firm’s contribution to GDP, employment and the extent of the firms’ economic contribution in its sector.

Ayyagari et al, (2005) have taken anther approach where they propose that the size of an SME is classified using the median of the range of employees a firm has thus; SME250 classification would mean that an SME in that category would have a range from 200-300 employees. The author considers this view to be a slight adjustment of the classification using thenumber of employees as the criteria.

In summary three ways of defining and classifying SMEs are proposed as below:

a) Universal Defininationbased on Number of Employees using set criteria
b) Location based definations
c) Sector based definations

These views confirm that there is a general lack of a clear definition of an SME and that the definition is still under discussion. This current lack of clarity becomes more evident when one notes that as recently as 2012, (Wymenga et al, 2012) in the EU 2011/12 annual report on SMEs, considers firms with fewer than 10 employees to be SMEs, where it is reported that, SMEs have retained their position as the backbone of the European economy, with some 20.7 million firms accounting for more than 98% of all enterprises, of which the lion’s share (92.2%) are firms with fewer than ten employees.

This research will regard employment as the major indicator and will consider an SME as a firm with 10-250 employees as defined by the European Union and in agreement with (Vedanthachari, 2007) and (Verheugen, 2005). The turnover and the balance sheet shall not be adopted in the definition. This is particularly relevant because most of the literature Reviewed will have used the EU definition of SME.

2.3 Contribution of Construction Industry to National economy.

Construction has on many an occasion been described and found to be an important economic growth driver. This position is supported by a contribution made in 1926 to the (US) House of Representatives in the course of urging the government to provide low interest lending for construction works; "Construction employs more labour, brings in to use more materials. It creates more spending power; and with that start, it will permeate through into the trades and the general price level." (U.S. House of Representatives ,1926, p.578-79. (Wheelock, 1992) (Cridland, 2009) observes that in the UK construction industry makes a tremendous contribution to the national economy. Radelet, (2007 p. 15) agrees with this position when he observes that construction was a key growth driver, in Liberia, and would continue to be as buildings, roads, and other infrastructure are repaired and rebuilt.

The construction industry is an important segment of the Malaysian economy that contributes approximately 6% of the Gross Domestic Product. It generates wealth, improves quality of life and creates work opportunities for many. (Azman et al., 2014)

When America was under threat of a recession in 2011, as unemployment remained stubbornly high, the President proposed to spend $140 billion in construction works involving modernizing schools and repairing of roads and bridges. The proposal had the aim of cresting jobs.(The New York Times, Sunday, October 28, 2012), The success of this initiative is corroborated by President Obama's 2013 Budget which includes a six-year $476 billion reauthorization of the surface transportation program and the creation of a National Infrastructure Bank.

Overtime, the United States has invested in infrastructure which has yielded high economic returns and validated production from the construction industry as one of the leading means of creating wealth (Aschauer, 1994). The Associated General Contractors of America (2016) records that the construction industry in the USA some 6.5 million workers and engaged 658,500 construction companies in 2013. Boston Consulting Group (2016, p10) in a contribution to the World Economic Forum stated that construction is not only beneficial but it is crucial to economic and environmental improvement and influences society.

In the EU, construction is recognized as the largest single economic activity and it is the biggest industrial employer in Europe, employing 20million directly and having an indirect impact on 44million workers (Ecorys Scs Group, 2010). It is also the industry leading in creation of wealth as more than 50% of fixed capital formation is realized through construction outputs (Saleh, 1997), (Ecorys Scs Group, (2014)).

In the years 2007 to 2009, Malawi sustained a remarkable annual economic growth rate of 8.954% (IndexMundi, 2012). In this period, the construction industry is estimated to have risen from an average of 7.9% to 19.9% between 2007 and 2009 and to 52.3% in 2010. (African Development Bank; 2011) This indicates the huge contribution construction industry has on the growth of national economy in general and underlines the importance and the potential of the SMEs in the construction industry to contribute to lifting the least developed countries (LDCs) in the Table 2.1 below to higher levels of economic growth and into the category of developing countries.

The World Bank (2013) list of LDCs has 55 countries out of which 32 are in Africa with 193 countries in the world. Observing that Africa has 52 countries, this implies that 58.2% of the least developed countries in the World are in Africa, and that 61.8 % of the countries in Africa are LDCs. This observation reinforces the need for African countries to prepare strategic policies that will encourage and sustain economic growth.

Table 2.1 : The World Bank list of 55 Countries Least Developed Countries (LDCs)

No.	Country	No.	.Country.	No.	Country
1	Afghanistan	20.	Guinea-Bissau	39.	Samoa
2.	Angola	21.	Haiti	40.	Sao Tome and P.
3.	Bangladesh	22.	Kenya	41.	Senegal
4.	Benin	23.	Kiribati	42.	Sierra Leone
5.	Bhutan	24.	Korea, (North Korea)	43.	Solomon Islands
6.	Burkina Faso	25.	Kyrgyzstan	44.	Somalia
7.	Burundi	26.	Laos PD	45.	Sudan
8.	Cambodia	27.	Lesotho	46.	Tajikistan
9.	Central African	28	Liberia	47.	Tanzania,
10.	Chad	29.	Madagascar	48.	Timor-Leste
11.	Comoros	30.	Malawi	49.	Togo
12.	DRC	31.	Maldives	50.	Tuvalu
13.	Djibouti	32.	Mali	51.	Uganda
14.	Equatorial Guinea	33.	Mauritania	52.	Vanuatu
15.	Eritrea	34.	Mozambique	53.	Yemen
16.	Ethiopia	35.	Myanmar	54.	Zambia
17.	Gambia	36.	Nepal	55	Zimbabwe
18.	Ghana	37.	Niger		
19.	Guinea	38.	Rwanda		
Source: World Bank 2013.					

In 1971, the United Nations listed the 55 Least Developed Countries (LDCs) in the world. These countries were recognized as countries forming the "poorest and weakest segment" of the international community. The LDCs have the common characteristics of being highly disadvantaged economies and their development process run the risk of failure to defeat chains of poverty, and therefore need concerted effort and special support from the international community to improve their economic performance. (UN-OHRLLS, 2009).

This definition was revised in (UN, 2015) to include the specific issues to be overcome as " *(LDCs) was established in 1971 as a special group of developing countries characterized by a low-income level and structural impediments to growth, and requiring special measures for dealing with those problems*"

Malawi and other countries in the region are in this category where poverty alleviation interventions are required urgently in order to raise income and improve quality of lives in the affected nations (UN-OHRLLS, 2009). Growth of SMEs will play an important role in increasing employment and reducing poverty (Jan De Kok, *et al*, 2011), (Katua, 2014) (kongolo, 2010). Development and sustainability of SMEs in the construction industry will make a positive impact on the economic growth of Malawi and the other nations on the list as it has contributed in the developed world.

2.4 SMEs in the Construction Industry Generally.

Small and Medium Enterprises (SME) sector is the backbone of the economy in high-income countries but is less developed in low-income countries.

Literature reviews reveals some divergent views regarding the success of SMEs in the developing countries including East and Central Africa. Klapper (2011) finds that SMEs have not made a significant contribution to economic growth in Africa and though evidence has linked entrepreneurship and economic growth in developed countries, there is scarce evidence that such a relationship exists in developing countries (Klapper *et al* , 2011). This view is supported by (Fatoki et al, 2010) who found that despite the best effort of the South African government, new SMEs have achieved limited growth. Ce'line Kauffmann (2005) affirms that SMEs are weak in Africa because of unfavourable market environment which include cumbersome official procedures, poor infrastructure, dubious legal systems, inadequate financial systems and unattractive tax regimes. The African Development Bank (ADB), (2011) states that SMEs in the region and are now a fundamental part of the economic fabric and play a crucial role in furthering growth. African Economic Outlook (2012) reinforces this position when it asserts that, SMEs play a significant role in Kenya's economy as in 2011 the SME sector employed close to 80% of Kenya's total workforce and contributed 20% to the GDP while in Nigeria, SMEs contribute 55% of the GDP and generate up to 70% employment.

However, (Matambalya, 2000) asserts that the SME sector in the South African Development Cooperation, (SADC) region have had a tumultuous pattern with start-ups rates per annum which are as high as 30% in some countries but the failure rate is also very high as (Fatouki, 2014) and (OECD, 2000) estimates a failure rate of between 70% and 80%. The growth of SMEs in these countries appears to subscribe to the philosophy of “Better to let 1000 flowers bloom, even if some of them turn out to be weeds” (Handy,1996).

Malawi which falls within SADC has start-up entry rates and failure rates similar to these recorded by (Matambalya, 2000), (OECD, 2000) and (Fatouki, 2014) with “impulsive start-ups” “bandwagon and copycat” start-ups entering the market in large numbers following a period of good performance in a particular sector. This will be observed when the numbers of SMEs in the construction industry surged in the years 2007 to 2010 when the construction industry grew by an average of 7.9% to 19.9% between 2007 and 2009 and to 5.23% in 2010. This is during the period that the industry was reorganized with the effective entry of the National Construction Industry Council (NCIC) and the government policies targeting improvement of infrastructure.

Malawi Government Annual Economic Report (2014) informs that the construction industry grew in the rates indicated annually (0.5%, 2011) (2.5%, 2012) (5.5%, 2013) (5.6%, 2014) and (6.0%, 2015). The research reveals that while the construction industry has indeed grown in Malawi, the industry is still lagging behind those included in the studies included in table 2,2 herebelow.

Table2.2 below summarizes the importance of SMEs in a number of countries in creating economic activities which in turn generate jobs and help distribute income to families. 99% of all the businesses in the Developing countries and 50% of the SMEs constitute GDP (Fjose, *et al* 2010) (Muriithi, S. 2017)

Table 2.2: Contribution of SME to National Employment

Country	Contribution to GDP (%)	Contribution to National (&) Employment	Source Reference
EU &Developed countries	55	70	OECD, 2017;WTO,2016; Muriithi, S. 2017
OECD Nations	50	70	OECD, 2004; Bousazza B.O, 2015; OECD, 2000
USA	40	75	Nuwagaba, A., 2015
Netherlands	31.6	55	Katua, NT, 2014
Sub-Saharan Africa	50	95	Fjose, et al 2010,p5, p12
Ethiopia	3.4	90	central Statistics Agency (CSA) 2003, Gebrehiwot 2006
Ghana	70	49	Ghana Bank Doing Business Report, 2013; World Bank, 2006; Abor & Quarterly, 2010
Kenya	45	80	Mwarari and Ngugi,2013
Malawi	11.5	41.7 38*	Meghana Ayyagari, Thorsten Beck and Asli Demirgüç-Kunt, 2005 Nayak,P*.,2016, p5
Nigeria	50	70	Ariyo,2011; Kolasinki,2012; Nuwagaba, A., 2015
Rwanda	20.5	60	Mukamuganga, 2011; Muriithi, S. 2017
South Africa	55	60	DTI, 2012; Willemse, 2010; Echmgreen& Tong, 2005;
Tanzania	35	20	Ngasongwa, 2002, Nuwagaba, A., 2015, p147;
Uganda	18	90	Uganda Ministry of Trade, Industry and Cooperatives (MTIC), 2015
Zambia	10.7	30	Mbuta, 2007. African Economic Outlook: Zambia 2017) Market Systems Development for Decent Work (LAB), (2014)
Zimbabwe	40	15	Katua, 2014; Zwinoira, 2015
Cameroon	50	20.3	Ayyagari, M. et al, 2005; Molonge, K.T. 2016; Thorsten Beck, et al 2005

2.5 SMEs in Construction Industry in Malawi

In the UK, SMEs provide 62% of the total Employment and contribute 25% of the GDP (Muriithi, S. 2017) SMEs constitute 99% of all the businesses in the Developing countries and 50% of the GDP (Sveinung, Fjose, 2010), (Muriithi, 2017) indicating that they are very important and they play a significant role in the economies of the developing countries (Kamunge, Njeru & Tirimba, 2014).

Ojukwu, *et al* (2011) describe the SMEs in Malawi as characterized by a "missing middle' which is defined among business economist as the lack of focus, attention or support instruments by the government to favour a particular category of businesses (Fjose, et al, 2010).
Chris Darroll (2012) defines "the missing middle" as a phenomenon best described in a statistical data graphical presentation which is manifested by two peaks or bimodal distribution with a valley between thus the data profile approximates the likeness of the twin humps of a Bactrian camel (Hsieh, *et al* 2014). The leading reason explaining this phenomenon, which is common in poor countries, is as a result of high numbers of start-ups who enter the market making the numbers of the small entrepreneurs very high but lacking the necessary resources to grow into medium sizes entrepreneurs (Hsieh, *et al* 2014). The numbers of the medium sizes entrepreneurs, therefore, remain low, and those of the large sized entrepreneur increase steadily as they are more secure (Fjose, et al, 2010).

The second reason is that the macro and small entrepreneurs in some sectors receive favourable attention and enjoy support from Governments and NGOs and are therefore able to stay in business because they are more secure (Mark Curtis, 2016) and (Valentin, P, 2016)
Céline Kauffmann (2005) also finds that the SMEs are the "missing Middle" in Africa. SMEs are weak in Africa because of small local markets, undeveloped regional integration and very difficult business conditions, which include cumbersome official procedures, poor infrastructure, dubious legal systems, inadequate financial systems and unattractive tax regimes. Many firms stay small and informal and use simple technology that does not require use of national infrastructure (Kauffmann C., 2005).

Kauffmann found that SMEs were growing rapidly in South Africa, Mauritius and North Africa, due to favourable modern financial systems and clear government policies in favour of private enterprise. Political instability on the other hand discourages long term investments and, on some occasions, results in vandalism and looting which lead to enterprises going bankrupt as was the case in the DRC in the 1990s

In the middle of the two extremes are Senegal and Kenya, who have created conditions for private-sector growth but are still held back by an inadequate financial support system for SMEs (Kauffmann C., 2005).

Statistical data in support of the "the missing middle" concept is provided by Edmore Mahembe (2011, p14) (World Bank, 2007) by providing data on SMEs in Malawi which record that the distribution of enterprises was 91% for micro enterprises, 8.5% for small and only 0.2% for the medium sized entrepreneurs.

Ojukwu, *et al* (2011) also found that the SME sector is dominated by commerce and trade enterprises (44%), manufacturing (30%), crop production (17%), and services (9%) with the majority of enterprises being agriculture related.

Table 2.3 : Impact of construction industry SMEs on economy by selected Indicators

Country	Contribution of SMEs in the construction industry (%)		Proportion of SMEs to all businesses (%)	Source
	GDP	Employment		
UK	6.2	6.50	99	Rhodes, C.,2015; Rhodes, C.2017,p5
Europe	10.5	7.60	65	Martinuzzi, 2011; ;Oyeyinka,B.O,2010
Australia	7.8	9.10		Australia Government Department of Employment, 2014; AIG, 2015;
India	17.0	40.00		Nayak P,2016
Nigeria	10.22	9.72	96	Oyeyinka, B.O.,2010; SMEDAN, 2013:
Kenya	7.0 5.4**	8.00 6.1**	98	Competition Authority of Kenya, 2017; Wairimu, WW, 2015; Kithae et al, 2012; UNDP,2012; Danish Trade Union**,2016; Africa Review, 2017; Kenya Economic Report+,2016,p99
Zambia	29	29.00	97	Uriyo, G.A. et al,2004; Nuwagaba, A., 2015;
Malawi	4.3	4.90	10+, 38*	Agar, J+., et al, 2014. Danish Trade Union, 2016, p9, Fjose, S. et al, 2010
Tanzania	10.7	10.00	70*	Nangale, G.,2012; NBS,2017:
South	9.6	8.00	91	Nayak P, 2016; CIBD,2017;

Developed by G. Kaggiah from literature reviewed.

The study published by Ojukwu. *et al* (2011) appears to have found the number of SMEs in the Construction insignificant or perhaps they were included in one of the listed categories.

Table 2.3 above summarise the findings of several researchers in regard to the contribution of SMEs, and particularly the SMEs in the construction industry, to the economies of selected countries with a view to demonstrate the performance of SMEs in the construction industry in Malawi.

The data collected from several works as indicated in table 2.3 above the performance of the construction industry in Malawi is comparatively lower than that of the other countries in Africa with the exception of Ethiopia who appear to be lagging behind in the privatization process according to Central Statistics Agency (CSA , 2003) and (Gebrehiwot , 2006)

Majority of the researchers were not focusing on the parameters in table 2.4 and it required reviewing several publications to compile the data in the two tables above. An example is where the proportion of the employment in the construction in Nigeria where the total number of employees was obtained from (NBS Nigeria Construction, 2015, p7) and the national total number of employees in the construction industry was obtained from (SMEDAN, 2013, p6).

Wairimu, (2015) in her study , which is supported by the work of Kithae, et al, (2012) established that the objectives of SAPs to reduce the involvement of Governments in all non-strategic activities and to promote SMEs to fill up the gap and create employment had been achieved as it concluded and documented that employment in the public sector had reduced to 27.4% while the SMEs were responsible for 72.6% of all employment in Kenya. Thus, the transition of African economies from command economies to market economies had been successful. This position has been supported by the Small and Medium Enterprises and Development Agency of Nigeria (SMEDAN) and the National Bureau of Statistics of Nigeria in their finding that 84% of the total labour force in Nigeria in 2012 was generated by the private sector (SMEDAN, 2013). Data on such direct comparison is not available and the Author also noted that in some cases employment attributable to the informal sector and the Micro businesses was attributed to SMEs. The Danish Trade Union (2014) published a Labour Profile for Malawi in which in it is clear that the SMEs in the Construction Industry underperformed when compared with other sectors in Malawi and other countries in Africa as indicated table 2.4 here below.

Table 2.4: Proportion of Employment by SMEs by Sector in Malawi

No.	Sector	Employment share (%)		
		Urban	Rural	Average
1	Trading	68	58	63.0
2	Manufacturing	16	31	23.5
3	Social services	5	6	5.5
4	Transport	8	4	6.0
5	Construction	3	1	2.0

It is quite clear from the literature reviewed that SMEs form the majority of all businesses taking proportions as high as 99% of all the businesses registered in some countries but the value added per employed person, or the labour productivity ratio, is higher in the developed countries while it is relatively lower in the least developed countries where in all cases the numerical proportion (%) of employment is higher than the corresponding proportion of GDP achieved. Also, the labour productivity ratio is lower in smaller firms than in larger ones. (OECD, 2002)

The Zambia Green Jobs Programme LAB (2014) contextualizes this phenomenon in the conclusion that there are poorly performing SMEs working under poor conditions and employing relatively the greater numbers of the workforce. Indeed, the ILO considers labour productivity as an area of critical importance (ACI) (ILO, 2014).

SMEs in the construction sector are particularly of great importance in Africa and other developing countries because it generates employment for the few trained technical staff and Engineers available as well as the majority of the uneducated and untrained persons who are considered as the less privileged because they have fewer opportunities available in other sectors (Thwala and Mvumbu, 2009). The SMEs in the construction industry favour the youth and other untrained employees who are then trained on the job which is considered more cost effective that employing trained professional workers (Ocen, *et al,* 2011). In a study conducted in Kenya, (National Construction Authority, 2015) established that 18% of the construction workers were formally trained while 81% acquired their skills by in-house training.

In India, SMEs in the Construction sector employs 35million workers 31% of the total work force(Dmg events India, 2015) and contributed 32% of the GDP making the construction sector the second largest sector after agriculture in India(ILO, 2016). (Okoye, *et al,* (2016) describe the construction sector as "an indispensible sector of the economy" and that is why this research aims at indentifying the causes of the poor performance of SMEs in the construction industry in Malawi and developing a strategic framework for improving the growth and sustainability of the SMEs.

Literature reviewed and summarized in Tables 2.3 and 2.4 above show that SMEs form the highest proportion of registered businesses in most counties, recording as high as 99% in the UK (Rhodes, 2015) and the SMEs in the Construction Industry contribute significantly in GDP and offer a correspondingly high proportion of Employment. (OECD, 2000) records that SMEs constitutes over 95% of all firms and offers between 60% and 70% of the current employment in the OECD countries.

However, the findings recorded in the literature reviewed on contribution of SMEs in the construction industry show that the SMEs in Malawi had the lowest contribution to GDP at 4.3% compared to GDP of other countries covered in the literature reviewed where the highest contribution was 17% in India with 10.6% in Europe.

The construction Industry in Malawi contributed only 4.9% to the employment of the national work force and compared to 40% in India, 29% in Zambia and 7.6% in Europe.

This is indirectly corroborated by the in (Ojukwu, 2011, p7) in the statement that 44% of the SMEs in Malawi are in commerce and trade while 30% are in manufacturing, 17% in crop production, and only 9% in services. Construction is considered a service and is therefore included in the 9%.

Malawi has continued developing SME policy strategy since the first issue of October 1998 and in 2012 when a Policy Strategy entitled "*Enabling Enterprise Growth in Malawi: 2012-2017"* was initiated and a Draft Final was published in December, 2012 (Darroll, 2012). The government's friendly approach and support to SMEs and cooperative development policy has helped establish effective SMEs associations helping develop successful value chains, particularly in the agriculture and natural resources sector (Ojukwu, *et al*, 2011), (ADB, 2011).

In the UK the construction industry yielded 6.5% of GDP equal to £103 Billion and generating 2.1 million jobs equivalent to 6.2% of the total employment in 2015 (Rhodes, 2015). The economic output of £103 Billion was equal to MK 70.5 Trillion (at 1 GBP = MK684.18) and noting that the Malawi Budget for the year 2014/2015 was MK727.7 Billion (Gondwe, 2014), one observes that the annual production of construction industry in the UK is ten times the economy of Malawi.

Table 2.5: Percentage of total GDP Contribution by Construction and related sectors

Sector	2011	2012	2013	2014	2015
Manufacturing	9.90	9.60	9.50	9.40	9.30
construction	3.00	3.00	2.90	2.90	2.90
Electricity gas and Water supply	1.30	1.30	1.30	1.30	1.30
Real Estate activities	8.20	8.30	8.00	7.70	7.50
Source: Malawi Government Annual Economic Report 2014					

2.6 Factors affecting the performance of SMEs

Growth of the Private sector is considered very important in the developing countries because of its potential in spurring economic development and is often referred to as "engine of growth". SMEs in the construction industry are key players in the private sector and they have been identified as the leaders in generation of employment and therefore poverty alleviation,

The observation that Sub-Saharan Africa (SSA) is not on track to achieve the Millennium Development Goals (MDGs) (UN 2007), (UNIDO, 2008) is quite disturbing because it means growth in the region has not met expectation.

Research carried out in literature review reveals the following as the major factors affecting the growth of SMEs in the construction industry negatively thus are inhibiting their growth and sustainability leading to high incidence of bankruptcy and closure for start-ups.

There are internal factors within the SMEs and external factors, which are outside the SMEs organization but within the environment in which the SMEs operate. (Kinyua, 2014), (Sitharam and Hoque, 2016).

Moorthy, et al (2012) carried out a study of SMEs in the Manufacturing Sector in Malaysia and found that some of the factors affecting growth of SMEs negatively were, lack of effective Entrepreneurship, appropriate human resource and limited use of marketing information technology.

2.6.1 Obstructive Business environments to SMEs' growth

A thriving private sector is crucial for poverty reduction, and that certain business-friendly conditions must be in place to unleash private sector dynamism. (UNIDO, 2008)

It is considered that positive attributes in the society such as low levels of bureaucracy, an independent judiciary, good roads and a functioning education system, are parts of enabling a good business environment.

Doing Business (2011, pp3); Doing Business (2018, pp3); identified important regulatory characteristics listed here below as the key indicators that contribute positively towards improvement of the business environment in a country and leads to an increase in start-ups, and Governments are encouraged to make it easy for upcoming entrepreneurs to manage them and enter into their business of choice.

a) Register and start a business
b) deal with construction permits
c) obtain an electricity connection
d) register property
e) obtain credit (Kinyua, 2014)
f) Protecting investors
g) pay taxes
h) trade across borders
i) enforce contracts
j) resolve insolvency

The table 2.6 below shows the indicators for monitoring the existence of the individual factors which collectively enable a favourable business environment in a country. (Earnest &Young, 2013). The table includes all the factors listed above which have been identified in UNIDO (2008)

Manuel, *et al,* (2013) in the report "Independent Panel Review of the Doing Business report" indentifies the ten topics, each of which is the cumulative outcome of several indicators, and the aggregate of all the topics, together define the "Ease of Doing Business index". Thus, this is a summation of all the friendly regulations, which result in an enabling environment for new SMEs to start.

Villanger and Berge (2015) record that there is a violent debate among economists and strategic planners over the degree of involvement of donors and governments in the private sector. They observe that the relationship between poverty and productive employment has convinced many analysts that policies directed towards promotion of industries focusing on labour intensive activities such as construction would be beneficial to the LDCs.

Private Sector Development (PSD) is considered important because it is also seen as having the ability to achieve several poverty reduction goals concurrently. The UK Department of International Development (DIFD) views PSD as catalyst to successful delivery of other benefits such as health and education in view of the ability of the private sector to reduce poverty. (ICAI, 2014) (Villanger, et al, 2015).

Nuwagaba, (2015) in works on SMEs in Zambia emphasizes that the SMEs continued demonstration of their prowess in creation of job opportunities cannot be ignored but must be encouraged by all stakeholders and especially the governments by creating enabling legislation and reducing entry and practicing barriers as those listed in the table above, to stimulate growth and sustainability of SMEs.

Villanger, et al, (2015), supports these views as they stress on the importance of supporting developing SMEs by enhancing their competitiveness for a positive impact on poverty alleviation, which can be achieved by putting in place policies that would reduce the costs and risks of starting and operating a business.

Table 2.6: Factors enabling a favourable business environment in a country

	Enabling factor	Indicators for monitoring individual enabling factors	Successful Country
1	Indicators for monitoring individual enabling factors	Having no minimum capital requirement	Kenya, Madagascar, Morrocco, Rwanda
		Having a one-stop shop	Burkina Fasso
2	Deal with construction permits	Having comprehensive building rules	Kenya
		Using risk-based building approvals	Mauritius
		Having a one-stop shop	Rwanda
3	Obtain an electricity connection	Streamlining approval processes (utility obtains excavation permit or right of way if required)	Benin
		Reducing the financial burden of security deposits for new connections	Mozambique
4	Register property	Setting fixed transfer fees	Rwanda
5	obtain credit	Allowing a general description of collateral	Nigeria, Rwanda
		Maintaining a unified registry	Ghana
		Distributing data on loans below 1% of income per capita	Kenya, Tunisia
		Distributing both positive and negative credit information.	South Africa
		Distributing credit information from retailers, trade creditors or utilities as well as financial institutions	Rwanda
6	Protecting investors	Allowing rescission of prejudicial related-party transactions	Mauritius, Rwanda
		Requiring external review of related-party transactions	Egypt
7	pay taxes	Allowing self-assessment	Rwanda
		Allowing electronic filing and payment	Mauritius, Tunisia
		Having one tax per tax base	Namibia
8	trade across borders	Using risk-based inspections	Morocco, Nigeria
		Providing a single window	Ghana
9	enforce contracts	Making all judgments in commercial cases by first-instance courts publicly available in practice	Nigeria
		Maintaining specialized commercial court, division or judge	Bukina Fasso, Liberia, Sierra Leone
		Allowing electronic filing of complaints	Rwanda
10	resolve insolvency	Requiring professional or academic qualifications for insolvency administrators by law	Namibia
		Specifying time limits for the majority of insolvency procedures	Lesotho
Source: World Bank/IFC Doing Business 2013.			

2.6.2 Industrial Polarisation:-preference to micro-enterprises and Multinationals

In the course of the migration of the responsibility for creation of employment opportunities from public service to the private sector in the 1970s, Governments have placed more emphasis on support and promotion of micro enterprises and large corporations. Further, the policies adopted towards the promotion of the small-scale sector were more influenced by welfare considerations than those based on economic efficiency were.

In part, this was a result of the polarisation of policy-making, which separated small-scale sector development, from mainstream industrial policies, which had evolved out of the intellectual dichotomy between the informal and formal sector in the 1970s. As a result, SMEs were looked upon as potential generators of employment, vehicles for achieving balanced regional growth and as counterweights to the concentration of economic power by larger firms.

In the 1980s small enterprise development was often strategically tied to policies to mitigate the negative impact of structural adjustment. (Paul Cook, 2000)

As stated in (UNCTAD, 2005), the Governments in Asia provide SMEs with technological extension services (such as quality assurance, research support and information on sources of technology). However, a similarly robust and dynamic SME sector is absent in many developing countries, particularly in the least developed countries (LDCs).

The private sector is composed of the Small and Medium sized entrepreneurs (SME) and the large entrepreneurs. The SME have 0 to 250 employees with the large entrepreneurs having more than 250 employees with the Small entrepreneurs generally having 0-10 employees. In many LDCs, the enterprise sector manifests the twin humps of a Bactrian camel (Hsieh, *et al* 2014) which is recognized as evidence of the existence in the economy under consideration high proportions of the small and the large enterprises but with a marked absence of the Medium sized entrepreneurs. This is generally referred to as the “missing middle phenomenon” or the “bimodal distribution” to an extent where the graphical representation of the cumulative data of the SMEs in their numbers against their increase in size; small, Medium and large form a distinct dual structure. This observation is confirmed in (Céline Kauffmann, 2005) who posits that the SMEs are the “missing Middle” in

Africa.

Ojukwu, *et al* (2011) describe the private sector in Malawi as characterized by a “missing middle’ due to the distribution curve having numerous micro-enterprises and very few large enterprises and very few SMEs, while a much larger number of SMEs is expected for a normal distribution

This structural imbalance in many developing countries has arisen despite the implementation of SME promotion programmes for many years in these countries. The industrialization policies pursued by developing countries in the past are identified as having contributed to a bias in favour of larger scale enterprises by encouraging premature movements of resources into large capital-intensive businesses rather than promoting the gradual and organic growth of enterprises. This bias persists in many developing countries, rendering their SME promotion strategies largely ineffective (UNCTAD, 2005).

Government's efforts focus on the informal sector (OECD, 2009), Klapper et al, 2011) and have limited SME strategy. This has resulted in the observation by several authors that the imbalance in promotion and resourcing, attributed to hidden and largely inadvertent biases in economic policies, in many developing and least developed countries (LDCs). This has resulted in a situation where there is evidence of a “missing middle”: a shortage of middle-sized growth-oriented SMEs that could make an important contribution to development (UNCTAD, 2005).

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2.6.3 Leadership in Management of Construction SMEs

The construction industry is usually described as being one of the most risky business arenas. SMEs face particularly harsh business environments. The risks in the industry include those which are inherent in construction activity such as lack of job continuity owing to the project-based nature of the industry, deficiencies in individual construction industries themselves and risks in the operating environment of the industries such as difficulties in access to finance.(Ofori, and Toor, 2012)

The SMEs in the construction face even more risks and challenges as the beneficiaries and other stakeholders of projects are more knowledgeable, better organised and have more exacting demands on the SMEs majority of whom are Contractors. The industry is also faced with introduction of more regulations in an effort to address environmental, health and safety and other concerns resulting from the construction activities. Individual SMEs are also finding greater competition from the larger number of enterprises in the industry forcing them to review their charges and their profit margins downwards. (EPOC, 2012).

This situation is made worse by the fact that while an SME in the MK0-5 Million category are not allowed to submit tenders for works falling in the other categories above while there is no rule inhibiting say an SME in the MK15-100 Million category to compete for works of lower value. These challenges have made the leadership of the SMEs a major factor in their development and growth. There have been efforts to differentiate leadership from management (Zaleznik, 1977); (Bennis and Nanus, 1985).

Mintzberg (1990) studied how managers spent their time and which tasks they performed. He concluded that managers carry out the traditional functions of planning, organising, co-ordinating and controlling. They perform ten related roles, which are in three main categories:

(i) interpersonal roles (figurehead, leader and liaison roles);
(ii) informational roles (monitor, disseminator and spokesperson roles); and
(iii) decisional roles (entrepreneur, disturbance handler, negotiator and resource allocator roles).

Thus, leadership is one of the functions of a manager. As Toor and Ofori (2008a) argue, leadership is long-term, visionary, and purpose-oriented, and seeks to attain innovation and change, while management is short-term, narrow, and task-focused, and aspires to achieve control and stability. Similarly, leaders and managers undertake different functions, apply different conceptualizations and approaches to work, exercise different problem-solving approaches, and exhibit different behaviours owing to their training and background (Toor, 2012).

The reasons cited by (Koksal and Arditi, 2004) for organisational failures in construction included lack of business knowledge, lack of managerial experience, lack of experience, lack of commitment, and poor working habits. Thus, there is still a lack of appreciation, among researchers of the dangers of ineffectiveness of leaders in the construction industry.

There is greater need for leadership in construction in the developing countries. There are frequent reports of severe project performance deficiencies such as cost and time overruns poor quality, technical defects, poor durability, and inadequate attention to safety and environmental issues (Ofori, 2012).

Toor and Ofori (2008b) reviewed works on leadership in the construction management literature and observed that empirical works on the effectiveness and performance of construction leaders appeared in the 1980s (Bresnen, 1986) (Bryman et al, 1987). In the 1990s, the focus moved onto leadership style attributes, and behaviours of leaders of projects (Dulaimi and Langford, 1999), (Rowlinson et al., 1993). However, (Toor and Ofori, 2008) argue that leadership research in construction has relied on old frameworks and empirical work based on quantitative analyses. Chan (2008) also observes that the understanding of leadership in construction is primitive as it depends on managerial functionalism.

An increase in interest in understanding the quality of leadership in construction is evident. New research centres, and international networks on leadership in construction have been set up. Toor and Ofori (2008) proposed a research agenda for leadership in construction. McCaffer (2008) called for a concerted effort by researchers around the globe, noting: “What is needed is a global research institute concentrating on leadership development in construction” (McCaffer, 2008, p306). (Ofori *et al*, 2012)

According to UNIDO, 2008, most owners of informal micro enterprises are necessity entrepreneurs who run their business as an activity of last resort in the absence of employment alternatives. This view indicates that the entrepreneurs will not trained or have experience in the area of venture. The majority of SMEs are unable to access competent professional advice to give them early warnings and prepare them to avert problems.

Russell Evans, CEO of Wolters Kluwer Asia-Pacific, points to a separate CCH survey of more than 210 accountants servicing small businesses, which were ranked bad business models as the main reason SMEs fail. This view is backed up by ASIC data on 5600 business failures in 2011-12, which cited poor strategic management as the most common cause of failure, attributed to 19% of SME failures, with another 15% of failures attributed to poor financial control.

Waters (2011) is of the view that, Small and medium-size businesses in developing countries most likely to fail because of an inability to manage costs or anticipate rising costs, according to a survey of more than 1000 owners of SMEs.

The survey, published by accounting software provider CCH and global information services group Wolters Kluwer, revealed SMEs see inexperienced management, a bad business model and lack of access to capital as other key reasons for small business failure in sub Sahara Africa.

Waters (2011) adds that of those surveyed, 61% of SME operators said small businesses failed because of an inability to manage costs, 50% said inexperienced management, 50% said poorly designed business models or no business plan, 49% said insufficient capital, 37% said poor or insufficient marketing, and 35% said insufficient time managing the books.

2.6.4 Limited access to investment and trade opportunities

Malawi's economic activities are concentrated in agricultural production, which accounts for 80 percent of exports, 85 percent of employment and 35 percent of GDP. The narrow export base exposes the Malawi economy to fluctuating terms of trade. Although Malawi has strived to mainstream trade into National development strategies and promote export and product diversification, challenges in implementing trade development priorities (i.e., agricultural commercialization, strengthening local standards and quality conformity) are engendered for example by the lack of direct linkages between Trade policy and other economic policies (Health, Transport, Employment) (UN in Malawi, 2010)

This economic environment offers limited opportunity to the SMEs in the construction industry thereby increasing the competitiveness in the industry for limited opportunities.

2.6.5 Access to Credit and Financing

Pietro Calice, et al (2012) find that financing is a greater obstacle for SMEs than it is to large firms, particularly in the developing world. They emphasise that inability to access finance affect the growth of the SME sector more adversely than that of large companies (Schiffer and Weder, 2001), (Beck et al, 2005) (Beck et al, 2006), (Calice, et al, 2012).

Phiri, (2007) agrees to this view and emphasizes that the most severe constrain on private sector in Malawi relates to credit availability and allocation. Government priority should focus on reform of financial institutions and credit policy to allow flow of resources for long-term investment and production. The SME sector deserves special attention in this regard (Phiri, 2007)

Some of the reasons making it difficult for SMEs to access credit and Financing are discussed below.

2.6.6 High lending rates;

Interest rates in the country have maintained a double digit track record making lending rates also relatively high. The interest rate was at 25% in 2006 reducing to 15% in 2007 but rising 44% in 2012 and currently at 38% from September 2013.

Such a high interest rates require that the borrower charges high rates for the inputs in order to support the high interest rates. This scenario favours SMEs who have been in business longer and who have accumulated capital resources in equipment and plant and therefore requiring fewer inputs to satisfy the contractual conditions that are associated with the first payment which guarantees completion of the project if the SME applies appropriate financial management principles.

This position notwithstanding, the loans are offered at very high interest rates making it difficult even for the disciplined entrepreneurs who are willing to comply with the set repayment schedule.

Table 2.7: Nominal unit rates in Construction Works

Labour	Materials	Plant and Transport	Fuel and Lubrications	Overheads and Profits	Total Rate
16.0	32.8	13.0	18.2	20.0	100.0
Compiled using Data from the Roads Authority of Malawi by GMB Kaggiah					

Unit rates are built-up in the format indicated in the table 2.7 above, which contains averages of each major element of the inputs in construction activity for a particular output. The contents of the table 2.7 above, provided to the author by the Roads Authority of Malawi provides average proportions of each of the major elements based on several contracts awarded.

To be competitive and win contracts, SMEs in the construction Industry are forced to limit their unit rates within a range in which all other players bid. This results in shrinkage of the profit margins and therefore reduces the income of the SMEs considering that they use money borrowed at the high lending rates indicated in table 2.8 below.

Table 2.8: Average Annual lending rates in Malawi

Year	**Interest Rate (%)**	**Year**	**Interest Rate (%)**	**Year**	**Interest Rate (%)**
1998	37.67	**2004**	36.83	**2010**	24.63
1999	53.58	**2005**	33.08	**2011**	23.75
2000	53.13	**2006**	32.25	**2012**	32.33
2001	56.17	**2007**	27.72	**2013**	46.01
2002	50.4	**2008**	25.28	**2014**	44.29
2003	48.92	**2009**	25.25	**2015**	44.39
Compiled using Data from Reserve Bank of Malawi by GMB Kaggiah					

It will be observed that the profit is the incentive for entrepreneurship and if it goes lower than some thresh hold, the SME will not be able to operate. It will be noted that the cost of borrowing is not shown as an item and is usually built in the overheads component. John A. Biernbaum (1998) confirms this position and advices that loan and cost of financing is used to determine overhead costs. The magnitude of the interest rate stands out as missing in the in the build-up processes of the unit rates the SMEs offer for construction works. This indicates that a number of the SMEs are forced into offering “suicide bids” (Lip, 2003) with very little or non-existent profit margins just to sustain the flow of work to keep in business and retain their skilled labour and their market niche in expectation of better times in the future (Prior, G., 2010)

2.6.7 High Collateral Requirements;

Collateral requirements in general are high, with an average value of collateral exceeding the value of the loan by 43 percent for commercial banks and 105 percent for MFIs. Most MFIs accept only traditional collateral such as leasehold land and buildings, vehicles and equipment (Sanchez de Carmona, 2007).

2.6.8 High Inflation Rates

The inflation treads in the market environment affects the prices of all inputs in production, thereby requiring all players including the SME in the construction industry to increase their rates. However, since the construction contracts has a schedule of rates given by the SME, price adjustments are not allowed for majority of the items in the schedule and no adjustments are allowed at all for short term contracts. The SMEs are therefore obliged to absorb part or all the additional costs arising from inflationary trends in the country.

2.6.9 Poor Loan Repayment Culture

A view exist in Malawi that SME owners are not adequately disciplined and have not developed a culture of prioritizing and effecting loan repayments on time. A similar mindset has been documented by other studies in Swaziland and in Malaysia, underlying the need for borrowers to be inculcated with a repayment culture from the outset so that loans are not viewed as entitlements or gifts from the Government. (UNCTAD, 2005, p9) This makes the banks more lethargic to offering financial support to budding SMEs. (Justice Zotorvie, 2017)

2.6.10 Lack of Recognition by the financial Sector

The lack of a universal definition of SMEs and the inconsistencies among current official definitions of SME can lead to serious distortions of data and information provided. Celine Kauffmann (2005) confirms this state of lack of clarity in defining SMEs and stresses that, there was lack Government involvement and policy, and very few countries have working definitions of SMEs, so related data is hard to compare.

Most international organizations have adopted a non-definitional policy, although many also employ a working definition. The issue of definitions is further complicated by the tendency of NGOs, donors and authors of various studies quoted in the country reports to adopt classifications and definitions that suit their own purposes (IFC , 2009).

The information on the subject matter from Literature, therefore, lacks the benchmarks to enable proper comparison or categorization as data and information from some authors refers to macro, small and medium enterprises almost interchangeably since there is no clear definition.

This is demonstrated in (UNCTAD, 2005, p4), UNCTAD/ITE/TEB/5 where it is stated that there is no generally accepted definition of micro, small and medium-sized enterprises. No single definition can reflect the differences between firms, sectors or economies of different size and at different levels of development.

This view is supported by (Kendrock and Agar, 2007) who found that there was no one definition for SMEs among the banks in Malawi and likewise there was no consensus on market potential and one of the major bank closed a dedicated SME operation while two others opened them.

SMEs are, therefore,placed in a disadvantaged position in accessing capital goods, intermediate goods and spare parts. This arises from the biases, limited administrative resources to obtain incentives and other authorizations.

Further to this, there is a problem with the time for payment between delivery of a product and collection of payment especially for SMEs (Phiri, 2007)

2.6.11 Outdated policy, legal and regulatory framework;

With increased pace of globalisation, economies require laws and regulations that are compatible with global trends (Malawi Economic Policy Brief, 2016) Government noted that, unless some laws and regulations for the financial, labour and goods markets, are revised they would pose a constraint rather than facilitator to private sector development. Some of the existing legal and regulatory frameworks amount to obstructive business environments to entrepreneurship growth, trade and investment (Doing Business, 2012)

2.6.12 Unreliable and costly economic infrastructure

Private sector growth in Malawi is partly constrained by inadequate infrastructure in transportation, telecommunications, power and water supply. Road transport is the main means for imports and exports but its high cost affects the competitiveness of Malawian product (Matengula, 2017) The potential of rail and air transport is subdued by lack of capital investment. Access to telecommunications services in terms of telephone, mobile and internet services is limited, with less than 3% of the population covered (AICD, 2010), (IMF, 2017).

Although the current Malawi Growth and Development Strategy aims "to transform the country from being a predominantly importing and consuming economy to a predominantly manufacturing and exporting economy", (Saasa and Atema, 2010) predicted that this goal was unlikely to be achieved by 2011 and recommended that policies should be tailored to include:

- Supporting an Inclusive Business environment for MSMEs and an enabling environment.
- Supporting the mobilization of Private Sector Investment (PPP)
- Promoting Pro-Poor Inclusive Business Models
- Creating an enabling policy environment for inclusive micro-finance

2.6.13 Seasonality

Seasonality is significantly prominent in East and Central Africa Region and in Malawi the rainy season starts in November and end in May. There are six months of dry season from winter in June to October.

Development of Infrastructure and other development projects are very sensitive to weather because they are carried out outdoors and rainfall in excess of a particular threshold, makes it impossible for the heavy equipment used in construction to move or operate in the appropriate manner to perform the required function. Additionally, the inputs in construction are materials which should have moisture content in a prescribed range and rain raises the moisture content to levels where majority of the construction activities and processes cannot be carried out with a satisfactory outcome.

SMEs in the construction industry suffer interruption of business every year for very long periods due to heavy annual rainfall ranging between 800 and 1400 mm in most areas of Malawi, occurring between November and April. (Minot, N., 2010).

In every economic process time is considered one of the important assets as it provides space in which inputs, production and returns on Investments are forecast and measured for monitoring and evaluation over specific periods of time. A “time-to-produce” constraint captures the delay in transforming productive capital into final products (Zhanhui Chen,2011). In pursuit of improved competiveness, organisations are looking into better utilization of time to increase productivity and profitability as operating around the clock or with extended hours, industry can increase productivity. (Postnote No.250, 2005) Flexible Manufacturing system (FMS) in the Netherlands has been highly developed and achieved the 24 hour efficiency (Amit Bouri, 2011)

Construction processes and production are influenced significantly by the weather conditions with the dry weather being generally more favourable and the wet weather making construction activities slower and at times impossible to perform. The rain can cause damage to some of the construction materials, makes transportation and general movement difficult (Huber, 2002 pp207) and makes the site of construction too wet for access, workability and safety of the construction personnel and equipment and plant. Rainfall leads to delays in delivery of construction materials and associated damages and wastage . The wet season therefore represents a long period of time with very low productivity for SMEs in the construction industry. "Time is money" is a frequently used adage. Economists, recognizing the effect of time on the production process, have incorporated this effect in the distinction between a firm's short-run and long-run costs. (Gronau,1970) In the ideal situation, all construction processes should “run at all times in an endless do-loop” as proposed for FMS by (Guixiu Qiao, 2006).

The SMEs in the construction industry work an 8hour day for only 6months per year, which emphasizes the under utilization of the time, which (Klein, 2007), observes is a resource taken from nature, which is essential for the firms to meet their recurrent expenditure and their commitment to stakeholders (Freeman,1984).

The stakeholdedrs being "an individual or a group who can affect or is affected by the implementation of the change project" (Zanjirchi and Moradi, 2012)
The rainy season reduces productivity in the construction industry to very low levels which makes it impossible for the Contractors to achieve the level of turn over that would yield incomes that would sustain the contractor's establishment during the wet season and record profit levels desired to justify continued maintenance of a uniform level of resources throughout the year.

In every economic process time is considered one of the most important assets and inputs, processes, products, and returns are forecast and measured for monitoring and evaluation over specific periods of time. Any period when no production is realized is recorded as a loss to the SME, the user and the promoters, as established by (Couto and Teixera, 2007) due to interruption in production. Parallels in other sectors can be drawn as (Bill Canis, 2011).observes the severe impact interruptions have on productivity and the economy as he notes that "A number of plants were idled for a short period of time as parts from Japan were interrupted and most manufacturers were sent scrambling to find new sources for other parts" (Canis, 2011).
During the West Coast port lock out in the fall of 2002, a widely quoted estimate claimed that a 10day shutdown of port facilities would cost the U.S. economy $1.94 billion a day (Martin Associates, 2001a), (Hall, 2004, p. 354)
This lack of production over long periods has a negative effect on the economy as the construction sector controls over 20% of the economic activities in Malawi and a slowdown or a shut down over the 6 months rain season results in an overall slowdown of the economic growth of the country. It also leads to slow growth of local companies due to the fact that the profits made over the active period of the year are used supporting the management of the company and servicing capital investments which are not productive over the period, and sometimes the companies are driven to closure.
Interruptions in the construction works have a negative impact on the production and therefore cash flows and profits for the organization and are therefore undesirable. Interruptions in Construction activities may be compared to interruptions in the supply chain in manufacturing Industry due to various events as indicated in the examples below. Weather is in some cases classified as a "non-excusable delay"

and considered to be the SME's responsibility with no compensation or relief allowed although weather is usually one of the main causes of delay (Ahmed, *et al*, 2005, p5 p16) and (Afshari, *et al, 2011)*

In Malawi the rain season is six months long. The rains causes frequent interruptions or completely halts some construction activities such as earthworks; and no income is generated by the SMEs during the period to enable sustain a cash flow regime that would support their workers and other stake holders in the construction supply chain (Arcuri, *et al,* 2007). This scenario is repeated over the years forcing many of the stakeholders in the Industry (Ramanathan, *et al,* 2012) into bankruptcy and therefore thwarts the national goals of developing a sustainable local construction industry. This scenario denies the SMEs the chance to build the capacity to offer employment to many young people and therefore accelerate the alleviation of poverty and eradication of extreme poverty and hunger (UN, 2008).

2.6.14 Nature of the Work

Construction is a complex array of interdependent activities that some would say is at best organized chaos. The very nature of construction introduces challenges typically not encountered in other industries. (Bob Muir, 2005),

For example, construction differs widely from manufacturing in that:

- the work is often seasonal (Martinuzzi, 2011) (Langford , 2011)
- each project is unique
- often involves remote sites with access and health problems (Martinuzzi, 2011)
- the process is not as predictable
- difficulty in applying automation
- there is high potential for encountering unforeseen conditions
- costs can vary according to conditions
- difficult to manage and supply utilities and other resources.
- technical innovations are adopted slower.
- success is dependent upon the quality of its people.
- very custom-oriented
- the work is not performed in controlled conditions, therefore highly impacted by weather and other environmental conditions(Bob Muir, 2005)

2.6.15 Payment paralysis

A major problem especially at the lower contract value end of the scale occurs because the contractual obligations to make payments by a stipulated time are not honoured and the contractor does not receive payments at the anticipated date. This leaves the emerging SME in construction, with a major problem of cash flow and vital inputs like fuel, cement, steel, and bituminous products which are usually paid on order cannot be paid. Consequently, the works come to a standstill and plant and laour become idle at the SME's cost while waiting for materials and fuel to be delivered to site. The losses are usually at the contractors cost because the contract document normally only allows for the contractor to be paid 'interest on late payment.'

Payment is considered as the lifeblood of the construction industry because constructions often involve very large capital outlay and take a considerable time to complete. It is beyond the means or capacity of most SMEs to complete the whole of the construction work before they get paid. This is especially so among the medium and small size Contractors (Jud *et al*, 2010) The impact of late payment can be disastrous to SMEs as during the 2008 recession it is estimated that 4,000 businesses failed as a direct result of late payments in the UK (Abrahams, 2013).

Late payment or non-payment leads to "payment paralysis" which is a situations where the Employers delays payments to SMEs in the construction industry for long periods, making the SMEs to suffer acute and prolonged cash flow interruptions and is unable to meet his financial commitments to pay staff, service bank loans or to order materials (MDA Consulting, 2010). The works therefore come to a standstill and plant and labour become idle at the contractor's cost while waiting for payments. In such situations, the contract normally provides for the SME to be paid 'interest on late payment'. The SME is rendered helpless and paralysed; unable to take any action or withdraw from the contract.

Failure to pay timeously is a breach of contract and payment of interest on late payment does not compensate the SMEs for the cost of idle time while the contractor waits for improvement of cash flows and delivery of materials. This situation is called payment paralysis (MD Consultants, 2010).

2.6.16 Corrupt practices in the Industry.

Procurement processes have been found, in some cases, to be influenced by corrupt practices, to the disadvantage of some SMEs. Corruption is universal and it exists in all countries, both developed and developing, in the public and private sectors, as well as in non-profit and charitable organizations. Corruption can be a major obstacle in the process of economic development and in modernizing a country and it should receive priority attention in a country's development agenda. (Myint, 2000)

According to the 2011 Corruption Perceptions Index, Malawi performed well below average with a score of 3 out of 10 (with a lower score indicating more corruption) and a ranking of 100 out of 183 countries assessed. Corruption poses a serious challenge in the development of Malawi. The country suffers from various types of corruption that impedes service delivery and exacerbates inequality and poverty in Malawi society. (Farzana Nawaz, 2012).

Corruption promotes mediocre entities at the expense of the qualified and more deserving cases with the unfortunate results that the quality of the products delivered by the mediocre entity is far below average but overlooked and sanctioned as a result of the compromise of procedures and standards arising due to the prevailing corrupt considerations.

Transparency International (TI), in their Corruption Perceptions Index (2015) Report declared that "not one single country, anywhere in the world, is corruption-free". However, in the LDCs corruption appears to be relatively high with over 30% of the annual budget being lost through corruption and mismanagement in some countries. It is in this light that elimination of corruption take centre stage in the African Unity (AU) Agenda 2063 which stipulate that corruption and impunity shall be abolished to achieve "the Africa we Want".

Malawi is within the countries perceived as highly corrupt with a corruption index rating of 31 which is lower than 50 which is the boundary of the highly corrupt and least corrupt countries with the most corrupt at 0 and the least corrupt at 100. Malawi, is however, ranked as less corrupt when compared with some other African countries such as Tanzania, Kenya, Uganda, Guinea, DRC, Angola, Burundi Zimbabwe, Sudan and others. (TI, 2015)

Corruption affects Malawi as 40% of the budget is usually from donor funding, and whenever there are indications of corruption and mismanagement of donor funds the donors withhold the funds. Such an incident was recorded by (Lameck Massina, 2013) when USD 250 Million is reported to have been misappropriated through the "Cash gate" scandal leading to economic stagnation as many government programmes are "put on hold" due to the withdrawal of donor funding.

2.6.17 Apparent Discrimination of SMEs

Over the years because of the Government's procurement policy and practice, SME's have been discriminated against. The procurement processes and particularly the "due diligence" consideration requires that for an organization to be awarded particular contracts, it must have carried out similar works for a specified number of years before. This particular requirement is very frustrating to budding SMEs who may have the ability but have never had an opportunity to prove themselves. (Barcelona ACN, 2014).

This requirement forces the SMEs to subsist on small scale projects belonging to individuals and other small organizations where the risk of project financing is real as sometimes can be observed by the numerous number of incomplete projects within the cities and towns in Malawi.

This situation inhibits the growth and advancement of SMEs from the lower categories of classification by the NCIC to the higher class due to lack of the references required for upgrading.

2.7 Classification of SMEs in Construction Industry in Malawi.

The construction sector in Malawi is categorized into five main sub-sectors namely water, energy, housing, roads and irrigation. Consultants and contractors are key private players in the construction industry. Only firms registered with the National Construction Industry Council (NCIC) are qualified to work on government jobs.

The two main categories are civil and building contractors that comprise 80 percent of the firms registered with the council while electrical contractors make up 10 percent. Consultants are amongst the minor categories of the registered firms with 4 percent representation with the council. Firms are assessed to determine their financial capacity and experience in construction and are registered into the categories that best fits the complexity and the limiting value of works they can carry out. At the time of this study, NCIC had a total of 1355 firms registered in the types and categories indicated in table 2.9 below.

From the data, a contractor with a sustained contract value of over 5.0 Billion Kwacha will have more than the 250 employee range for SMEs and may be considered a big corporation.

Table 2.9 : SMEs in the Construction industry in Malawi

SME category based on Capacity and scope of works					
Limiting Contract Amounts in Million Kwacha ($MKx10^6$)	0-5	5-10	10-15	15-100	100+
Civil Contractors (No.)	365	9	170	135	53
Buildings (No.)	164	24	54	141	
Electro-Mechanical(No.)	65	16	9		
Totals	594	49	233	276	53
Compiled with data from National Construction Industry Council (NCIC) of Malawi					

Table 2.9, above, classifies the SMEs in the construction industry at the time of the study as in the register of the NCIC, indicates that 53 SMEs are qualified to carry out projects of contract value above MK100 million. In this category therefore lie a few contractors who have the capacity to carry out works valued above the 5.0 Billion thresholds. In Malawi it is estimated that 10 contractors reach this mark, and therefore there are approximately 1,255 SMEs in the Construction industry in Malawi.

Table 2.10: Personal on Contracts of different Value

Contract Name	Contract value (Billion MK)	Contract Period (months)	Labour force (No.)
A	2.4	25	150
B	4.16	48	170
C	6.44	60	328
Compiled by George Kaggiah using Data obtained from Road Authority of Malawi			

The Clients determine the best time of the year to let Contracts in terms of weather conditions in an effort to save on costs. The timing is also to some extent influenced by availability of funds and for the institutions financed through government funding, contracts are awarded after the budgetary allocations in June.

According to data collected from the Roads Authority and set out in Table 2.11 here below, shows that some SMEs are productively employed for only 4months in a year and due to competition over limited opportunities, there is no guarantee that they would be similarly employed in the following year.

This is confirmed in Table 2.11 where the Roads Authority, who is the largest Employer of SMEs in the construction industry, invited tenders for a total of 154 contracts and indicates that the smallest of SMEs who qualify for works valued between MK0 and MK10.0 Million are the majority but are targeted for fewer jobs and have the lowest probability of success in being awarded a contract. Table 2.11 below also shows that the period of engagement is shortest for the smallest of SMEs.

Table 2.11: Contracts advertised in May 2013 for annual routine maintenance

SME Classification (MK)	0-10	10-15	16-100	100++
No. Registered	603	233	276	53
Jobs advertised	15	66	43	30
No. without Job	588	167	276	32
% to be employed	2.49	28.33	15.58	56.60
Probability of engagement	0.02 (1 :40)	0.28 (1 in 4)	0.16 (I in 6)	0.57 (1 in 2)

Compiled by George Kaggiah using Data obtained from Road Authority of Malawi

Table 2.11 above, clearly indicates the high number of SMEs particularly at the lower end of the contract value where 600SMEs competed for 15 contracts with the probability of 1in 40 winning a contract, while at the upper end of the contract value 53 SMEs competed for 30 contracts with a probability of 1 in 2 of winning a contract.

This demonstrates that the works contracts floated by the Government through its leading construction agency, Roads Authority, were packaged to meet the needs in the field, but they do not reflect a conscious effort to adjust them with a view to creating more opportunities for the SMEs who were at the lowest category in conformance with the government policy.

Table 2.12 indicates the period of time the contractors who won contracts were to be engaged in the work. The SMEs registered in the two lower end categories were all awarded a total of 81No Contracts which lasted 90 and120 days respectively while the SMEs on the upper categories were awarded contracts lasting up to one year and therefore affording them a chance of continuity in construction activities and earnings.

Table 2.12 Contract Period for works advertised in May 2013

SME Classification (MK)	0-10	11-15	16-100	100++
No. Registered SMEs	603	233	276	53
Less than 90 days.	15	44	28	1
120 days	0	22	6	12
150 days	0	0	0	5
180 days	0	0	0	6
365 Days	0	0	9	6
Total No. of Contracts	15	66	43	30
Compiled by George Kaggiah using Data obtained from Road Authority of Malawi				

2.8 Development of a Strategic Framework for their Reduction.

2.8.1 The Incidence and Impact of non-payment and delayed payments

Apolot, Alinaitwe and Tindiwensi (2011) found that delays in payment to SMEs caused protracted delays in completion of works and resulted in interruptions in cash flows which impacts negatively on the sustainability of the SME. The severity of delayed payments was demonstrated in Lea Nebel (2014), on the support for enactment of the “Prompt Payment Act” which has been in force in Europe, Canada and Malaysia since 2013. Weighing the impact of the factors affecting sustainability of SMEs in the construction Industry, identified from literature review it was concluded that the payment paralysis had a more severe impact on SMEs as when it struck, it eroded all the gains and investments an organization had build up during its existence. This includes the human resources as capital resources. In the works of Abrahams, D. (2013) it was established that in 2008 some 4000 SMEs in the UK.

Personnel would leave the organization due to long periods of nonpayment of salaries and organization would use its capital resource to pay off some of the debtors. The author therefore believes that developing a strategic framework to reduce the incidence and effects of payment paralysis, would improve the sustainability of SMEs in the construction Industry. This view is strengthened by the finding that the impact of late payment can be disastrous as during the 2008 recession it is estimated that 4,000 businesses failed as a direct result of late payments in the UK (Abrahams, 2013)

Payment is considered as the lifeblood of the construction industry because constructions often involve very large capital outlay and take a considerable time to complete. It is beyond the means or capacity of most Contractors to complete the whole of the construction work before they get paid. This is especially so among the medium and small size Contractors (Jud, *et al*, 2010)

Late payment or nonpayment leads to “payment paralysis”. Payment paralysis is a term first used by MDA Consulting (2010) of south Africa to describe situations where the Employers delays payments to an SMEs in the construction industry over long periods of time making the emerging SME to suffer acute and prolonged cash flow interruptions. This leads to the SMEs’ inability to meet their financial commitments to pay staff, service bank loans, order materials and fuel or to service and repair his equipment and plant. This becomes a major problem especially at the lower contract value end of the scale, where most SMEs are, because the contractual obligations to make payments by a stipulated time are not honoured and the contractor does not receive payments at the anticipated date.

The contracts therefore come to a standstill and plant and labour become idle at the contractor’s cost while waiting for payments. The losses are usually at the contractors cost because the contract documents normally only allows for the contractor to be paid ‘interest on late payment’. Failure to pay timeously is a form of breach and payment of interest does not compensate the contractor for the cost of idle time while the contractor waits for improvement of cash flows and delivery of materials. This situation is called payment paralysis (MDA Consultants, 2010).

The contractor is rendered helpless and paralysed; unable to take any action or withdraw from the contract.

The Ontario General Contractors Association asserts that late payment practices are an important issue for the Ontario construction industry as they have negative consequences for the construction industry and for the broader economy, including:

- reduced employment in the construction industry,
- less investment in apprenticeship,
- greater use of 'independent operators',
- less investment in machinery and equipment and hence lower productivity,
- higher construction costs because of the need to factor in late payment risk,
- smaller bidding pools because payment risk forces contractors to limit the amount of work they take on, and
- an erosion of the principle of a level playing field by rewarding those contractors that delay payments without justification while penalizing those contractors who are forced to cope with late payments.

Late payment is a problem in every industry. However, the unique structure of the construction industry amplifies the consequences of late payment (ADB,2005; Kamanga MJ *et al*, 2013; Emuze, and Kandangwe, 2013)

. The construction industry is distinct from other industries because of its complex system of contracting and sub-contracting. The system maximizes the benefits of specialization. (Prism Economics and Analysis, 2013)

The National Trade Contractors Coalition of Canada (NTCCC) (2009) noted that during the normal course of business, a contractor carries a substantial amount of up-front costs to carry out a particular job. This includes equipment, materials, employee salaries, and maintaining necessary insurance, amongst any number of other issues. These costs are substantial, even if they are expected.

However, to function, the system of contracting and sub-contracting requires that cash flows through many levels of a pyramid structure. An interruption in the payment flow anywhere in the construction pyramid has a cascading effect down the rest of the contracting and sub-contracting chain.

This research will therefore study the incidence of late payment and non payment to SMEs in the construction industry in Malawi and develop a strategic framework for reduction of the incidence of payment paralysis.

2.8.2 Incidence of Late payment and delayed payments in Literature

Payment problems are old age issues that permeate the construction industry over the years. Every so often Contractors complain of either not getting paid or the payments being unduly delayed by the Employer. A study which was carried out recently showed that most construction disputes which were brought to court were mainly concerning payments – either late payment or non-payment by the Employers to the Contractors (Judi, *et al,* 2010). Payment defaults remain chronic and prevalent issues that affect the entire delivery chain of construction industry.

In the attempt to promote and uphold construction industry, payment has constantly been found to be an issue and a barrier that hinder such efforts (Dhiyafullah, *et al*, 2014) for that particular reason, Government of Malaysia has made efforts to reduce payment default issues by enacting Construction Industry Payment and Adjudication Act (CIPAA) in 2012 (Dhiyafullah *et al,* 2014).

Lip, (2006), found that critics have also blame the construction industry for its outdated and inefficient payment practices resulting late payment and the uncertainty on effective payment date relative to certification of Interim Valuation Certificates. (Emenke, 2010)

The Central Vigilance Commission of the Government of India observed that in India, a large number of Government organizations inordinately delayed payments to contractors/suppliers and, therefore, made the system vulnerable to corruption, in addition to increasing the cost of procurement by the Government agencies (Singh, 2005).

In the United Kingdom, it is generally accepted that late and/or non-payment will cause severe cash flow problems especially to contractors, and this would have a ‘chain reaction’ effect down the contractual payment flow. The importance of cash flow was recognized by late Lord Denning in Dawnays Ltd. v. FG Minter who regarded cash flow as the “lifeblood of the enterprise.” Late and non-payment issues or rather contractors' payment woes are regarded to involve many players in the local construction industry, whether in government or private financed projects (Hasmori, 2012).

A survey of the Payment Performance in Britain indicated that construction industry, in particular, was prone to late-payment culture. Payment of debts due to subcontractors and suppliers were, on average, made 53 days after invoices or applications for payment had been rendered (Johnston, 1999), (Amoako, 2011). This position is confirmed by (Vince Cable, 2013) observation that statistics indicated that 85% of small businesses, in the UK, had experienced late payment in the previous two years, and SMEs were owed a total of over £30bn in late payments. Late payment is fundamentally a question of business culture. The fact that average payment terms and actual payment performance vary so much between countries with similar legal frameworks is evidence of this. (Department for Business Innovation and Skills, 2013)

The Zambian construction industry continues to face a number of problems among them late payments. This frustrates and destabilizes Contractors, especially those who have already committed to mobilization and material supplies. The issue of delay in payments was identified as a major obstacle that impedes sustainability of SMEs (ILO, 2004).

The National Council for Construction, Zambia (2004) also found that SMEs in the construction industry suffer from erratic cash-flow problems and are often forced to delay or suspend works due to delay in payment or non-payment, with the Government being the main defaulter in this respect. Contractors fail to meet their various obligations and works end up costing much more than budgeted due to claims and interests. Cases have been cited, where the government owes a single contractor, monies amounting to a total of K250 billion. In the case of the labour based Works, delayed payment inevitably leads to strikes, unrest and serious disruptions.

In Sri Lanka, the National Construction Association of Sri Lanka (Southern Branch) recorded that financial weakness of contractors caused by long delayed payments sometimes kept them lumbering in the contract scenario losing their capital and capacity for reinvestment affecting their sustainability negatively.

This situation is made worse by inclusion of Contingent Payment Clauses in the contracts (Prism Economics and analysis, 2013)

Contingent payment clauses are provisions of construction contracts that allow for payment to be delayed notwithstanding that the construction work was performed satisfactorily. In some cases, a contractor who is not paid is allowed to suspend work. In other cases, work must be continued at least for a period of time, even though payment is in arrears. Some contingent payment clauses provide for interest on delayed payments. However, the majority of contingent payment provisions do not require interest to be paid.

As will be observed from the extract from Multilateral Development Bank Harmonised Edition; General Conditions (2017), Sub Clause 14.8**,** (copied here below) the sub-Clause has a proviso that "*Unless otherwise stated in the Particular Conditions"* which invites the person preparing the Contract Documentation to provide otherwise. It will also be noted that this Clause does not attempt to prescribe similar penalties as those prescribed alongside the *Prompt Payment Legislation which* prescribes 8% above the lending rate of the central bank in the country and prohibits attempts to adjust the provision.

"Sub Clause 14.8 Delayed Payment (FIDIC, 2017)

If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the date for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of its sub-paragraph (b)) of the date on which any Interim Payment Certificate is issued.

Unless otherwise stated in the Particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central bank in the country of the currency of payment, or if not available, the interbank offered rate, and shall be paid in such currency.

The Contractor shall be entitled to this payment without formal notice or certification, and without prejudice to any other right or remedy"

.

It will also be observed that the same contract provides to the SMEs to be paid 56 days after submission of their invoices. The provision for compensation in the event of late payment is covered under Sub-Clause 14.8 but it also allows the provision to be interfered with by qualifying it with the appendage "*Unless otherwise stated in the Particular Conditions"*

14.7 Payment

The Employer shall pay to the Contractor:

(b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents; or, at a time when the Bank's loan or credit (from which part of the payments to the Contractor is being made) is suspended, the amount shown on any statement submitted by the Contractor within 14 days after such statement is submitted, any discrepancy being rectified in the next payment to the Contractor; and

For instance, the pay-when-paid clause often used in contracts agreement between main contractors and sub-contractors or between housing developers and main contractors. "Pay when paid" or also known as "back to back" method of payment is relevant especially in the case of nominated sub-contractor (Hasmori, et al, 2012)

In Malaysia, based on the conditions of contract, an Employer is considered to have neglected or failed to pay the Contractor if the latter does not receive his payment for a period of 2 – 3 months after the period of honouring his certificate Judi S.S. et al (2010).

Based on the research conducted by the *construction industry Development Board (CIDB) of Malaysia* (2006), (Emenke, 2010) both contractors and consultants agreed that the most frequent causes of late and non-payment inter-alia are;

1. Local culture/ attitude
2. Delay in certification by consultant
3. Paymaster's poor financial management
4. Conflict among the Parties Involved in the Project
5. The use of "pay when paid" clause in the contract
6. Paymaster's Wrongly Withholding of Payment
7. Breach of contract term by parties involved in the project

8. Disagreement on the valuation of work done
9. Issues with regard to documentation error

These causes have been confirmed or endorsed by other researches (Azhar, *et al,* 2014) and the National Construction Association of Sri Lanka (Southern Branch)

This research is concerned with delayed payments or non payments after the Employer has received interim valuation Certificates (or Invoices) and found them and the works satisfactorily. This research therefore takes item 3 above "Paymaster's poor financial management" as the main issue to be addressed. It will be noted that items numbers 2, 3, 4, 8 and 9 may be considered as occurring in the course of processing interim valuation Certificates and are, therefore, before the point of interest for this research which is after the client has accepted the Certification. Items 1, 5 and 6 make the situation worse by appearing to justify or validate the paymasters' choice to make late payments or not to pay and they have to be dealt with together with the main cause which is item 3.

2.9 Action t in other Countries to reduce impact of payment paralysis

On account of these problems, some developed countries like United Kingdom, Singapore, New Zealand and some states in Australia have passed construction specific legal payment security regimes that deliberately enact provisions to address issues on immediate payment in the construction industry, and to eliminate, as much as possible, poor payment practices and smoothen the contractor's cash flow. (Hasmori, 2012)

The Need for Prompt Payment Legislation in the Construction Industry (2013) records that a 1994 report on the construction industry, commissioned by the U.K. government, drew attention to the damage to the industry caused by payment delay.

The Report "Constructing *The Team*: *Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry"* was prepared by Sir Michael Latham who recommended that "any attempt by a contractor to include a clause in a bespoke form with the effect of introducing 'pay-when-paid' contingency clauses should be explicitly declared unfair and invalid clauses. He also to impose penal interest rates on late payments. (Sir Michael Latham, 1994, p34)

Subsequently the government prohibited 'pay-when-paid' clauses in section 113 of the *Housing Grants, Construction and Regeneration Act, 1996* (commonly known as the '*Construction Act*'). Section 113 provides that 'pay-when-paid' clauses are void, except in conditions of insolvency. "*The Latham Report" to the Housing Grants, Construction and Regeneration Act (Construction Act) in 1996 which had several aims including improving cash flows in the construction Industry. This came to effect in October 2011 in England and Wales and November 2011 in Scotland*.

Section 114 empowers the Minister to establish by regulation a 'Scheme for Construction Contracts' which constitutes a 'default' contract. The *Construction Act* applies equally in the public and private sector.

The Government of the UK strengthened this position when further steps were taken to address delayed payment or nonpayment by enacting a legislation entitling suppliers to charge an interest of 8% above base rate on late payment since 1998. Since the two additional EU directives, there is a legal default maximum payment term of 60 days, unless otherwise agreed (Vince, C., 2013). This protection of the domestic SMEs went well with the famous pronouncement of Judge Lord Denning, who said *"Cash flow is the life blood of the building industry"* in a series of Court of Appeal decisions starting with Dawnays v Minter (1971) and finishing with Modern Engineering v Gilbert Ash (1973) The European Union "Late Payment Directive" also referred to as the "Directive 2011/7/EU of the European Parliament and the Council if the European Union" was published on February 16, 2011and was designed to speed up payments in commercial transactions. (Voller and Molling ,2015), (Tymowski, 2018),

Canada also realized the need for prompt payments and followed in the footsteps of the United States of America (1982), the U.K.(1996), Ireland(1997), Australia (1997) the European Union(2000) and New Zealand (2002).

Prism Economics and Analysis (2013) records that Australia offers the shortest payment period of 10 days after submission of an approved invoice.

The requirements of Prompt payment legislation were introduced in Canada in Ontario on December 12, 2017 based on requirements in other jurisdictions, including the United Kingdom and Australia. The existing "Construction Lien Act" in Ontario, was host the new requirements and was substantially amended and renamed “The Construction Act” in July 2018 and “Prompt payment and adjudication Act” came into force in October 2019. Prism Economics and Analysis (2013).The process was replicated in all the other Provinces and territories in Canada between 2017 and 2019 and the “Federal Prompt Payment for Construction Work Act” received Royal Assent on June 21, 2019 (Martin and Stanger, 2019).

Judi et al (2010) found that that in Malaysia, SMEs have no right of suspension of work due to non payment under the common law. The general principle is that the Contractor has no legal right to suspend work, and on the part of the Employer, he has also no legal right to order any suspension of work. Once the construction work is started, the Contractor is contractually obligated to carry out the work “regularly and diligently” until the project is completed.

Suspension is a temporary halting by one party of the performance of their obligations under the contract on the grounds that the other party is in breach contract for failing to make payment in accordance with the terms agreed between them. Suspension is temporary in nature because where there is a right to suspend, the procedure does not bring the contract to an end; but putting on hold the obligation of the suspending party until the breach has been properly remedied. According to Murdoch and Hughes (1996), “it is not uncommon to find that a Contractor or Sub-Contractor, who has not been paid what is due, threatens to suspend the work under the contract until payment is made”.

In 2006 Malaysia made proposals to amend the Conditions of Contract to allow the Contractor to suspend wholly or partly or to reduce the rate of the works until the Employer makes full payment plus the interest due. The Contractor is also entitled to any extension of time or loss and expense arising from such suspension.

It is observed that often, a contractor whose payment is delayed has no means to verify that a payment delay higher up the construction pyramid was the cause of the delay.

In the current system, there are incentives to improperly delay payments (Prism Economics and Analysis, 2013)

In amending the conditions of contract to reduce the incentives for non-payments and delayed delay Judi S.S. et al (2010) propose that the options considered, include the following:

(a) suspension of work,

(b) slowing down the work,

(c) claiming interest on late payments,
(d) application for summary judgement,
(e) apply for the winding up of Employer's company or
(f) determining the contract with the Employer.

2.10 The Position of Malawi

The Literature reviewed indicates a lot of work has been done in the developed countries and stringent legal framework put in place to remove the threat of payment paralysis from the SMEs in the construction industry in the UK, Canada, Australia, the EU and such legislation is in processes of enactment in Malaysia and other countries. These laws remove the incentive for Employers and the main contractors to consider non-payment or delayed payment as an option in their procurement, and contract management processes.

Non-payment and delayed payments is acknowledged and recorded as one of the factors impacting negatively on the sustainability of SMEs in construction industry in several countries in Africa. Countries acknowledging the problem include South Africa, Nigeria and Ghana, However, few studies have been carried out in respect to the incidence,and magnitude or measures to reduce the effects of non-payment and delayed payments to SMEs.

Malawi falls among the countries where limited work in research has been done in regard to frequency and severity of non-payments and delayed payments and limited specific literature was found on the subject.

Emuze, and Kandangwe, (2013) recorded that due to various adverse reports in the media regarding the performance of SMEs on road projects in Malawi, a preliminary diagnostic study that was aimed at examining the barriers that are hindering the successful execution of road projects in Malawi was carried out 2012. The investigation was conducted among engineers who were employed by the agency responsible for road projects in Malawi and civil engineering contractors used a self-administered questionnaire for data collection. Salient findings indicate that delayed payment by clients severely affected the sustainability of SMEs in the Construction Industry.

The study was the first of its kind in Malawi and the authors considered it to be a preliminary diagnostic study that would lead to other detailed studied. This was the first such a study in Malawi seeking to record factors affecting SMEs negatively.

The African Development Bank Group in their Project Completion Report (2005) for Road Maintenance and Construction (Romac II) Project in the Republic of Malawi recorded that some Payments to the Contractors and Consultants were delayed during implementation, giving the contractors and Consultants an opportunity to lodge claims related to interrupted cash flows(ADB,2005)

Kamanga *et al* (2013) found that slow payment procedures adopted by the client in making payments resulted in insufficient cash flows to the SMEs and delayed the project completion period.

Gerald Mabveka (2014) observes that it is common to find Procurement Entities (PEs) include payment terms that are unfair to the SMEs. The SMEs are forced to accepted these terms because during the years, with the diminished volume of construction work, SMEs are under pressure and at times engage in risky 'suicide' bids with little or non-existent profit margins just to sustain the flow of work and stay in business (Lip, 2003)

This observation is important because it reveals the psychological and financial disposition in which SMEs prepare their bids and negotiate contracts.

In most cases SMEs are at the disadvantage with unfair payment terms set by PEs. In August 2014 the question of payment for late payment arose as Government of Malawi through the Ministry of Finance acknowledged that GoM had to pay MK370 Billion (USD800.0Million) in arrears to SMEs in various sectors (Mabveka, 2014).

Imbalances in bargaining have led to the widespread use of contingent payment clauses in contracts which allow a party to delay payment to another party when payment to the first party has been delayed. In most circumstances there is no interest paid on the delayed payment. In many cases, a contractor is obliged to continue work even when payment has been delayed. Contingent payment clauses invite abuse (Prism Economics and Analysis, 2013)

The *National Construction Association of Sri Lanka (Southern Branch)* stated that "the basic premises underlying the whole structure of the classical (and still in-force contractual documents) is that the contractors are greedy villains and the employer has to defend himself from. From these premises, the ensuing rationale is to grant the employer and his engineer some economical coercion power over the contractor, the contract is no more a contract between two parties equal in rights; it become a link of serfdom based on the hope of economical reward at a time freely disposed of by the employer. Hence the employer is granted the possibility of acting according to his own whim without having much fear from the contractor.

It has been confirmed that employers in the construction industry in Malawi use Contract documents approved by the Office of the Director of Public Procurement (ODPP). The Contract documents are usually compiled in two sections; with section one being the "General Conditions of contract" for procurement works contracts, or services (consultants) and section two is the "special conditions of contract". The Special conditions of contract which are adjusted by the Procuring Entity (PE) to be assignment specific allow for insertion of additional clauses and modification or deletion of some clauses in the General Conditions of Contract with a provision that the "special conditions of contract" supersedes the "General Conditions of contract".
It is in this section that contingency Clauses are added as the Clients and their agents find appropriate.
The literature review has revealed that there need to fill the gap in knowledge in what causes the non performance of SMEs in the construction industry in Malawi. The literature has also highlighted several factors which impact negatively on the SMEs, but they are not specific to construction industry and there is no information on the magnitude of the impact by the different factors which are discussed in section 7.2.
Which are the factors impacting most negatively on sustainability of SMEs in the construction Industry in Africa; case of Malawi? Can a strategic framework address the negative impact? This research will provide information towards answering these questions and which shall form a contribution to knowledge as well as offering a practical solution.

2.11 Recognizing six Leaders and professionals in Construction Industry

The literature reviewed revealed six eminent Leaders and professionals who manifested the believe that Construction Industry was a useful industry which helped tremendously in economic growth of countries throughout the world and they used their offices to promote the economies of the world by supporting the industry.

In the course of reviewing the remedial actions taken in other countries to combat delayed payment and non-payment, the author found that to enhance growth and sustainability of SMEs in the views of the six leaders would inform the this research significantly. These leaders are listed here below, and in section 6.28:

- **a)** Hammurabi the law giver (1810BC to 1750BC),
- **b)** Benjamin Strong Jr. (December 22, 1872 – October 16, 1928).
- **c)** Judge Lord Alfred Thomson Denning (1899 to1999).
- **d)** Robert Strange McNamara (1916-2009)
- **e)** Sir Michael Latham (1943-2017)
- **f)** Rolffe W.Peacock

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CHAPTER THREE

3. RESEARCH METHODS

3.1 General

This chapter discusses the research methodology that was chosen for this study. The author reviewed literature on the research philosophy, research paradigms, approaches and methodologies to learn and to navigate through the many possibilities documented to find a combination that best suits data collection and analysis to answer the research question and concludes that research involving both literature research and survey were the most appropriate for realizing the research objective.

3.2 Introduction

The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

The outcome of the research shall be useful to Governments, entrepreneurs, and scholars in construction management and particularly to those seeking to develop policies which will enhance the growth of SMEs in the construction industry and establish them as a suitable investment for budding entrepreneurs, sustainable source of employment and a base for creation of wealth in the developing countries. There are several types of SMEs in the value and supply Chains in the construction Industry and all of them will benefit in various ways from the knowledge contribution from this research.

Currently, majority of the large and relatively complex construction projects particularly those financed by the World Bank or the African Development Bank, in majority of the African countries are being carried out by foreign construction companies. Most of the firms are originating from the developed countries (mostly from Europe) because they are the companies satisfying the desired criteria on human and capital resource capacity and have a history of satisfactory delivery of works of similar nature and magnitude. These companies win the contracts in Africa simply from a business point of view, which values the confidence of performance and the reduced risks associated with experience and strong capital base.

However, this paradigm leads to a high level of repatriation of the construction budget to the country of origin of the construction companies, in profits, returns on investments and salaries for foreign project managers who are not available locally.

The repatriation is often viewed as defeating the international policies, including those of the IMF and the World Bank, aimed at improving the economies of the developing countries due to their failure to retain the foreign exchange for lack of competitive SMEs in the construction industry with the capability to carry out the work. This scenario is increases the balance of payments regardless of the World Bank interventions which has the intention of offering these countries with affordable finances in form of low-interest loans, interest-free credits and grants to invest in education, health, and infrastructure (Kimberly Amaedeo,)

Upon gaining some understanding on factors impacting negatively on SMEs in the construction Industry, this Research will propose strategies to reduce or mitigate the effects of some of these factors and therefore improve the sustainability and growth of the SMEs.

This need to generate knowledge to bring about a better understanding of the problem and therefore attempt to offer solutions, acknowledges Hosea (4:6); “My people perish for lack of knowledge”. The subject of research is confirmed viable by answering the three key questions regarding research posed by (Remenyi et al,1998), (Holden and Lynch, 2004)) “Why research?”, “What to research?” and “How to research?”. The first two questions were answered in the problem definition and the objectives of this research. The third question is very important and this chapter answer it and develops a road map for the tasks and activities to be carried out to perform and conclude this research satisfactorily.

3.3 Research Design

A research design is a is a strategic framework for action or plan for a study, research sites, and data collection procedures to answer the research question(s) with the goal of providing results that are judged to be credible (Leedy, 1997:p195; McMillan, & Schumacher, ,2001: p166; Durrheim, 2004:p29)

The Research problem is based on a general observation that SMEs in the construction industry in Africa were not growing in a sustainable manner and were unable to build capacity in human resource and capital to qualify to participate in the International Competitive Bidding (ICB); the entry into the market place for large donor funded construction projects.

Exploratory literature and archival research offered the available information and exposed the author to a number of possibilities of the cause of the problem as published by other scholars and the research design describes here below

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3.3.1 Interpretation and Options taken in this research

The most straight forward path for research is as set out in Saunders, et al,(2009,120) where four paradigms corresponding to four conceptual dimensions have been set out. The conceptual dimensions are subjectivism, objectivist, regulation and radical change.

In definition, regulation dimension is not judgmental or critical, and maintains the status quo of all players and seeks to explain how the organizational functions and processes of the organizations are regulated and suggests improvements which can be made to the organization for its benefit working within the established systems.

The objective of this research is driven by the need to bring about change “in the operating environment” and “to the organizations” to achieve sustained productivity and therefore sustainability of the SMEs. The stance and the motivation of the research is the belief that there has been limited success in growth and sustainability of SMEs. The theme questions in this research and the aim of research are as stated here below:

- What are the reasons for the poor sustainability and poor growth of SMEs in the construction Industry in developing countries?

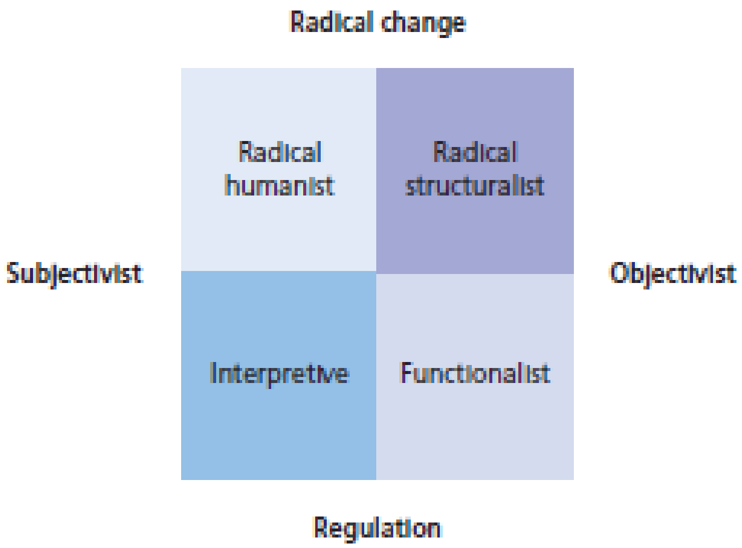
- “What can be done to improve sustainability and growth of SMEs in the construction Industry in developing countries”?

The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

This research targets the organisations, institutions and processes in the in the construction industry and particularly the interaction between the Procurement entities and the SMEs offering construction services in Africa. The SMEs are a national asset, which creates employment and contributes significantly to the GDP. The growth and sustainability of the SMEs in the industry is therefore, is a matter of national importance.

The research is therefore, judgmental and more critical and aims at prompting some degree of appropriate change to the existing framework and cause adjustments, which may yield the competitiveness, productivity and profitability necessary to sustain and support growth to the local SMEs in the construct ion industry in Africa.

The objective would therefore, be best viewed through the radical change dimension of the four philosophical-paradigm framework for analysis of social theories in, Figure 1 here below, which was developed by (Burrel and Morgan, 1982) Saunders et al (2009).



Source: Saunders et al (2009 p120)

Figure 1: The Four paradigms of Social theories (Burrel and Morgan 1982)

The author views the entry into research design as the Burrel and Morgan “Four paradigms of Social theories”. This offers a researcher the means to decide on philosophy and paradigm alignment and use to choose and dock-on to the appropriate port on the outer layer of Saunders onion’ as presented in (Saunders *et al*, 2009, p108). The choice on the port to dock on is based on understanding of the nature, the social views and direction of the research as dictate by the aim of the research.

The author found radical structuralist paradigm as befitting this research and with reference to the Burrel-Morgan paradigm framework, this research links with Saunder’s onion at the port of postmodernism which is in agreement with the stance radical structuralist.

(Burrell and Morgan, 1979) (Holden and Lynch, 2004), (Burke, 2007)

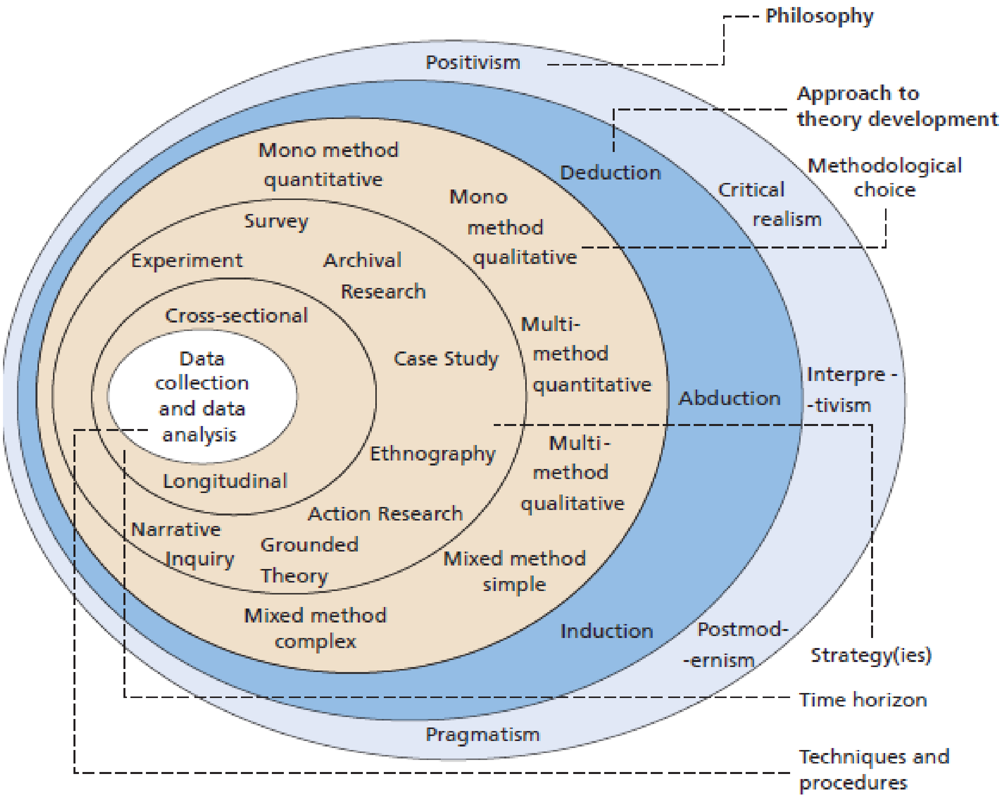


Figure 2a: Saunder’s onion extracted from (Saunders, *et al*, 2019, p130).

Literature reviewed indicate that the theories on research philosophy and paradigm stances have been summarised and consolidated in the combination of Burrel-Morgan four paradigms of Social theories and Saunders’s onion in (Saunders et al, 2009,120).

The research design has gone through the six stages, from research philosophy, paradigm stance (theory development), methodological choices, Strategy, time horizon and the techniques/procedures to conclude the research road map..

Literature reviewed, guided the author in making the appropriate choices at the stages of the research design processes to reach the research method applied to this research as in Table 1,2 here below

Table 1.2: **Summary Table for Design of a Suitable Research Method**

Item	**Characteristic**	**Options available in literature reviewed**	**Applicable choice for this research**
1	Research philosophical	Radical change, objectivism, realism Regulation, positivism, pragmatism, Interpretive (Saunders *et al,* 2009, pp120)	Radical
2	Paradigms	Positivism, Realism, Interpretivism, Regulation, Pragmatism, Radical structuralist *(Saunders, M. 2008)*	Radical structuralist
3	Reasoning approach	Inductive, deductive (Soiferman,2010)	inductive
4	Strategy	Exploratory Archival research, survey, experimental, case study, action research, grounded theory, ethnography.	Archival research + survey
5	Methodical Choices	Mono-methods, mixed methods , multi methods	Mixed methods
6	Time Horizons	Cross sectional (snapshot), longitudinal	Cross sectional (snapshot)
7	techniques and procedures	Data collection and analysis Sampling, structured-Interviews Questionnaires, focus group	archival research questionnaire and interviews
Developed by George Kaggiah 2018			

3.3.2 Strategy

The strategy chosen to deliver the objectives of this research is a combination of an archival research and a survey. Archival research yielded information on players in the field and particularly the SME in the construction Industry, the marketplace and the customers.

This information was obtained from the Ministry of Supplies and Public Works, the regulators and the single largest client for the SMES in the Construction Industry in the period preceding 1997 when an Act of Parliament established the National Roads Authority (NRA). NRA later transformed into the Roads Authority (RA) by an Act of Parliament No. 3 of 2006. The Ministry of Irrigation and Water Development and the Ministry of Housing are also major stakeholders in the construction Industry and therefore have records of SMEs in the construction Industry registered with them or those engaged by the Ministry for various services.

The NCIC Act of 1996 established the National Construction Industry Council (NCIC) with the responsibility of registration of stakeholders and regulating the Construction Industry in Malawi.

These organizations were the target of archival research and they provided historical data on the SMEs in the construction Industry in Malawi. It is a requirement that all SMEs in the construction Industry be vetted and registered by the NCIC in Malawi for them to participate in any bidding process and /or to be awarded contracts. Information on SMEs registered by the NCIC and based on their frequency of renewal of their subscription, which is viewed as a practicing license, gave indications on the performance of the SMEs. Those who did not apply for renewals of the practicing license were considered non performing and therefore, victims of the negative effects of factors affecting SMEs in the construction industry in Malawi.

Data collection was accomplished in three stages all in series with each informing the next. The first phase provided the historical data providing information on the players in the industry their interactions and most importantly the population and of the SMEs in the industry.

The second phase of data collection for the study was a survey by Questionnaire, developed to include all the important aspects of SME particularly concerning the management environment, performance, profitability and sustainability of SMEs.

The last phase of data collection was by interviews of two target groups target groups considered to have a deep understanding of the research subject by having lived the moments the study sought to understand and bring out their experience to inform the policy and legal measures necessary to improve the sustainability of the SMEs in the construction industry.

The two groups include 20No, SME failure cases in the industry and 5No. Senior professional experts who are leading policy/opinion shapers in the construction industry and the country at large,

3.3.3 Choices

The mixed method were considered best suited for this research to provide quantitative and qualitative data. This will give an indication of the size of the industry and the magnitude to which the industry is affected by negative factors impacting on the SMEs in the construction industry, and qualitative data to establish the factors affecting the SMEs in the construction industry and how each of the factors affect the SMEs. In this research, the quantitative data provide a view of the extent and magnitude of the problem, while the qualitative data gave the data that resulted in tangible actionable findings and recommendations

3.3.4 Time horizon

This research has a cross-sectional time frame, but archival data collected and analyzed covered over 10 years, which was necessary for an objective conclusion in regard to performance of the organizations to be reached.

3.3.5 Technique and procedure.

In general data collection can be carried out by sampling, questionnaires, and non-structured interviews or focus groups. In this research exploratory data to support and confirm the believe that majority of SMEs in the construction industry have either stagnated or gone bankrupt instead of growing and taking their place as a sustainable industry creating employment in the countries of their establishment. The SMEs have therefore not taken their role as key players in the national economy as is the case in the developed countries. This data is to be collected by exploratory and archival research at the Roads authority, the National Construction Industry Council (NCIC) the Ministry of Supplies and Public Works, Malawi Building and Civil Engineering and Allied Traders Association (MABCATA) and other stakeholders with knowledge and records of the Industry.

The Primary data helped confirm that indeed the research problem exists and that it requires urgent solution. This data confirmed that payment paralysis was prevalent and one of the factors affecting SMEs in the construction industry and therefore required the attention. The data also established the particulars of some of the successful SMEs. The records contained particulars of some SMEs who had failed and who might be in the sample of the target group in the second phase of data collection by in-depth interviews with the view of getting information on causes of payment paralysis and possible strategies to improve sustainability of SMEs in the construction industry in Malawi.

Non-structured interviews conducted with selected senior expert professional managers who have experience at the Ministry of Transport, Roads Authority, and NCIC and the industry at large shall collect data on the policy and support afforded to local SMEs. These leaders have interacted with several SMEs as they led the organizations playing major roles in policy, employment, registration and regulation of the SMEs in the Construction Industry in Malawi. The data shall establish their understanding of the problem and the researcher shall seek their proposals for its solution for incorporation in a strategic legal framework to reduce the incidence and the effects of payment paralysis.

The questionnaire was administered to a representative sample of picked at random in accordance with the recommended sampling procedures and possesses (Sekaran and Bougie, 2010).The population of SMEs in the construction industry in Malawi in the year 2015 was obtained from the records of the subscriptions and registrations with the NCIC as 5,000.

Literature reviewed established that there are several formulae used to determine sample sizes given the population, the environment and consideration of degree of confidence that a sample size will give and the resultant degree of accuracy. Literature suggests that a confidence level of 95% and a margin of error of 5% are sufficient (Krejcie and Morgan, 1970 and (Research Advisors, 2008).

“Research advisors” (2006) has a table, which indicates that for a population of 5,000 for a confidence level of 95% and a margin of error of 5% a sample size of 357 should be considered. Sekaran and Bougie (2010), recommends that in a population of 5000, a sample size of 400 is adequate. However, 550 questionnaires administered to make allowance for non-responsive SMEs.

The author subscribed to “monkey Survey” for data collection and posted questionnaires to several SMEs falling in the random sample, which was simply picking every fourth SME on the list.

This method did not work well because majority of the SMEs did not have active email address and for those with email addresses, several experienced difficulties using the link provided to access the questionnaire and forward it using the “monkey survey.”

However, before the process could be completed, the supervisors advised that monkey survey was not the most appropriate software for analysis of data for a research of this nature and IBM 20 Statistical Package for the Social Sciences (SPSS) would be more appropriate.

With the assistance of four enumerators the processes of distributing the questionnaire to 800 SMEs was completed and follow up made to track and maximise on questionnaires returned, This improved the return rate tremendously.

Seven hundred and fifty (750No.) respondents completed and returned questionnaires. The questionnaires received advanced to the processes of data coding and entry in the IBM SPSS for data analysis to be carried out.

The analysis and evaluation give the results on the severity of the negative impact of payment paralysis on SMEs and the final phase of this research will be to propose strategies of reducing the negative effects.

Researchers are required to conduct the research within an acceptable ethical framework. Ethics are defined as a set of moral principles and rules of conduct and the application research ethics, prevents harming or wronging others (Morrow, V., 2007)

Graham et *al* (2007) observes that it is hard for people particularly the respondents in a particular research to assess or evaluate the efficacy of the information they are given about the research procedures because research is unfamiliar and technical. It is therefore upto the researcher to ensure they comply. The University of Bolton requires the researcher to acknowledge awareness to these requirements by signing a declaration form.

In compliance to Ethical issues, permission to conduct this research from all concerned clients and authorities and the University of Bolton were obtained. The author disclosed the nature of this research to the Director of Studies by submitting the questionnaire and all other tools used in interviews conducted in the survey. The author submitted Form RE1 in application for ethical approval of the research by the University of Bolton for ethical compliance and received written approval as attached in appendix B1b) and B1c

information available with the players in the construction industry.

The Archives had little information since the National Construction Industry Council NCIC of Malawi was established by an Act of Parliament in 1996 (Brushett, A., *et al*,2005) and commenced operations in 2000 when it started collecting base line data on the market laying down the rules and procedures for registration of players in the industry. The NCIC has therefore been collecting data on SMEs in the construction industry in Malawi for only the last 5 years, which is within the inclusion criteria set for this research to ensure that the latest data and research on the topic of study were latest and most update.

The information available from the literature review provided the baseline information of this research and provided the basis for development of the questionnaire used in the survey.

3.4 Methodology

This research had a methodology and activity sequence ordered to start with the (Burrel and Morgan, 1982) “four paradigms of Social theories” as presented in Figure 1 (page 85) below which defines the point of entry into the Saunders’s Onion. The aim and the objectives of the research then guided the author navigate the onion and consolidate the research method.

3.4.1 Research Philosophy and Methodological Choices

The methodology of this research was developed in agreement with views of (Holden and Lynch, 2004) who emphase on the importance of choosing an appropriate philosophical stance for proper design and utilisation of a research methodology, arguing that it is the only way a researcher can ensure that their methodology is really appropriate for the problem under research.

The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

..

Implementation of the recommendations of this research is expected to result in changing the operational environment of SMEs in the construction industry to ensure their sustainability and growth. In this respect, radical change was the desired outcome and as detailed by Saunders et al (2009, p120) the philosophical stance of radical change was found most appropriate, and the radical structuralism paradigm (Mark Saunders, 2008) was the best match for the governing philosophy as determined.

Saunders et al (2009) asserts that there are two approaches to research; the deductive and inductive approaches. This position is supported in the works of (Soiferman, 2010) which discusses and agrees with the works of (Trochim, 2006) and (Clark and Creswell, 2007) in respect to the considerations researchers need to make in the process of research design and choosing the appropriate methodology.

Trochim, (2006), (Creswell and Clark, 2007) (Soiferman, 2010, p3) agree that there are generally two “broad methods of reasoning which are the inductive and deductive approaches. They define induction as moving from the specific to the general, while deduction begins with the general and ends with the specific. They found that arguments based on experience or observations are best expressed inductively, while arguments based on laws, rules, or other widely accepted principles are best expressed deductively”.

Creswell and Clark (2007) view the deductive researcher as one who moves from "top down", and the inductive researcher as someone who has a "bottom-up" approach. These are the same views held by (Burney, 2008, p4) who agrees but refers to inductive approach as "hill climbing" and deductive approach as a "waterfall" with the Theory at the top of the hill and observations (or confirmations) at the bottom of the hill.

This research is based on general observations and experience over some years that SMEs in the construction Industry are not sustainable. The Aim of this Research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

This is therefore a case of arguments based on experience and observations, which are best, researched inductively. Inductive approach is defined as starting at a specific and moving to the general or "bottom-up" which is moving from specific to general (Soiferman. 2010, p3). The inductive approach takes advantage of observing limited cases of specific circumstances and deriving a conclusion which covers the general conditions (Zalaghi, 2016). This science (or research) is the process of transforming things believed, into things known (Alolo, 2007).

The author's observation and experience were that "some factors" in the market environment are affecting the sustainability of SMEs in the Construction industry in Africa negatively leading to stunted growth and eventual closure". At the conclusion of this research is the discoverly of the single factor impacting most negatively on sustainability of SMEs in the construction industry in Africa; case of Malawi.

Thwala et al, (2009) found that in Swaziland, no local SME in construction had been in business for over 15 years and that intense competition forced the SMEs to work on contracts with a profit as low as 2% leading to financial failures of emerging SMEs.

Olwale Fatouki (2014) found that in South Africa, the estimated failure rate of SMEs within the first five years of starting is between 70% and 80%.

In Botswana a failure rate of start-up SMEs in the construction industry of 80% has been estimated and the OECD (1996) reported that “less than one-half of SME start-ups survive the first five years. Kauffmann (2005) and Atsede Woldie (2008) found that there was limited research on SMEs, and none was available on the subject of SMEs in the Construction Industry in Malawi. “Little or inadequate effort has been made to identify the causes of failure among the local contractors in Swaziland” Thwala et al, (2009).

Kulunga (2012) found that, literature on SMEs in the construction Industry in Malawi was limited a situation which was confirmed by Emuze, F. and Kandangwe,S. (2013) who stated that there was scarcity of literature on SMEs in construction in Malawi.

It was observed that The National Construction Industry Council (NCIC) of Malawi was established through an Act of Parliament in 1996 but they had no information on incidence of failure of SMEs in the construction industry. The observation by the author that local SMEs had not made a significant mark since independence in 1961 and particularly since 1980 when the IMF and World Bank through SAPs actively encouraged growth of SMEs through transfer of non strategic commercial activities from the Government to the privatesector. These observations were supported by verbal testimonies by people in the industry in Malawi and literature review of the studies in other similar SADC states. OECD (1996) and the findings of (Thwala et al, 2009) in Swaziland confirm the limited research carried out indicate a failure prevalence rate above 80% is in the short run and 100% in 15 years of starting.

Table 1.2 below summarises the design of the most suitable research method for this research and adopts Saunders research onion observing its development in (Saunders,. 2008), (Saunders et al, 2009) as confirmed an complemented by the works of other scholars as Soiferman (2010), (Saunders et al, 2011) and (Saunders and Tosey, 2012)

3.4.2 Research Structure

The research structure has been designed to fit in the research philosophy and the recommended approaches towards development if theories as universally accepted by researchers as manifest in literature reviewed by the author. Literature reviewed guided the design of this research structure and was particularly influenced by the interaction of the four paradigms of Social theories described by (**Burrel and Morgan, 1982)** Saunders's Onion and the objectives of this research.

The interplay of social science theories, objectives and the aim of the research resulted in the design of the research method summarised in Table 1.2 below. This summary was the most suitable research method and adopts Saunders research onion observing its development in (Saunders, 2008), (Saunders et al, 2009) as confirmed a complemented by the works of other scholars as (Soiferman, 2010), (Saunders et al, 2011) and (Saunders and Tosey, 2012).and (Saunders, et al, 2019).

The objectives of this Research are:

The Objectives of this research are as follows:

a) To discover the leading factor in impacting negatively on sustainability of SME in the construction industry in Africa: case of Malawi

b) To establish the major Drivers of the leading factor discovered in a) above

c) To develop a strategic legal framework to eliminate or weaken the identified drivers towards reducing the incidence and severity of leading factor identified in objective a) above.

d) To have the findings and recommendations of this research practically applied and have the various elements of the strategic legal framework enacted into actionable laws towards improvement of the sustainability of SMEs in Africa.

To achieve these objectives the research activities and processes below were carried out:

a) Critically review the existing literature to learn and find the factors, which are already been established by other scholars, which inn their various ways impact negatively on the performance and sustainability of SMEs in the construction industry inn Africa leading to slow growth and bankruptcy.

b) Review literature to with particular focus on the construction industry in Malawi to understand the National policies in construction and gather information on the key stakeholders in the construction industry.

c) Review literature to with particular focus to list factors that affect SMEs generally and the SMEs in the construction industry in particular, tp learn what other researchers and scholars had discovered and build on it.

d) Understand the research environment through exploratory and archival research to compile information on the population and sustainability of SMEs in Malawi to establish the population.

e) Conduct a survey using questionnaires to obtain information on factors affecting SMEs in construction industry and incidence.

f) Analyse data collected to establish the leading factor in affecting most negatively on sustainability of SMEs in the construction industry in Malawi.

g) Conduct one on one interview with 20No. SMEs who failed, and collect data on their experience with the leading factor in negative impact on SMEs as identified in e) above. Learn of their journey from the time of ne impact and the progress towards exit from the construction industry. Receive information on the drivers of the lead factor and suggestions on recommended measures eliminate or weaken the stated drivers. Suggest ways to strengthen or shield SMEs in the construction industry against the impact of the lead factor in negative impact established in e) above.

h) Conduct one on one interview with 5No.policy/pinion leaders in the construction industry to confirm and validate the leading factor in negative impact on SMEs established in e) and seek in-depth information on drivers of the leading factor in causing the most severe negative impact on the SMEs in the construction Industry. Receive information on the drivers of the lead factor and suggestions on recommended measures eliminate or weaken the stated drivers. Seek suggestions on ways to strengthen or shield SMEs in the construction industry against the impact of the lead factor in negative impact established in e) above.

i) Develop a strategic framework for eliminating or reducing the intensity or the potency of the drivers identified in literature reviewed and suggestions received from the interviews in f) and g} above, and therefore reduce the impact of the leading factor discovered in this research and improve the sustainability and growth of the local SMEs in Africa and particularly in Malawi.

Based on the aim of this research, the objectives and this Research methods adopted, the author designed the Research flow Chart in Figure 1a) and the Research Processes Flow Chart in Figure 1b) here below. The research processes flow chart indicate the interaction of all activities, the research processes, the research methods and the outputs in the write-up from chapters one to Chapter seven in the Thesis from expression of the Aim of the completion of the Research thesis.

Figure 1a) Research Flow

Aim of Research

The aim of this research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi, and develop a strategic legal framework for eliminating or reducing the incidence and severity,of the effects of the leading factor in impacting negatively on SMEs to improve sustainability of SMEs in the construction industry.

OBJECTIVE a)

To discover the leading factor impacting negatively to the growth and sustainability of SME in the construction industry in Africa: case of Malawi

RESEARCH METHOD (Mixed)

Exploratory, archival Research and Literature review to establish known factors that impact negatively on SMEs in the construction industry in Malawi. Mixed Methods of Data Collection were adopted with both qualitative and quantitate data, Questionnaire on a random Sample of 800 was administered.

OBJECTIVE b)

Establish the major Drivers of the major factor identified in a) above and collect information on experience of the 20 failure cases and receive on suggestions and recommended measures eliminate or weaken the drivers stated.

RESEARCH METHOD (Qualitative)

Questionnaire and one-on-one interviews on a target group of 20 SME failure cases

OBJECTIVE c)

Establish the major Drivers of the lead negative factor identified in a) above and collect expert and professional information of the major drivers, suggestions, and recommendations on the best measures to eliminate or weaken the identified driver.

RESEARCH METHOD (Qualitative)

Interviews on a target group of from 5 policy/Opinion Leaders in the industry. This Data shall be applied in development of the Strategic Legal Framework

OBJECTIVE d)

To determine the considerations to be addressed in the process of the Design and development of the strategic legal framework to improve sustainability of SMEs.

RESEARCH METHOD (Qualitative)

Collect data in interviews and literature review of comparable situations and processes in the world and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered in a) above.

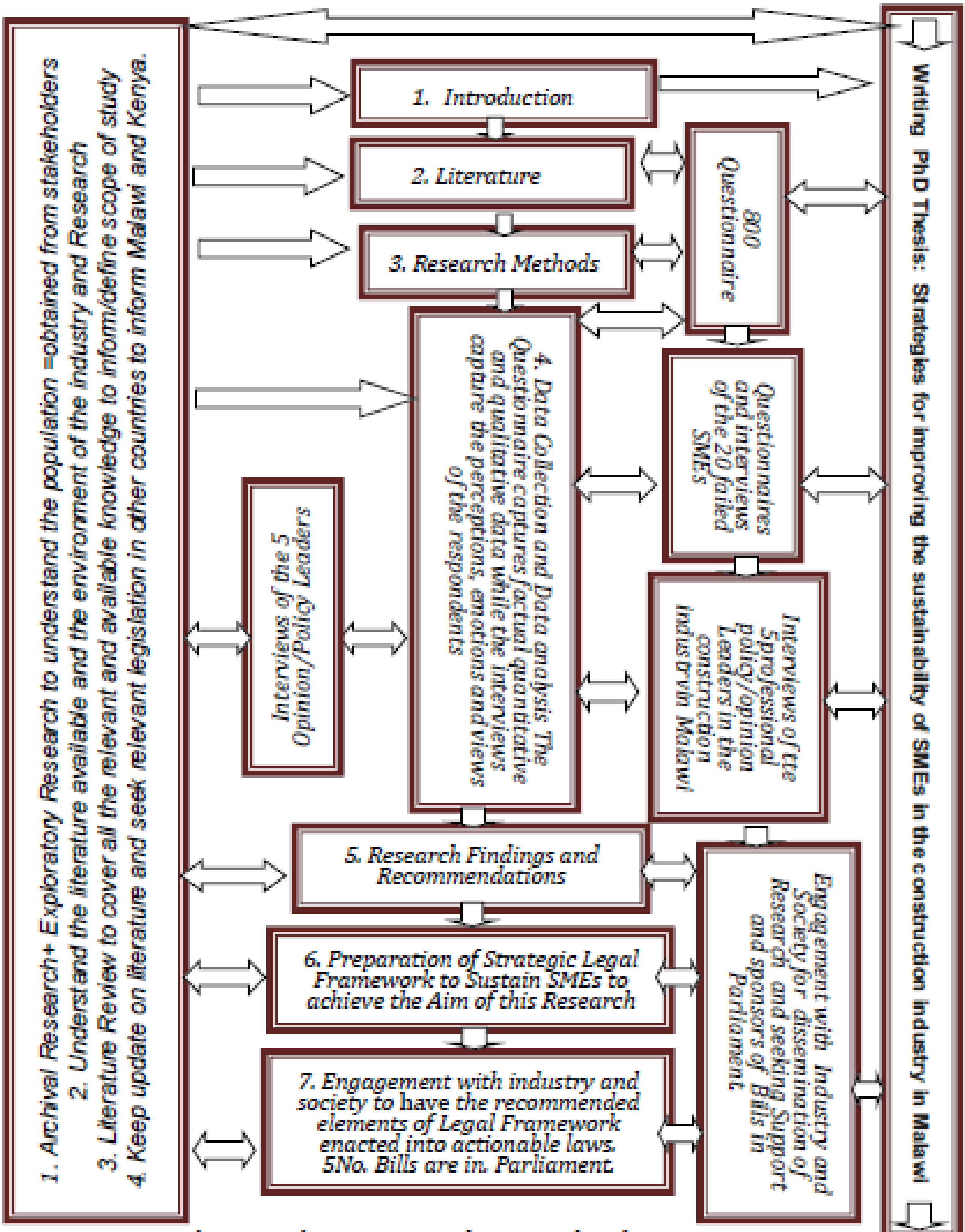


Figure 1b: Research Processes and Activity Flowchart

CHAPTER FOUR

4. DATA COLLECTION AND ANALYSIS

4.1 Summary

Data was collected in a survey which was by questionnaire. 800 questionnaires were distributed which realized 750 respondents. The information collected has been data coded to the IBM 20 Statistical Package for the Social Sciences (SPSS) which was used to process the statistical calculations and analysis.

It became necessary to administer questionnaires to a large number of SMEs because it was realized at the very early stages of data collection that although some SMEs had been in the field for a long time, they had not been awarded contracts continuously and it was observed that they were not able to capture the events in the industry during their period of inactivity. Others had entered the industry more recently and had not been active over part of the targeted period which is basically from 1996 to 2015.

The choice of the period is based on the year 1996, when the regulating Authority, National Construction Industry Council (NCIC) of Malawi was created by an Act of Parliament and became effective in registration and regulation of the SMEs in the Construction Industry and therefore records of SMEs were kept. It was indeed these records that were used in the random choice of respondents. Year 2015 is the year the survey was carried out.

4.2 Introduction

Literature Reviewed and exploratory research carried out identified several challenges to the SMEs in the construction industry in Malawi. However, no detailed research was found on any of the documented challenges and in some cases the author found only a mention. Observing that the objective of this research is to explore and highlight the factors which impact negatively on growth and sustainability of Small and Medium Entrepreneurs (SMEs) in the construction Industry in Malawi and find strategies of reducing the negative effects (of the identified factors) on SMEs in the construction industry in Africa, with particular reference to Malawi.

The process and the outcome of this research shall contribute in filling knowledge gap which exists in this field as manifested by the continued lack of growth and failure of start-up SMEs in the construction industry in the developing countries with particular reference to Malawi.

To achieve these goals, the researcher carried out the activities described here below to obtain data which was analyzed to reach the research findings recorded in this chapter.

- Critically review the existing literature with a view to establish the factors affecting the performance of SMEs in the construction industry leading to slow growth and bankruptcy.

- Critically evaluate existing literature on SMEs in the Construction Industry to ascertain whether there are any strategies to mitigate the negative effects of these factors in the construction industry in Malawi or elsewhere.

- Collect primary data in exploratory and archival research from the National Construction Industry Council (NCIC), Ministry of Supplies and Public Works, who are responsible for the registration, classification, and regulation of SMEs in the construction industry in Malawi. MABCATA, who The data will provide information and insight on the population of SMEs in the construction industry in Malawi and how that number has varied to confirm that the research hypothesis is supported by recorded data.

- Develop the tools and conduct a survey using questionnaires with a view to establishing the negative impact of each of the identified factors on SMEs in Malawi and attempt to determine the most significant of the factors.

Conduct one on one interview with the opinion leaders and policy makers in the industry to seek suggestions and proposals on strategies to reduce the effects of the most significant of the factors and improve the sustainability of SMEs in the developing world with particular reference to Malawi.

Literature reviewed yielded a number of factors affecting the growth of SMEs in the construction industry negatively and therefore inhibiting their growth and sustainability leading to high incidence of bankruptcy and closure for start-ups (Doing Business, 2018, pp3; Doing Business, 2011, pp3; Kinyua, 2014; Sitharam, and Hoque, 2016; Moorthy, *et al,* 2012) Paul J. Kulemeka, *et al* (2015)

The questionnaire was designed to test the factors that affect SMEs negatively which had been documented by different authors in reference to various types of SMEs.

The questionnaire for survey was designed to enable the respondents to test the challenges recorded below and indicate the ones they have experienced and categorise them in a hierarchy. The respondents were requested to identify the three challenges which had affected them the most negatively and rank the three challenges in their order of degree severity of the negative impact.

a) Obstructive business environment to SMEs

b) industrial polarization

c) poor leadership in management

d) delayed payment

e) Limited access to investment

f) Access to credit and financing

g) high lending rates

h) outdated policy, legal and regulatory framework

i) unreliable and costly economic infrastructure

j) seasonality

k) Corruption

l) Limited work opportunity

4.3 The Population of SMEs and Sampling

There are several active players in the construction Industry in Malawi including individuals with varying levels of training, expertise and capacity. The author used the definition of SME as an entity with a minimum of 10 and a maximum of 250 employees" as defined by the European Union and in agreement with Verheugen (2005) and Vedanthachari (2007).

In order to ensure that data was collected from entities befitting the definition of an SME, and therefore ensure that correct and credible data was obtained, the research limited its respondents to those who had satisfied all the set standards and conditions as to qualify for registration by the National Construction Industry Council (NCIC) who are the regulators of the entrants in the industry.

The population of SMEs in the construction industry in Malawi in the year 2015 was obtained from the records of the subscriptions and registrations with the NCIC as 5,000.

Data was collected from 750 companies using a questionnaire which was analyzed using SPSS20 and it was established that the leading factor in impacting negatively on the growth and escalating non-performance of entrepreneurs in the construction industry in Malawi is payment paralysis. No literature is available on this factor which is the single factor with the most devastating impact on the growth and sustainability of SMEs in the construction industry in Malawi.

Observing that the objective of this Research is to establish the factors which impact negatively on sustainability and growth of SMEs in the construction Industry in Malawi and find strategies of reducing the impacts the author identified twenty (20No.) SMEs which had discontinued operations as a result of the adverse effects in the environment and carried out a survey with a questionnaire with managers of the SMEs which had stopped operations with a view to establish the following:

- Confirm that their sustainability had been impacted by payment paralysis
- Get their views on causes of payment paralysis
- Get suggestions on how to reduce the causes of payment paralysis

The author then had one-on-one non structured interviews with five opinion leaders in the industry to get more information on the causes of payment paralysis and their suggestions on how to reduce its effects on SMEs performance and sustainability.

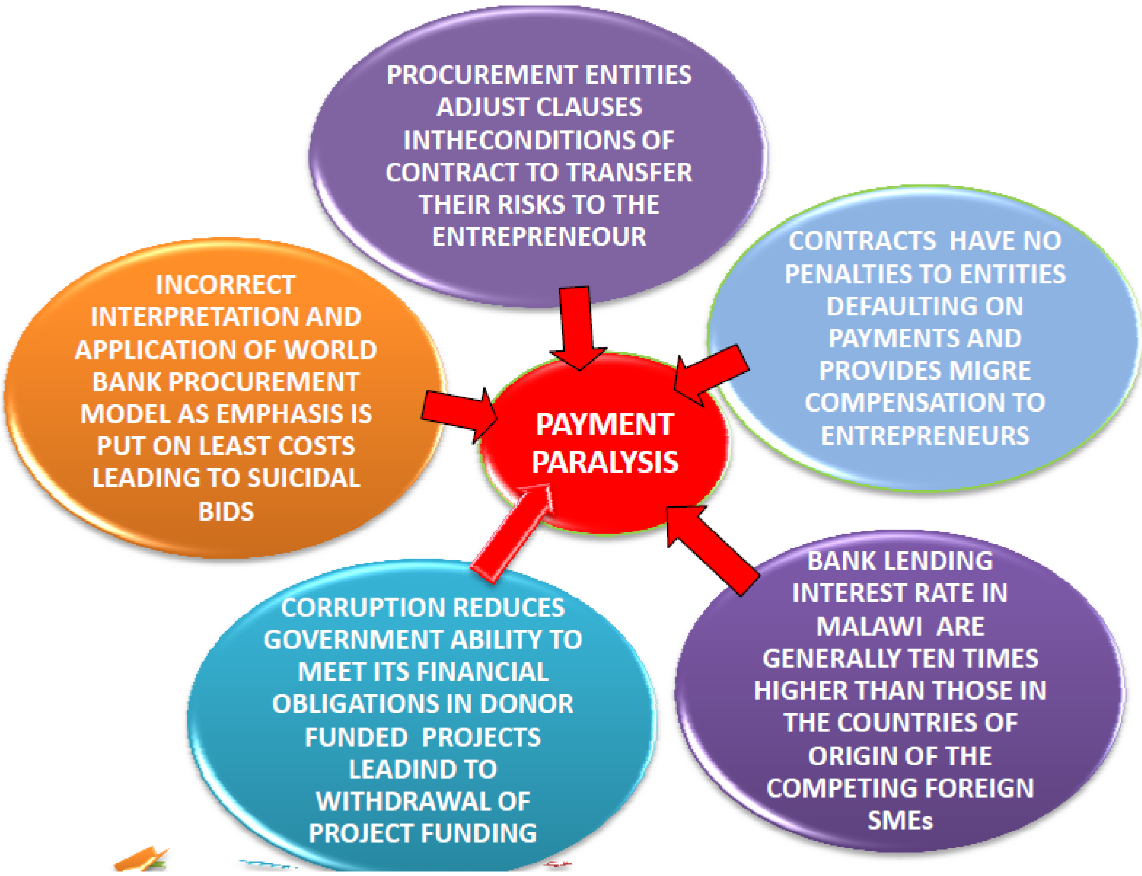


Figure 2: Drivers of payment paralysis in the construction Industry in Malawi

Some of the important outcomes which have a direct link to the answers to the questions raised in this research are indicated in the tables here below which are indicative of among other parameters, the following:

1) Distribution of SMEs in size spectrum defined in their categories of registration

2) Period in business.

3) Contracts successfully completed over the period of operation.

4) Prevalence and effect of payment paralysis

4.4 Data Analysis Outcomes

4.4.1 Category of SMEs as classified by NCIC

The data collected and analysis using SPSS as in Table 4.1 here below indicates that out of the 750 respondents, 213 SMEs who responded to the interview representing 28.4 % of the SME in the construction Industry in Malawi have the capacity to carry out contracts with a total value not exceeding MWK5.0millon (USD10,000.00) while 12.1 % are for up to MWK 10.0 Million(USD20,000.00), 22.1% are for up to MWK 100.0 Million (USD200,000.00) and 12.1% for up to MWK500.0Million (USD1.0 Million) and 0.3% in the unlimited (amount) category which project value above USD 2.0 Million

Table 4.1 : Q 1.6 What category is your firm currently in NCIC register

Category	Frequency	Percent	Valid Percent	Cumulative Percent
0-5 Milion	213	27.26	28.40	28.40
K 5-K10 milion	158	20.22	21.07	49.47
10-100 milion	166	21.25	22.13	71.60
100-500 milion	91	11.65	12.13	83.73
K500-1 Billion	44	5.63	5.87	89.60
Unlimited	2	0.26	0.27	89.87
No Responce	76	9.73	10.13	100.00
Total	750	96.00	100.00	
Source: SPSS Output George Kaggiah				

4.4.2 The annual turnover of SMEs in Construction Industry in Malawi

The results of the survey as in Table 4.2 shows that 56 % of the SMEs in the Construction Industry in Malawi have an annual turnover of less than MK4 Million (1USD=450MWK) and for 92% of the SMEs, the turnover is below MK 400Milion (below € 1.0 Million) .

Table 4.2 : Q 1.7 What is the current turnover of your firm currently

Turnover	Frequency	Percent	Valid Percent	Cumulative Percent
0-4 Million	418	53.9	56.0	56.0
4-40 Million	136	17.5	18.2	74.2
40-400 Million	136	17.5	18.2	92.4
Over 400 Million	45	5.8	6.0	98.4
No response	12	1.6	1.6	100.0
Total	747	96.3	100.0	
	776	100.0		

4.4.3 Comparing Turnover of SMEs in Malawi with those in Europe

Table 4.2 above indicates that over half (56.0%) of the SMEs sampled realized a Turnover of between MK 0 -4.0Millionn which a maximum of USD 9,090 per annum at the prevailing exchange rate of 1USD to MK440 as at June, 2015 when the survey was in progress. Out of the 750 respondents, 17.5 % having a turnover of upto MK40.00 Million (USD90,000.00),136 No. (17.5 %) had a turnover of MK400.00Million (USD900,000.00), and 45No. (5.6%) had a turnover exceeding MK400.0 Million (USD900,000.00),

This confirms that the turnover of 50 million euros and/or an annual balance sheet total not exceeding 43 million euro (European Commission, 2005) criterion used in the definition of SMEs in Europe, is about 50 times higher than that realized by SMEs in Malawi and is therefore not applicable for defining SMEs in Construction Industry in Malawi.

4.4.4 Age of SMEs

Table 4.3 below also indicates that the SMEs in the Construction industry in Malawi are relatively young with 43.4% in operation for less than 15 years while 28% have been in operation for over 20 years.

Table 4.3: Q1.8 For How many years has your organisation been in operation

Age	Frequency	Percent	Valid Percent	Cumulative Percent
1-2	6	.8	.8	0.8
1-5	150	19.3	20.1	20.9
6-10	168	21.6	22.5	43.4
11-15	143	18.4	19.8	63.2
16-20	41	5.3	5.5	68.7
More than 20	213	27.4	28.5	97.2
No response	21	2.7	2.8	100.0
Total	747	96.3	100.0	

4.4.5 Number of Contracts Successfully Completed

Table 4.4 below shows that out of the SMEs in the survey, 46.3% had completed less than 10 contracts throughout their period of operation, and 53.6% had been awarded and had completed more than 10 contracts.

Table **4.4**: Q 1.9 How many contracts has your firm successfully concluded

Contracts concluded	Frequency	Percent	Valid Percent	Cumulative Percent
0	27	3.5	3.6	3.6
1-2	99	12.8	13.2	16.8
2-5	84	10.8	11.2	28.0
5-10	101	17.7	18.3	46.3
over 10	402	51.8	53.6	99.9
No response	1	.1	.1	100.0
Total	750	96.6	100.0	

4.4.6 Number of Employees in individual SME

Table 4.5 shows that 71.6% the SMEs surveyed have less than 50 employees and 21.9% have 51-100 Employees. Thus 93.5% of the SMEs in the survey have upto 100 employees and only 6.5% have more than 100 employees. The data is in agreement with the number of employees in SMEs elsewhere in the world where the normal number of employees has been recorded as 1-250. However, one notes that the distribution curve for the number of employees in SMEs in Malawi is skewed towards the lower end of the scale.

Table 4.5 : Q2.1 What the highest number of employees company (at any time

No. of employees	Frequency	Percent	Valid Percent	Cumulative Percent
1-50	537	69.2	71.6	71.6
51-100	164	21.1	21.9	93.5
151-200	30	3.9	4.0	97.5
201-250	18	2.3	2.4	99.9
No response	1	.1	.1	100.0
Total	750	96.6	100.0	

4.4.7 Non-Payments and Delayed Payments

Table 4.6 below, shows that 86.3% of the SMEs in the survey had been impacted upon by payment paralysis with 647 out of 750 recording that they had experienced delayed payments and suffered losses in the process.

Table 4.6: Q6.1 Did you experienced delays in payments of your invoices?

	Frequency	**Percent**	**Valid Percent**	**Cumulative Percent**
No	**83**	**10.7**	**11.0**	**11.0**
yes	**647**	**83.4**	**86.3**	**97.3**
No response	**20**	**2.6**	**2.7**	**100.0**
Total	**750**	**96.6**	**100.0**	

4.4.8 Average duration of delay in payment experienced

The respondents gave information on the average delay on payment of their invoices and they indicated as in Tables 4.7 below. 60.7% if the SMEs sampled had suffered delay of up to 8months, while 21.2 % suffered delays of up to 1year and 1.6 up to 2 years. Delayed payments are the leading factor that has the most devastating negative impact on SMEs.

Table 4.7: Q6.3 On average what duration of delay in payment to your invoices?

Duration	**Frequency**	**Percent**	**Valid Percent**	**Cumulative Percent**
1-2 months	56	7.2	7.5	7.5
2-4 months	178	22.9	23.7	31.2
4-8 months	221	28.5	29.5	60.7
8-12 months	159	20.5	21.2	81.9
1-2 YRS	12	1.5	1.6	83.5
no response	124	16.0	16.5	100.0
Total	750	96.6	100.0	

4.4.9 Compensation for Delayed Payment

Table 4.8 shows that 62.1% of SMEs sampled, had worked on contracts which had inadequate provisions for compensation for losses incurred due to the interest charges. The respondents also stated that the Contract Documents did not protect the SMEs against risks arising from delayed payments.

Table 4.8: Q6.6 Did contract s provide compensation on late payments adequately?

Is compensation for late payments adequate		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	No	466	60.1	62.1	62.1
	yes	67	8.6	8.9	71.1
	No response	217	28.0	28.9	100.0
	Total	750	96.6	100.0	

4.4.10 Rating and Ranking of the negative factor experienced

The Questionnaire had a list of factors affecting the SMEs in the construction industry negatively and the respondents were requested to rank of the factors in their degree severity acoording to the degree of the devastation each of them caused upon SMEs they affected. Tables 4.9, 4.10 and 4.11 were derived from analysis of the data received.

Tables 4.9, 4.10 and 4.11 shows the SMEs views and experiences in regard to the severity of the negative effects of each of the negative factors identified and included in the questionnaire. In Table 4.9, 307 respondents equivalent to 40.9% of the sample indicated that delayed payments is the leading factor that has the most devastating negative impact on SMEs.

Table 4.9: Q7.5 The first most devastating negative factor to SMEs

Description of negative factor	Frequency	Percent	Valid %	Cumulative %
Obstructive business environment to SMEs	0	0	0	0
industrial polarization	6	.8	.8	7.1
poor leadership in management	61	7.9	8.1	15.2
delayed payment	307	39.6	40.9	56.1
Limited access to investment	39	5.0	5.2	61.3
Access to credit and financing	88	11.3	11.7	73.1
high lending rates	10	1.3	1.3	74.4
outdated policy, lega and regulatory framework	3	.4	.4	74.8
unreliable and costly economic infrastructure	47	6.1	6.3	81.1
seasonality	20	2.6	2.7	83.7
Corruption	12	1.5	1.6	85.3
Limited work opportunity	110	14.2	14.7	100.0
Total	750	96.6	100.0	

4.4.11 The negative factor ranked the second most damaging of all

From Table 4.10 it was found that 18.4% of the SMEs put delayed payment as the second factor with most negative affects emphasising and supporting the views of the 40.9% respondents in table 4.9 who found delayed payments, the leading factor that has the most devastating negative impact on SMEs in construction industry in Malawi.

Table 4.10: Q7.5 The Second Most devastating Challenge to SMEs

Description of negative factor	Frequency	Percent	Valid Percent	Cumulative Percent
Obstructive business environment to SMEs	34	4.4	4.5	4.5
Industrial Polarization	75	9.7	10.0	14.5
Poor Leadership in Management	35	4.5	4.7	19.2
Delayed payments	138	17.8	18.4	37.6
Limited access to investment and trade opportunities	52	6.7	6.9	44.5
Access to credit and financing	98	12.6	13.1	57.6
High lending rates	35	4.5	4.7	62.3
outdated policy, legal and regulatory framework	55	7.1	7.3	69.6
Unreliable and costly economic infrastructure	89	11.5	11.9	81.5
seasonality	7	.9	.9	82.4
Corruption	47	6.1	6.3	88.7
Limited work opportunities	85	11.0	11.3	100.0
Total	750	96.6	100.0	

4.4.12 The Challenge ranked the Third most damaging of all

As seen from Table 4.11 21.1% of the SMEs in the survey, returned "Unreliable and costly economic infrastructure" is the third most negative factor affecting SMEs in construction industry Malawi with delayed payments featuring yet again at 12.8%.

Table 4.11 Q7.5 The Third most Devastating negative factor to SMEs

	Frequency	Percent	Valid Percent	Cumulative Percent
Obstructive business environments to SMEs	**7**	**.9**	**.9**	**.9**
Industrial Polarization	26	3.4	3.5	4.4
Poor Leadership in management of construction SMEs	22	2.8	2.9	7.3
Delayed payments	96	12.4	12.8	20.1
Limited access to investment and trade opportunities	39	5.0	5.2	25.3
Access to credit and financing	75	9.7	10.0	35.3
High lending rates	38	4.9	5.1	40.4
Outdated policy, legal and regulatory framed	93	12.0	12.4	52.8
Unreliable and costly economic infrastructure	158	20.4	21.1	73.9
Seasonality	48	6.2	6.4	80.3
Corruption	81	10.4	10.8	91.1
Limited work opportunities	63	8.1	8.4	99.5
Other	4	.5	.5	100.0
Total	750	96.6	100.0	

4.4.13 The incidence of Payment Paralysis

The author observes that 72.1% of the 750 respondent SMEs indicated that delayed payment was one of the Factors affecting them most negatively with an overwhelming 40.9% ranking payment paralysis as the leading and most devastating as in Table 4.9 while 18.4% found pay paralysis the No.2 most devastating factor

Table 3 summarises answers from the 750 respondents who were asked whether they considered the provisions of the contract to have adequately covered them for compensation relating to damages and losses associated with non payments and delayed payments. 602No. (80.3%) of the 750 respondents indicated that the contract documents did not address the event of non-payment and delayed payments sufficiently

Table 4.12: Q7.5 : Are the provision of Contract document adequate in dealing with delay payments?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	116	14.9	15.5	15.5
	No	602	77.6	80.3	95.8
	No response	31	4.0	4.1	99.9
	Non responsive	1	.1	.1	100.0
	Total	750	96.6	100.0	

4.5 Experiences of SMEs exposed to Payment Paralysis

Upon analysis of the data collected in the first phase of the research; literature review and the survey by a questionnaire it was established that payment paralysis was the factor which had the most significant negative impact on SMEs in the construction industry in the construction industry in the developing countries; case of Malawi.

The researcher embarked on another stage of the research which involved the process identifying and engaging with some of the SMEs who had ceased operations in a view to find out to what extent their failure could have been influenced by payment paralysis. The author consulted with the NCIC and obtained data of twenty (20No.) SMEs in the construction Industry in Malawi who had not renewed their silences for the previous three years. It was considered that if an SME had not renewed their lisence for three years consecutively, then they were no longer in operation since the standard bidding criteria required every bidder to provide evidence of having been actively involved in construction over the last few years. The Procurement entities also required SMEs to provide audited accounts; Completion certificates from Clients and Tax compliance certificates to demonstrate continuance of the particular SME in operation over the last three years. It would therefore make it increasingly difficult for an SME to become active again if they had not carried out any contracts over the previous three years..

The data collected was in two stages starting with a questionnaire similar to the questionnaire administered to the initial group of 800 but with specific questions seeking their experience during the period of waiting for the delayed payment. Then a non-structured one on one interview was conducted with aim of getting some information on the eventual realisation that the anticipated payment would not salvage the organisation and the cessation of construction activities for the particular SME.

4.5.1 Data collected using the Questionnaire and its Analysis using the SPSS20.

The data collected using the Questionnaire was Analysed with the SPSS20 software provided by UoB with the outcome presented in the tables 4.13 to table4.20 here below.

The majority of the 20No. SMEs identified as having been registered and then ceased to license and therefore ceased to operate in the construction industry in Malawi, 76% were registered between the years 2001 to 2009. 24% were in the 0-5Million category while a majority at 57% was in the MK5-10million. 90.5% experienced payment paralysis as a result 85.7% of the SMEs were unable to pay their workers that led to court judgments requiring them to pay the workers and 90.5% had their properties auctioned. 68.4% of the SMEs suggested strongly that the best remedy to payment paralysis was a review of the Contract documents to improve the management of contract and particularly make the environment better for the SMEs.

47.6% felt that MABCATA and NCIC had not done enough and that the two bodies should review the market situation and create laws that would make payment paralysis a thing of the past.

Table 4.13: Year registered with NCIC					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	2000	1	4.8	5.0	5.0
	2001	5	23.8	25.0	30.0
	2003	4	19.0	20.0	50.0
	2004	2	9.5	10.0	60.0
	2007	1	4.8	5.0	65.0
	2009	4	19.0	20.0	85.0
	2010	1	4.8	5.0	90.0
	2011	1	4.8	5.0	95.0
	17	1	4.8	5.0	100.0
	Total	20	95.2	100.0	
Total		20	100.0		

Table 4.14 NCIC current Category					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0-5 million	5	23.8	25.0	25.0
	5-10 milion	12	57.1	60.0	85.0
	10-100 Million	3	14.3	15.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Table 4.15: Years in Operation					
		Frequency	Percent	Valid	Cumulative %
Valid	1-5	2	9.5	10.0	10.0
	6-10	8	38.1	40.0	50.0
	11-15	8	38.1	40.0	90.0
	16-20	2	9.5	10.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Table 4.16: Effects of delay payments					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Failing to pay employees	18	85.7	90.0	90.0
	huge interest accumulated in bank	2	9.5	10.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Table 4.17: Subjected to Auctioneers and debt Collectors as a result of delayed payments					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	19	90.5	95.0	95.0
	No response	1	4.8	5.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Table 4.18: If yes what has made you not to register and yet will revamp?					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	they charge an accrued fee	1	4.8	5.0	5.0
	fear for being deleted in the data base	2	9.5	10.0	15.0
	No response	17	81.0	85.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Table 4.19: Suggested remedy to delayed payments					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	NCIC should bring a new model of dealing with this cases	4	19.0	20.0	20.0
	the documents should be revised	6	28.6	30.0	50.0
	d MABCATA should find a legal ıich can present the cases to the mediation	6	28.6	30.0	80.0
	Seeking for court mediation	4	19.0	20.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Table 4.20: Influence of NCIC and MABCATA in dealing with delayed payments					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	revising documents	13	61.9	68.4	68.4
	find a legal entity to act as a mediator	5	23.8	26.3	94.7
		1	4.8	5.3	100.0
	Total	19	90.5	100.0	
Missing	System	2	9.5		
Total		21	100.0		

Table 4.21 : Assurance for problem solving					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	The biding and contract documents to be revised	4	19.0	20.0	20.0
	Change of MABCATA strategies in dealing with delay payments	5	23.8	25.0	45.0
	setting up rules to deal with this problem	7	33.3	35.0	80.0
	removing corruption	3	14.3	15.0	95.0
	No response	1	4.8	5.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

4.5.2 Interviews with owners/managers of SMEs Out of Operation

4.5.2.1 Brief

Many SMEs in the construction industry were registered between 2000-2014 In Malawi. These SMEs have been working under the licensing and regulation of the National Construction Industrial Council (NCIC) and are members of the Malawi Building and Civil-Engineering and Allied Traders Association (MABCATA) which unites them and affords them recognition with stakeholders status in the construction industry and therefore bargaining position. The expectation of these SMEs in the construction industry in Malawi is that registration or entry to these construction bodies will bring change and an end to the challenges they were facing.

Data collection and analysis for this research was conducted during the period 2012 to 2018. The aim of this research is to discover the leading factor in impacting negatively on the sustainability of small and medium enterprises (SMEs) in the construction industry in Africa; case of Malawi, and develop a strategic legal framework for eliminating or reducing the incidence and severity of the effects of the factor discovered to be leading in causing negative impact on the sustainability of SMEs in the construction industry in Malawi and Kenya.

4.5.2.2 Registration analysis

According to the data base collected from NCIC and MABCATA is shows that they are a lot of companies who registered, and they are failing to renew their registration to both MABCATA and NCIC.

The data collected from MABCATA and the interview with the officials of shows there is high percentage of dropouts of SMEs in the construction industry as indicated in data

in table 4.20 below which was obtained from MABCATA which is the voice of the local SMEs in the construction industry and mandated to represent and express their collective views, needs and demands to the government. SMEs desire to join and stay represented by MABCATA for the benefits which would arise from the bargaining power of such an organization if properly empowered by great numbers of SMEs. Comparison of the numbers registered by the regulatory NCIC in the period shows that the SMEs lack enough money to invest in MABCATA. As of 25 August 2016, registration was as in table 4.20 below while there were 5000 registered by NCIC.

Table 4.22 Analysis of Registration and renewal data (numbers)

YEAR	NEW ENTRANTS	RENEWED	DROUP OUTS	TOTAL
2014	116	00	00	116
2014-2015	87	7	109	203
2015-2016	38	30	192	241
2016-2017	38	18	223	279

The data presented in this table shows that the SMEs in the construction industry are unable to renew membership consistently once they have entered into the industry.

Table 4.23 shows the data in percentage presentation to emphasize the apparent high dropout rates of SMEs from active operations in the industry;

According to MABCATA registration data base shows that in the majority of cases when the SMEs have registered, they don't renew their registration.

Table 4.23: Analysis of Registration and renewal data (			
YEAR	REGISTERED (NUMERIC)	RENEWED (%)	DROP OUT (%)
2014	116	00	00
2014-2015	203	6.1	93.9
2015-2016	241	14.7	85.3
2016-2017	279	6.5	93.5

4.5.2.3 Challenges and suggested resolutions

a) Most of the SMEs are affected by delayed payments.

- In 2014 a lot of companies registered with NCIC and MABCATA, but few followed renewing their registration thereafter; meaning they could not operate and compete with other SMEs because they did not have licence and related valid certified documents necessary for bidding processes.

This situation implies that the SMEs who are not registering have withdrawn from being active in the construction sectors.

- From the data of this survey , that 90% of the SMEs have suffered from delay payments and due to this experience, they have lost all their assets in order to payback the bank loans by settling the debts they had with the workers and purchase of materials.

b) Impact of Delayed Payments.

In the years 2008 to 2010 there was a boom in construction industry was with a lot of work opportunities and as a result, during this period, a lot of start-up SMEs joined the industry. Even though things were like that, contractors enjoyed due to availability of many contracts national wide. The scenario changed when a slump in the industry came about in 2011. There were too many SMEs having a stiff competition over very few contracts and the clients changed the system of payments because they had too many suppliers and services contracts running but not adequate revenue or allocations to pay or to start new contracts; so, the contractors started dancing to a very difficult tune.

In the scenario for this interviewee as he narrated the events in his SME, which has dropped out are as described here. When the SME won the contract, the director got a bank loan to further the work and he purchased materials for the work and all the work thoroughly done with all due certifications made at the stages and periods set. When the time of payment came the client did not pay the SME in time and this made the SME suffer losses in a way that some of his workers who were not paid filed cases against him in court because they cold foresee that they had no hope of getting their wages otherwise. Meanwhile the bank loan interests accumulate with passage of time due to failure in paying the loan at the agreed time.

At the court a ruling was made requiring the SME to pay the workers after a month but since the client didn’t pay the SME it was not possible to execute the court order. So, the director of the SME suffered disposal of his possessions to comply with the court judgement to pay the workers and while the loan interest at the bank was also are accumulating at a high rate because of penalties due non compliance. He borrowed more money from other sources and paid the pay the workers. Five months later, the client paid him without any compensation due to delayed payments. The bank loan balsnce increased rapidly, enoumously due to compound interest applied, and the amount paid by the client was not enough to complete the payment due to the bank. He paid the sum received from the Client to cover for only part of the amount the SME now owed the bank, leaving a substantial balance which with the passage of time, the balance continued to compound to the extent he was unable to pay the loan. So, the sheriffs came with the bank loan officers to dispose the items he had deposited with the bank as collateral and they sold it in order to meet the balance of the bank loan. In the process the plot on which the director of the SME lived was sold leaving him in a desperate situation. The director expresses disappointment with the manner, in which the Employer had treated the SME to the extent that it was closed down and demoralising him and disabling him financially to the extent that he doesn't want to continue with the operations of the SME as he is suffering because of the way his client treated his organisation. The same scenario has been replicated, and many other SMEs have been closed, and the owners have been victims of payment paralysis and consider that they have been financially ruined for life.

From the SMEs overviewed it emerges that; they have approached the construction regulatory and representative bodies like NCIC and MABCATA to seek help on how they can deal with this problem of delayed payment, but it doesn't work so the main issue they have resolved is to quit until these problems are solved by the government

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c) NCIC and MABCATA have failed to address these problems.

- Suggestions have been sent to alert them how they can help the SMEs but instead of dealing with problem of delayed payments they provide support for the SMEs to access loans through the banks which is also a challenge in terms of interest rates. This is so because with continued non-payment or delayed payments the interest still accumulates which is a burden to the contractors.

- SMEs have suggested that NCIC and MABCAT should find a legal firm which will stand on behalf of SMEs to help them out if and when they are affected with delayed payments. The SMEs also requested that whenever an a SME presentied a query or a complaint to them, the legal firm will prepare the necessary claims and represent the SME in the court proceedings and this will give the SMEs chances of protection and participating in other contracts. This process will also lead the Employers treat the SMEs and the contracts will respect and mind the rights of the SMEs by giving their dues in time without challenges.
- Apart from this idea it has also been suggested that the Contract documents has to be revised to outlaw some tendencies with some Procurement Entities (PE) for example asking for payments of upto MK10,000 for SMEs interested to be prequalified in a certain project and or at tender stage they pay a fee to receive Tender documents. The managers interviewed felt that in some cases more than 50 SMEs wish to participate and such a payment is seen as an attempt by the PE to get money from SMEs including those who would not be shortlisted. Since only one SME will win the contract and a lot of money is spent by all interested SMEs for pre-bid site visits and time inputs of experts who prepare the dossier, this means that many of the SMEs just lose their funds. Affected SMEs appeal to NCIC and MABCATA will do to curb this problem.

d) The small SMEs are poorly equipped to compete with the larger ones

The small SMEs are suffering in the hands of the bigger ones because the classification of SMEs by NCIC only prohibits the SMEs of a lower classification from competing for works for the upper categories while the SMEs in the upper category are not prohibited to compete in works in a lower category.

There are some SMEs in the construction industry in Malawi with heavy capital outlay while some have low capital outlay and are not allowed to bid for works above a certain limit but according to contract bidding documents the big SMEs are allowed to compete in contracts across the categories. This gives the bigger SMEs a huge advantage in the cases where they choose to bid for works falling within the ambit of lower categories. This is a big challenge because the bigger SMEs always end up getting an elephant chance of participating in the work across the categories. The interviewee wondered how the small SME would survive if this tendency continued since they will find it increasingly difficult to get the work and based on business life cycle; a business grows as the performance is increasing. In this case do we expect these small contractors to grow?

It was suggested that the only remedy to this problem, ifs to have NCIC and MABCATA, specify who to compete on a certain range of works based on the capacity as defined in the category of SME

4.5.2.4 Corruption

The experts and opinion leaders interviewed indicated that corruption in Malawi was experience at two levels

- At National Budgetary level
- At project level

At the National Budgetary level, the national finance is siphoned out as in the cases of cash gate and maize gate leaving the national covers deficient and unable to support the projects and commitments made in the National Budget.

Malawi Ranks No. 120 out of 176 on transparency international corruption perceptions. In too many countries peoples are deprived of their most basic needs and go to bed hungry every night because of corruption while the powerful and corrupt enjoy lavish lifestyles with impunity (Jose Ugaz, 2016)

The Government is therefore unable to meet its obligations and commitments to project already included in the prevailing annual budget or those intended to commence as programmed. This information is neither available nor directly felt by the SMEs in the construction industry and therefore when a survey like the one carried out in this research is carried out, they do not perceive the events around them as having been caused by corruption (Charles Mchiocha, 2009).

The construction industry, in Malawi does not experience a lot of corruption but it is still one of the most serious problems, which the industry confronted.

The interview therefore indicated that corruption in a major driver of financial mismanagement and consequently fuel payment paralysis.

4.5.2.5 Training Deficiencies

The senior Engineers interviewed had held senior position in the Government of the Republic of Malawi for more than 10 years indicated that the Government had not offered sufficient training to SMEs in the construction industry and particularly the personnel at senior management and strategic level in Industry. they recognized that National Construction Industry Council (NCIC) and Technical Entrepreneurial and Vocational and Education Training (TEVET) had done commendable work in training of the middle level technicians like surveyors, works inspectors and artisans in large numbers and at affordable rates and the market had a reasonable number of such experts although saturation level had not been reached. In case of clerks of works and engineers, the country had a deficiency of suitably qualified experts.

It was observed that all EU World Bank and African Development Bank projects had a component for training of the client staff, but this was rarely accomplished because majority of the senior officers were reluctant to release junior officers for such training for Masters Degree or post graduate Diplomas because their long absence would affect the performance of the department.

This lack of post graduate training and professional qualifications has resulted in weak management skills and poor decision making in the industry resulting in poor instructions and leads to lost time and claims.

The training of graduate engineers to be professionals requires some hands-on skills to enable them to monitor, supervise and evaluate Construction activities. It also puts them in a better position to appreciate challenges and difficulties posed by site conditions or the material encountered and prepares them to give the correct and appropriate instructions, advice or guidance to resolve or eliminates a possible crisis. In the absence of such a skill, wrong instructions may be given leading to unsatisfactory outcome and significant remedial and maintenance works.

Understanding of contract documents and the distribution of project risks is another area which graduate engineers are supposed to be tutored before being allowed to manage major projects. Claims and Disputes are also an important area of training as it offers the professional Engineers a view of his powers and particularly the issues on which he has no authority.

Evaluation of claims and compensation for various events affecting the works in quality, progress and costs are important elements for project management and all project managers supervising SMEs in the Construction industry should be well acquainted with definition monitoring and evaluation of all aspects of the works. While the European Union, ADB and World Bank include a training component in their funding framework, such funds have gone unused, and the procuring entities should be made to see the importance of the training and be encouraged to use the funds fully.

4.5.2.6 Political Interference

The politicians make a lot of promises to their electorate and for them to deliver the promises they have to influence the authorities who are the custodians of the budget with a view to inclusion of the subject(s) of their promises.

The National budget is always constrained, and the inclusion of additional needs leads to diversion of funds from one project to another. This process which some experts rather than refer to as “Acting or Faith Planning” sometimes leads to commencement of two projects with the budget of only one, thereby leading to two incomplete projects for a lengthy period of time as the procuring authorities juggle with finds a workable dispensation to satisfy the political needs.

These requirements sometimes extend to commencement of many projects, roads, water, and schools etc in the same spirit of “acting in faith rather than planning” which progress very slowly as finances trickle in and are subject to high price and schedule escalations.

Unfortunately, such projects are not limited to the one area but could be widespread throughout the country. Limitation of political interference in development projects and having the political inputs at the project definition stage and not at implementation stage should be enforced

4.5.2.7 Political Corruption.

In many African Countries, there is a significant element of rewarding supporters of the incumbents politicians with supply services and construction contracts to pay them back for the financial and social support offered in the course of campaigns

This tread leads to a misunderstanding that all the SMEs who are awarded contracts at a particular time are supporters of the leadership in whose tenure of office the contracts were awarded.

This misconception causes the opposing political teams to perceive all the successful SMEs as their enemies. When there is a change of guard in the political arena all the SMEs who had contracts with previous Government become target for decommission and the starting point of the decommission process is usually a suspenpension of all payments and performance of unnecessary audit processes which could last for as long as 5 years. This mean that their payments are delayed for in 5 years resolving matters ensures that majority of the affected SMEs do not get clearance to offer their services to the new regime until such pending “corruption Cases” are resolved, and at gives the new political team time and opportunity to recruit their preferred SMEs and award them contracts.

This interruption of cash flows for SMEs every time there is a change in political players has had very negative impact on SMEs in the construction industry. It is very sad that these events occurs without any reference or input in any way from the SMEs Concerned.

An independent procurement body which is completely impervious of the political persuations should be put in place to ensure a seamless procurement process across the political charge and continue to uphold the qualified and performing SMEs while only punishing defaulters.

Political regional and tribal considerations must not be a tool for discrimination and .the relevant Act of Parliament should be revised to empower the office of the Director of Public Procurement (ODPP) in Malawi to ensure he is not subject to political manipulation.

4.5.2.8 Culture

One of the opinion leaders felt that culture has had a negative impact on the SMEs in the construction industry. The culture in Malawi encourages generosity and celebrations and it is quite usual for the directors of the SMES to divert the monies paid for in advance payment for contracts just commenced to buying luxurious vehicles or taking an early holiday to Mangochi in Malawi or to other destination abroad.

This diversion of resources deprives the ongoing construction works of resources in cash flows, materials, equipment and labour thereby impacting on production and cash flows. The culture is also generally forgiving and even after such a director of an SMEs has mismanaged the company, the project managers hesitate from applying the punitive provisions in the contract such as liquidated damages clause. The experts interviewed could not recall any SMEs who had been charge liquidated damages or had equipment confiscated and auctioned to compensate the Employer, who could be a private co-operation or the Government of Malawi, for losses incurred due non performance in the contracts.

The experts also seemed to suggest that in some cases the project managers fear that if they applied the punitive clauses in the course of discharging their duties, they might suffer at the hands of witch craft and therefore found a middle ground which would not punish the SME involved. The reverse is also considered true that SMEs would fear confrontation with a project management official who delayed certificates and invoices for work done.

Adam Ashforth, (2015) records that in a study conducted in 2012 by the association of secular humanists and funded by the Norwegian Embassy, it was concluded that 10.6 % of the sample considered themselves victims of witchcraft in the recent past and within the last two years.

Thomas McNamara, (2015) Van Dijk (2001) found that there was a witchcraft cleansing ceremony in the 1930s and to date, witchcraft rumours and accusations are rampant. These works indicate that the expert interviewed believed, just as the informants of the work of Thomas McNamara, (2015) that some people in Malawi will be influenced and act in fear of witchcraft.

The Environment therefore is that of calculated tolerance and forgiveness to avoid escalation of a confrontation. This culture the expert suggested may inhibits application of the contract to the ‘Letter’ on both sides; the SME and the procuring Entity (PE) and therefore the termination or the liquidated damages clause are never applied while conversely few SMEs go to court to demand redress for late payments or in disagreement to evaluation of their claims.

4.5.2.9 Procurement Generally

The opinion leaders interviewed indicated that the procurement process did not focus on encouraging the participation of local SMEs because the size of many Construction Contracts was too large for majority of the local SMEs and therefore only one or two could effectively compete in the International Competitive Bidding (ICB) because of the set eligibility and capacity criteria.

The Eligibility Criteria demands several years of experience and proof of successful completion of several works of similar complexity and therefore does not leave room for an SME who have Successfully completed works of a lesser value but with similar elements of work to be allowed to bid. The capacity criteria also disqualify majority of the Local SMEs because they cannot show proof of ownership of the equipment required to carry out the works or get a letter from well known organization who hire equipment such as those required for the subject project. The local SMEs also fail to demonstrate that they have the financial capacity to acquire equipment or materials as the Invitation to Bid (ITB) may prescribe.

This gives the International SMEs who usually have over 50 years of existence and have built a good relationship with reputable banks, insurance companies and equipment providers and therefore submit a company brochure with many projects over the years and all the backups required for resourcing the works. From the dossiers submitted, the foreign SMEs score high because they demonstrate that the risk of failure or an abandonment of the works is nonexistent, while the young local SMEs are perceived as a risk.

4.5.2.10 Award of tenders to the “lowest bidder”

The interviewed experts confirmed that the term “lowest bidder” may have been misused or misinterpreted and has lost the original meaning as prescribed by the

World Bank and other funding agencies who coined the phrase “the lowest bidder evaluated bidder”. The phrase meant the lowest bidder considering their price, the quality and therefore duarability of the work to be delivered.by an SME who is also compliant and responsive to all the requirements for the successful completion of the works according to the bid evaluation report.

The opinion leader observed that government funded projects which use the “Development Fund” which finance set aside allocated and managed solely by the government. He also observed that the government are usually underfunded and as a result the onion leader believes that the PE is directed to award the contracts to lowest bidder in terms of the contract sum.

The opinion leader suggested that at times some SMEs who are known to be ruling party supporters end up winning a significant number of projects implemented under the development fund. The Employer also makes an effort to clear the debts of such SMEs at the earliest opportunity. The spirit of teamwork is mutual as these SMEs are also seen by the observer as being protective of the interests of the government of their party and would not complain publicly even when payments are not made in time. In such situations the supervising engineers may experience some pressure to make hurried approvals as the quality of the works.

The opinion leader said that in the view of some experts, as this practice of awarding contracts to “the lowest bidder” rather than “the lowest evaluated bidder” has been repeatedly authorized and quality of works has not been high on the performance assessment. A culture of taking such processes of project management as the “normal process” has slowly emerged and non-engineering leaders in both government and political arena have in some instances found it appropriate to demand such a treatment of projects in their areas of influence.

4.5.2.11 Discussion of Data Analysis Results

Table 4.6 indicates that 86.3% the SMEs interviewed have suffered delayed payments of up to 2 years and suffered the negative impact of rapid accumulation of compounded interest on loans from the banks. It was also established that 62.1% (Table 4.8) of SMEs worked on contracts which had inadequate provisions for compensation for losses incurred due to the interest charges and escalation of prices which arise and made worse by the longer completion period which result due to slow progress as a result of delayed payments. Table 4.8 shows that 62.1% SMEs found that Contract Documents are unfairly prepared and do not protect the SMEs as they do not allow adequate compensation to SMEs in regard to:

- Delayed payments
- Escalation of prices during the initial contract period
- Extension of time arising from slow performance as a result of non-payment.
- The tender Documents have some clauses which allow the Employer to fill as he finds it best suits his position particularly in regard to duration set for him to meet his obligations in the contract.

- The tender documents have some declarations that are required of the bidding SMEs to make which are seen as intimidating and sometimes cause some SMEs to hesitate in exercising some their rights under the contract as this would lower their scores in future bids. An example of such requirement is to state whether the SME has had a litigation history. The narrative of SMEs during their experiences of hardships one observes that their counter actions do not include taking the matter to the court because they are afraid of losing a chance of getting another contract with them and the partners in their supply chain.

Records for membership to MABCATA in table 4.22 above show that the SMEs in the construction industry in Malawi find it difficult to renew their memberships in MABCATA which the sole body uniting the SMEs in construction and seeking to defend them as the need may arise. Table 4.22 above show that during the period 2014 to 2017, 279 new members joined MABCATA but 524 members did not renew

Table 4.24: Registration Records

YEAR	New Entrants	Renewed	Dropouts	TOTAL
2014	116	00	00	116
2014-2015	87	7	109	203
2015-2016	38	30	192	241
2016-2017	38	18	223	279

their membership during the same period. This would imply the MABCATA suffered a net loss of 245members over this period.

On table 4.22 above, provided by MABCATA from their data base, one observes that a total of 55 SMEs managed to pay their annual subscription fees. This implies that some of the SMEs are not active and have pulled out. This is interpreted as an indicator that those SMEs may have become insolvent and had therefore failed in accordance to Peacock, R.W.(2004) definition failure mode b) ii. in which the owner becomes bankrupt for business reasons and the owner(s) or SME(s) exits the small business sector.

Had it all been well in this industry, the SMEs would have maintained their membership. In a business sector it is disheartening to find that only 6.5% of companies are able to progress while 93.5% drop out. This is an indication that; there are regrettable challenges of development in the country because when these SMEs are doing well it means the people’s lives is improving in the same way the SMEs growing. The Government would also grow as collection of revenue improved by collecting a lot through taxes collected when the work is done, purchase of materials during construction i.e., customs duty and renew of registration to construction bodies (NCIC and MABCATA).

One feels that if all the resolutions suggested can be implemented and followed up correctly this sector will improve because a lot of local investors would be interested to join and improve creation of wealth, GDP and reduce poverty.

4.6 Selection of the participants for the one on one non structured interviews

Two targeted groups with different characteristics were so targeted to offer different types of data. One group was composed of 20 SME failure cases and was targeted in order to give a blow by blow narrative of their journey and experiences from fully functional SMEs to their struggles to keep the contract running in the face of delayed payment in the believe that payment was soon to be made to the realization that the payment was too late to save them from the court cases by their staff, suppliers and in some cases; the Tax authorities. A story which ends with each of the 20No SMEs financially destitute.

The second targeted group is constituted of five (5No.) Senior Policy/Opinion leaders who have held senior office in the construction industry and played a part during in the course of their duties to influence policy, laws or management procedures affecting the SMEs in the construction industry in Malawi.

This second group, therefore, has watched the interaction between SMES in the construction industry, the Procurement entities and the National budgetary procedures and the management teams coordinating and regulating the players in the industry. They have therefore participated in giving National feedback in the state of the industry and recommendations of action(s) required to create harmony in the industry.

The first group is therefore targeted in order to highlight the problem they suffer while the second group with problem solving capability is invited to review and give recommendations of the best solutions. The constitution of each of the groups and the selection of participating members is as detailed in subsections 4.6.1 here below.

4.6.1 **Selection of the Participants in the Twenty (20No.) Failure Case** SMEs

In making the choice of the twenty (20No) failure case SMEs, the author sought the assistance of the NCIC to help identify and the SMEs who were performing well but have ceased to be active in the industry for some years suggesting that they had failed. This criteria was in accordance with (Rolffe Peacock, 2004) SME failure rule 2 and failure mode 2.b), in which the owner becomes bankrupt for business reasons and the owner(s) or the SME(s) exits the small business sector.

However, due to the high costs of litigation in Africa it is rare for MSEs who go bankrupt for business reasons to be declared bankrupt even when they are legally registered unless one of the debtors applies to a court of law for such a declaration to be so pronounced.

The NCIC assisted the author select 25 cases of failed SMEs as potential participants in the one on one non-structured interviews with the understanding that the author would interview the first 20SMEs located.

Table 4.25 here below, which is a screenshot of the SPSS data entry table for data captured in the questionnaire administered before the interview indicating some limited particulars of the participants. Question Q1.1 containing particulars of the SME has been removed.

Table 4.25 Screenshot of the questionnaire data preceding the Interview

	Q1.1	Q1.2	Q1.3	Q1.4	Q1.5	Q1.6	Q1.7	Q1.8	Q1.9	Q1.10
1	..	Managing ...	2004	2011	Civil engineering	5-10 milion	5-10 million	1-5	over 20	4-
2	..	11	2003	2000	Civil engineering	5-10 milion	5-10 million	6-10	5-10	
3	...	Managing ...	2001	2001	Building contractors	0-5 millon	0-5 million	6-10	2-5	
4	..	Managing ...	2000	2003	Building contractors	5-10 milion	5-10 million	11-15	2-5	
5	..	Managing ...	2003	2009	Building contractors	10-100 mill...	5-10 million	6-10	1-2	
6	..	Managing ...	2013	17	Building contractors	5-10 milion	5-10 million	6-10	1-2	
7	..	Managing ...	1997	2009	Building contractors	5-10 milion	5-10 million	11-15	2-5	
8	..	Managing ...	2001	2007	Building contractors	5-10 milion	5-10 million	6-10	1-2	
9	...	Managing ...	1997	2001	Civil engineering	0-5 millon	10-100 mill...	11-15	2-5	
10	..	Managing ...	2001	2004	Civil engineering	5-10 milion	100- 500 m...	6-10	5-10	
11	..	Managing ...	2001	2009	Building contractors	5-10 milion	10-100 mill...	16-20	2-5	
12	..	Managing ...	2000	2004	Building contractors	0-5 millon	5-10 million	11-15	2-5	
13	...	Managing ...	1997	2003	Civil engineering	5-10 milion	5-10 million	1-5	2-5	
14	...	Managing ...	1997	2001	Civil engineering	0-5 millon	10-100 mill...	11-15	2-5	
15	..	Managing ...	1997	2003	special contractor	5-10 milion	10-100 mill...	11-15	2-5	
16	..	Managing ...	2000	2009	Building contractors	10-100 mill...	5-10 million	6-10	2-5	
17	...	Managing ...	1997	2003	Building contractors	5-10 milion	100- 500 m...	16-20	over 20	
18	..	Managing ...	1997	2001	Building contractors	10-100 mill...	10-100 mill...	11-15	over 20	
19	..	Managing ...	2001	2009	Civil engineering	5-10 milion	10-100 mill...	11-15	5-10	
20	..	Managing ...	2001	2001	Building contractors	0-5 millon	0-5 million	6-10	2-5	
21										
22										
23										
24										

After the response to the questionnaire was completed, the one-on-one interview was conducted guided by the questions indicated in Appendix B3a) on page 292. Other questions were put to the respondent as were necessary to draw the objective relevant data.

4.6.2 Selection of the Five (5No) Policy/Opinion Leaders

As stated in section 4.6 above leaders, were selected based on their understanding of the industry, their previous degree of interaction with the stakeholders in the industry and their problem solving capability. Basically they have been invited to review and give recommendations of the best solutions to the problems presented by the 20SME failure cases as presented to him by the author in the interview.

The Policy/Opinion Leaders are among the most knowledgeable experts on the subject matter in Malawi and, as was expected, they contributed some aspects requiring attention that were not mentioned by the 20 SMEs interviewed.

Table 4.26 below summarises the **5Senior Policy/Opinion leaders'** interview respondents, but not identifying them by name or providing personal data.

Table 4.26: Selection of the Five (5No) Policy/Opinion Leaders		
No.	Professional Qualifications Description	Senior Position Once Held.
1	M.Sc. one of the few engineers in qualified in early 1970s Served in top level of the Ministry and to contribute towards formation of all the quasi government instructions, all policies in construction and training /qualifications required for SMEs and professionals in the industry.	Senior Consultant, Member of Parliament
2	M.Sc. Engineering, Fellow the Malawi Institution of Engineers over 20years of Design and management of major Donor funded projects in Malawi.	Chief Executive Office in leading construction works procuring Entity.
3	M.Sc Engineering, over 30 years in leadership at the Ministry of Public Works and Transport which manages all engineering disciplines and Training in Malawi. The Ministry is a PE for SMEs services as well as the policy formulator of the construction industry in Malawi.	Within top position Number Three Engineer in the Ministry of Public Works and Transport
4	BSc civil Engineering, 40years experience. Worked at the ministry of works, started own construction SME, run the company successfully and was regularly awarded major contracts by government and Municipal Councils, became an MP and with his experience had opportunity to contribute to policy.	CEO of a Leading Local SME in the Construction Industry and Member of Parliament
5	MSc in Engineering, over 30 years experience, Senior Manager of an institution Regulating qualifications and training of SMEs in Malawi. Conducts policy public awareness campaigns for SMEs and the industry.	Senior Manager in one of the leading regulators of SMEs in the construction Industry in Malawi

4.7 Challenges on data collection.

All the SMEs interviewed declined for any records to be taken even after the author had informed the respondents that information shall be confidential and shall not at anytime be disclosed to anyone.

This research collected data in four stages

a) Literature review and interviews in the form of conversations with stakeholders at the preliminary stages when the author visited their offices for introductions and asked general questions regarding the historical and current status of the industry.

b) a random sample of 800 active SMEs by questionnaire.

c) The targeted group of 20SMEs who had failed and ceased to operate at the time of interview.

d) The 5 policy/opinion leaders in the construction industry and the society generally. These are senior members in the construction industry who have played a part or held a position which helped shape the destiny of the SMEs in the construction industry in Malawi and the region.

The nature of the questions in the interviews and the questionnaire did not have questions phrased in a manner that were considered likely to generate responses that would point at any particular department, organisation, or an individual office as delinquent, but the respondents still did not answer some questions.

The contractors who had become bankrupt in the cause of carrying out some construction works were apprehensive of receiving visitors who are related with the construction industry because of the financial trauma and personal humiliation that they had gone through in the process of trying to recover their hard-earned dues but failed to collect.

These 20 cases of failed SMEs could not have the oral interview recorded and the majority only accepted to be involved in the interview in the hope that their participation would save others from going broke and the belive that the outcome of the research would form a basis for them to recover their lost wealth. This outcome wold also reinstate their social stature as it improved the market place for the SMES in the construction industry in Malawi and Africa generally.

These particular respondents were financially crippled after spending a lot of their time and money pursuing the delayed payments and on the other hand spent money for engaging lawyers to defend them from their debtors and some had some unpaid taxes. They were therefore apprehensive that some of the answers they gave and touched on some offices or personalities could trigger further painful experiences for them while they were in a defenceless situation.

All the five policy/opinion leaders in the construction industry started the interview with a statement to the effect that the matter under discussion was sensitive as it seeks to bring out the weaknesses in the policy, management and to some extent the governance of the construction industry and the SME sector generally. The Government has designated spokespersons at every level with each ministry and all institutions had an official spokes person. This arrangement is meant to channel information from one source to avoid contradictions and dissemination of unapproved information but it was also used to limit the government officials discussing some aspects of their work since they are “not allowed to issue statements”. This was a disclaimer to the effect that they would not give all the information in their possession. In this regard, they requested that no recording of the interviews should be made.

On the social cultural considerations some African communities believe in witchcraft, this would lead to fear of making some statements if the respondent believed that such statements could be construed to constitute an accusation to anyone.

This dimension is confirmed in works of (Adam Ashforth, 2015) and (Thomas McNamara, 2015) who confirm that people in Malawi believe in witchcraft with 10.6% of the sample actually considered themselves victims of witchcraft in the recent past and within the last two years. This implies that the proportion that believes in witchcraft but has not fallen victim is much larger. This would cause a significant proportion, perhaps up to 50%, of the respondents to withhold some pronouncements and to tone down some of the responsive

Such cultural believes may have influenced the outcome especially when one observes that at the time of the study there were several corruption scandals such as cash gate being investigated and the media was giving details of many others but corruption was merely acknowledged by the 750 respondents of the questionnaire survey.

The outcome recorded in subsection 5.5.1 shows that out of the 750 SMEs in the survey, only 12No.(1.5%) indicated that corruption was the first priority in reducing the negative effects on SMEs in the construction Industry while 47No. (6.1%) thought corruption should be second in the priority list and 81 (10%) placed it third on their priority list.

4.8 Position of the SMEs in the Contract Management Environment

The views of the respondents interviewed, the procurement process of construction works generally in Africa and particularly in the East, Central and Southern Africa, does not view the SME providing construction services as an equal party at the time of preparation of the contract documents, biding, and all other project management processes. It was argued that the SME carrying out the construction works and the Procuring Entity (Employer) are not equal parties in the Contract for the following reasons.

a) In majority of cases the Employer retains the powers of the Engineer.

b) The Engineer is the “Engineers Representative” who is an Employee of the Engineer who is the Employer and only exercises such powers as has been delegated to him by the Employer.

c) In Malawi the Procuring Entities are very few and the contractors consider that being in the good books of the PEs would pay dividends and thus the fear of any SME in the construction industry risking to be blacklisted is real and sometimes directs the actions and the responses of the SMEs

d) From a), b) and c) above, one deduces an environment where the SME Contractor is on one side while the Engineer and the Employer are together.

The one-on-one interviews with the policy/opinion leaders revealed that the SMEs in the Construction industry in Malawi operate in an environment where they are usually intimidated. They confirmed the observations made in d) above.

e) The Engineer also takes direct orders from his Employer and the that expectation that he would act impartially in managing the Contract is, in this context, irrational

f) The term Employer in Africa appears to be applied in the contract in its literal meaning to reflect the Employer as the master of his employees. The Engineer and the Contractor are Employees and therefore servants of the Procuring Entity (PE). It is noted that even the Contract Documents uphold this notion as the PE is usually with the titles Procuring Entity, Employer and the Engineer. This inherent reverence makes it quite difficult for the Contractor to imagine that they are equal parties in a contract with the Employer and therefore, cannot understand that they have equal rights in the contract,

g) In reference to c) above the Engineer is able to blacklist, those contractors and/or consulting Engineers who demand and pursue their contractual rights. Some SMEs are labelled “Claims Conscious” and are black listed only because it has been observed that they make a claim whenever they deserve.

h) The questionnaire attached in Appendix B4 demonstrates the truth of the fears leading to the position of policy and opinion leaders and the 20 SME failure cases interviewed. The questionnaire has questions that appear to imply that should …..

i) Witch craft also comes into play as (Adam Ashforth, 2015) and (Thomas McNamara, 2015) confirm when they found that that people in Malawi believe in witchcraft 10.6% of the sample actually considered themselves victims of witchcraft in the recent past and within the last two years. This implies that the proportion that believes in witchcraft but has,not fallen victim is much larger.

CHAPTER FIVE

5 RESEARCH FINDINGS

5.1 Growth in number of SMEs in the Construction Industry in Malawi.

The Findings of this research supports the view that there is indeed significant interest in the construction industry in Malawi as the data collected and analysed is clearly conclusive that the Construction Industry attracts a large number of new entrants every year. (Paper Nov.2015)

Table 5.1 below summarizes the information on SMEs in the construction industry in Malawi registered with the NCIC during the period 2011 to 2015. It was established that the market is very dynamic with a lot of players and that since 2011/12 the local SMEs had increased fourfold from 573 to 2206 (385%) in 2012/13 while the Foreign SMEs have increased by a factor of 6 from 6 to 40 (667%).

The number of foreign companies had doubled but remained modest increasing from only 1.0% to 2.2% of the local SMEs in the 10year period.

Majanga,(2015) ,and Dawood and Page (2006), conclude that SMEs in Malawi, collapsed at an alarming rate with 60% of new SMEs failing within the second year an additional 30% fail before their 10th anniversary and only 10% are in operation beyond 10years of their entry in the market. Thus, it is estimated that 90% of all SMEs in Malawi fold up within ten years of operation.

Table 5.1: SMEs registered with NCIC between 2001 and 2015														
Type	building		civil		Electrical		Consults		Miscellaneous		Materials supply		Totals	
Year	L	F	L	F	L	F	L	F	L	F	L	F	L	F
2013/14*	675	16	824	16	140	4	64	4	99	0	13	0	1815	40
2012/13	785	11	1056	11	159	5	66	7	104	0	36	0	2206	34
2011/12	713	7	936	10	86	3	55	7	63	0	8	0	1861	27
2010/11	466	6	755	9	114	4	46	6	56	0	4	0	1441	25
2009/10	294	8	671	5	101	1	34	4	42	0	2	0	1144	18
2008/9	460	11	465	7	128	3	46	4	45	0	9	0	1153	25
2007/8	365	9	343	5	88	3	58	6	30	0	11	0	895	23
2006/7	299	9	282	4	75	2	41	6	24	0	4	0	725	21
2005/6	503	7	469	4	58	1	51	6	38	0	8	0	1127	18
2004/5	363	6	443	3	39	1	53	6	27	0	7	0	932	16
2003/4	302	4	389	2	64	1	50	5	17	0	7	0	829	12
2002/3	197	4	229	2	31	1	38	9	15	0	2	0	512	16
2001/2	270	2	180	0	37	0	48	4	35	0	3	0	573	6
F=Foreign L=Local 2013/14* Data provided in April 2015 while year ends in August.														

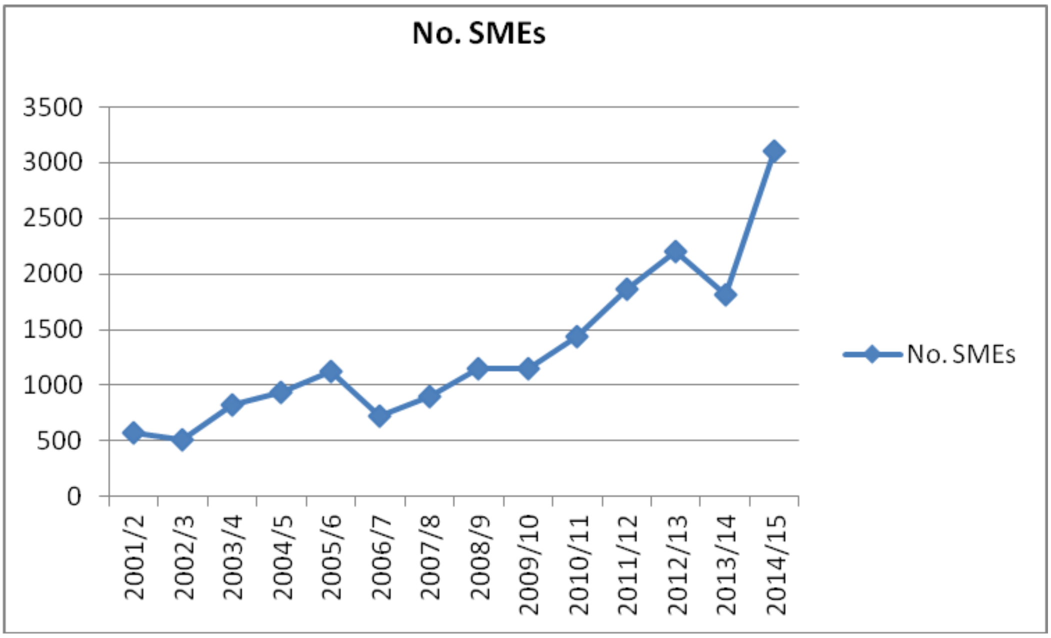


Figure 3: SMEs in the Construction Industry registered with the NCIC from 2001 to 2015

5.2 Total volume of construction works in the Malawi

The total volume of works let in the year 2014/2015 was for a total value of MK 1,121, 678,502,963.85 which is equivalent to USD 2,25Billion at the exchange rate ruling in May 2014 (1USD=K498) This Total Contract Sum is for all projects worth at least MK 30 million (USD60,240.00) each. Table 5.2 below, indicate the breakdown of this amount by each construction sector

Table 5.2:Breakdown of Values by Sector in the Year 2014/2015

Sub-Sector	Contract Sum	Percentage
Borehole & Drilling	2,021,488,033.50	0.2%
Building	118,649,601,317.11	10.6%
Civil	980,934,020,194.24	87.5%
Consultant	18,172,482,084.65	1.6%
Electrical	1,900,911,334.35	0.2%
Total	1,121,678,502,963.85	100.00%

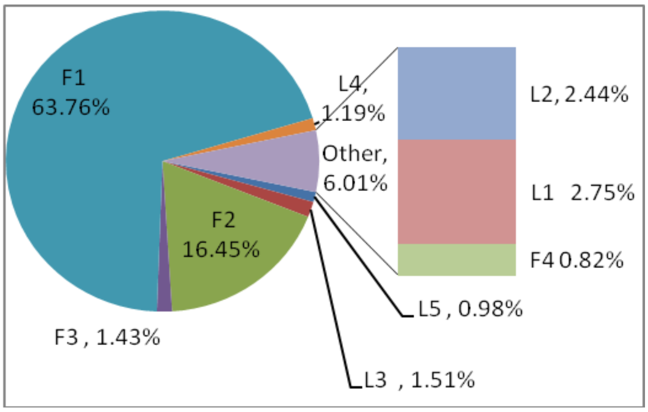
5.3 The Distribution of Works among the SMEs in the Construction Industry

The data collected in respect to the market share of the upcoming SMEs as manifested by the distribution of the value of works carried out, indicates that the five (5No.)leading foreign firms won contracts worth 83.23% of the total value of the contracts awarded annually in Malawi while the leading five (5No.) of the leading local SMEs won contracts worth 8.87% and the rest of the registered SMEs won 7.9%.of the total value of contracts awarded during the financial year. Table 5.3 below and the pie chart labelled Fig 4 show the market share captured by foreign SMEs and the Local SMEs respectively.

Table 5.3: Top 10 firms who secured contracts in the year 2014/2015 (market-share)

Name	Proportion (%)	Position	Origin
1	63.76	1	Foreign
2	16.45	2	Foreign
3	1.43	6	Foreign
4	0.82	9	Foreign
5	0.77	10	Foreign
Total 1	**83.23**		**Foreign**
6	2.75	3	Local
7	2.44	4	Local
8	1.51	5	Local
9	1.19	7	Local
10	0.98	8	Local
Total 2	**8.85**		**Local**

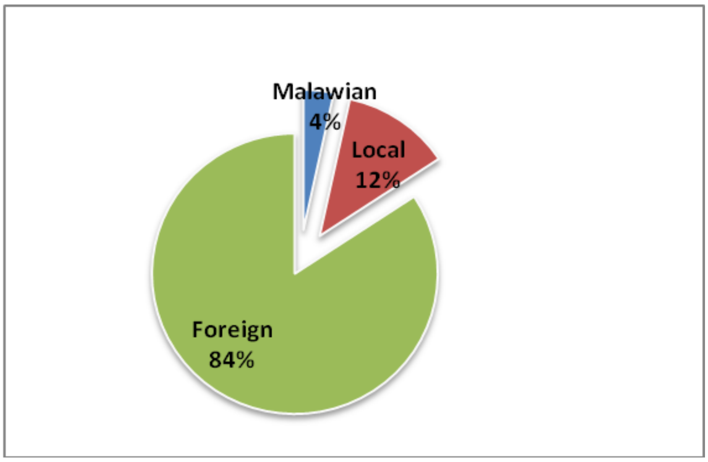
Figure 4 below, indicates the proportion of works awarded to the top 10 contractors and the percentage of the value of works won to the total value of the contracts awarded in the year 2014/2015.



F=Foreign SME, L= Local SME (5 Foreign and 5 Local)

Fig 4: Distribution of Works by Value to Top Five Foreign and Top 5 Local SMEs**.**

Overall, the data recorded shows that foreign firms took the largest proportion at 84 percent of the total construction works in value while the local firms and Malawian SMEs share 12 percent and four 4 percent respectively as shown in Figure 5 below which summarises the distribution of all the construction works awarded during the



Source: NCIC

Figure 5: Distribution of Construction Works by Values among Firms in Malawi

The term “Malawian” in Figure 5 above means indigenous Malawian while the term “local” means an SMEs registered in Malawi by local residents who could be of other Nationalities.

5.4 Interpreting the data to explain the market

Data analysis from the survey conducted in the form of questionnaire reveals that majority of the local SMEs are in 0-4 Million category. This is the lowest category; based on the financial capital, Human Resource Capital and Equipment and Plant which reflects the capability of an SME to successfully carry out single construction Contracts for works within the financial range (value) indicated in table 5.4 below.

Table 5.4: Annual Turnover

Category	Frequency	Percent	Valid Percent	Cumulative Percent
0-4 Million	418	53.9	56.0	56.0
4-40 Million	136	17.5	18.2	74.2
40-400 Milion	136	17.5	18.2	92.4
Over400 Million	45	5.8	6.0	98.4
No response	12	1.6	1.6	100.0
Total	747	96.3	100.0	

Table 5.5 below indicates the classification of the SMEs in the construction industry in Malawi and noting that the works offered for construction was for contract sums above 30Million, only the SMEs registered in the MK50.0 Million categories or above would be eligible to bid.

Table 5.5: Classification of SMEs in the Construction Industry

CATEGORY	K5.0M		K15.0M		K50.0 M		K100.0 M		K200.0 M		K500.0 M		K1.0Billion		UNLIMITED		TOTAL NUMBER	
Year	**L**	**F**	**L**	**F**	**L**	**F**	**L**	**F**	**L**	**F**	**L**	**F**	**L**	**F**	**L**	**F**	L	F
2013/14	385	-	246		101		41		19		12	1	6	1	14	14	824	16
2012/13	574	-	298		97		48		14		15		5		10	9	1056	11
2011/12	574	1	214		68		36		12		13				19	9	936	10
2010/11	468	-	168		63		28		6		7				15	8	755	9
2009/10	375	-	175		62		25		7		8				16	5	671	5
2008/9	311		131		50		15		6						15	7	465	7
2007/8	222	-	65		29		8		4						15	5	343	5
2006/7	186	-	59		21		6		6						8	4	282	4
2005/6	352	-	74		25		2		2						12	4	469	4
2004/5	342	-	73		15		2		4						11	3	443	3
2003/4	300	-	64		12		1								12	2	389	2
2002/3	161	-	41		12										15	2	229	2
2001/2	116	-	46		6										12		180	0.0

Developed by George Kaggiah from Data obtained from NCIC

This eliminated the SMEs in the 5Million and 15Million categories whom in 2014/2015 were 631 or 76.8% of the field. The bigger contracts would therefore attract less bidders and therefore less competition since the unlimited category has only 3.3% of all the SMEs

Data analysis reveals that the SMEs in 0-4 MK Million (USD 0.0 to USD8, 500.00) category were 56% of the total SMEs

It will also be of interest to note that out of the 1056 SMEs licensed in 2013/2014 more than 232 had not renewed their license and therefore were out of play. This figure could be much higher than 232 as there were new entrants in the register during the year.

It is observed from table 31 above that the SMEs for civil works had works with total contract value of MK980.934 Billion which is equivalent to 87.5% of the contract value. It was also noted from Table 5.3, Figure 4 and Figure 5 show that the top 10 SMEs shared among them 92.10% of the total value of all the contracts awarded. It was deduced from this data that all the 10 top SMEs were in the unlimited category of SMEs. It was also inferred that the top 5No foreign SMEs who were awarded works contracts worth 83.23% of the total value were in the unlimited category

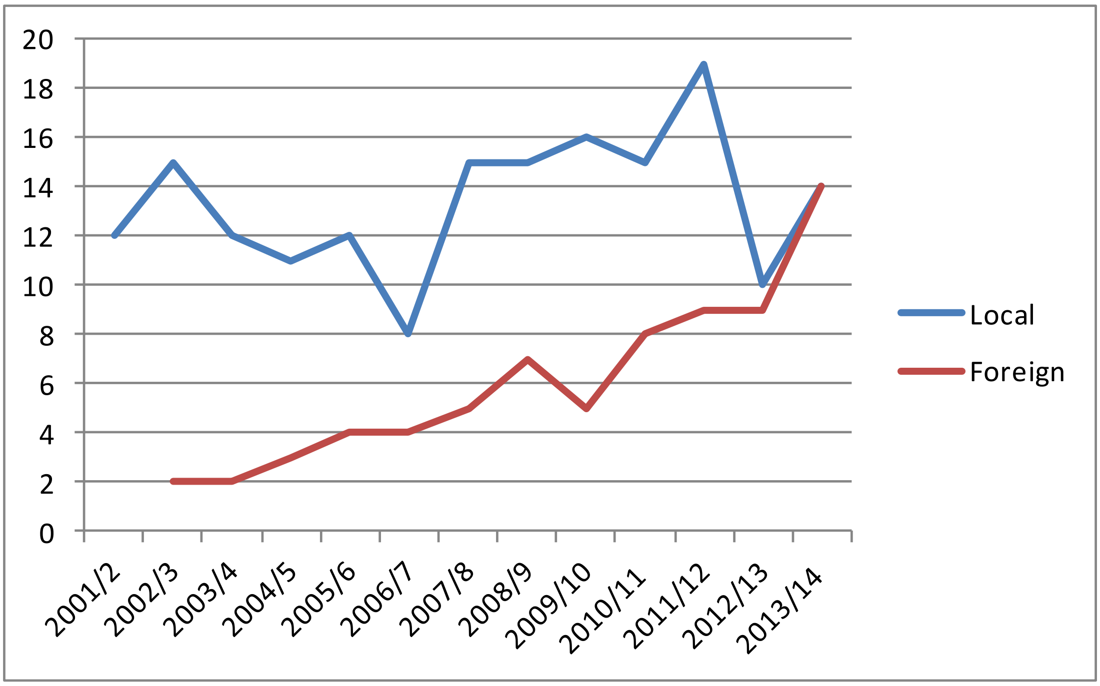
.This generated interest to study the SMEs in the unlimited category more keenly with a view of finding out the reason for the market share pattern exhibited by the data.

Table4.16 above and Figure 6 below reveals that there were no foreign SMEs registered in Malawi in 2001 at a time when there were 12No local SMEs in the unlimited category.

The first two foreign SMEs in the unlimited category were registered in 2002 and the number had grown steadily to 14 in 2014.

During the same period the local SMEs increase in a rather unsteady fashion with peaks and dips which suggest an irregular environment and experience and the treading suggests that the local SMEs may be overtaken in number by the foreign SMEs.

Figure 6: Comparison of Local and Foreign SMEs from 2001 to 2014



The data shows that while the numbers of the local SMEs particularly those in the categories of 5.0M to 50.0million have grown tremendously, they did not advance to the next category.

5.5 Seeking Out the Springboards of Payment Paralysis

The results of the survey as summarized in Table 4.7 above shows that out of the 750 SMEs respondents of the 800 SMEs sampled in construction industry in Malawi, 68.8% have suffered delayed payments for periods longer than 4months, while 27% have had their payments delayed for between 8 and 12 moths. 2% have suffered delays in payments exceeding 2years. Such delays result in non-performance of the affected SME for lack of resources to pay suppliers and pay wages.

Literature reviewed revealed that such delays are unacceptable in Europe, Canada and Malaysia where the “Prompt Payment Act” is in force. In the UK and Europe, there is a mandatory 30-day payment terms for transactions with public authorities.

Law regulates payment terms between businesses and unless there exists an agreement to the contrary, payments must be made within a maximum of 60 days (Winther, 2011)

In the UK the payment period is being reduced even further and the Government is encouraging central government departments to aim at paying 80% of undisputed invoices in 5 days. (Cable, 2013)

5.5.1 Corruption

Out of the SMEs in the survey, only 12No.(1.5%) indicated that corruption was the first priority in reducing the negative effects on SMEs in the construction Industry while 47No. (6.1%) thought corruption should be second in the priority list and 81 (10%) placed it third on their priority list.

SMEs in the survey did not appear to recognize corruption as ranking highly on the list of factors affecting them negatively but in the one-on-one interviews with senior project managers and opinion leaders in the industry, it emerged that corruption contributed a great deal as a cause of nonpayment and delayed payments (payment paralysis) to SMEs. The opinion leaders interviewed agreed that corruption was rampant at high levels of government, but it was difficult for individual SMEs to relate the corruption directly to their activities. It was difficult to relate the corruption to a particular procurement processes or projects particularly when such corruption appeared to occur in government ministries and departments far removed from the Client Ministry and therefore the majority of the SMEs interviewed, could not directly show evidence of the effects of corruption on the market environment or on their performance

This revelation lends to the conclusion that in order to understand the impact of corruption on the Construction Industry it would be appropriate to view corruption as occurring in two levels. The first level is the corruption close to the SMEs when it occurs within the Government Ministry, Department or parastatal which directly employs the SMEs and when such corruption occurs at other Ministries or departments who are responsible for channelling development funds to the employers directly engaging the SMEs.

The majority of the opinion leaders interviewed observed that SMEs in the construction Industry in Malawi are fully dependent on the Government as the main employer who can award contracts, because the Private sector and individuals enterprises do not have the resources base to carry out major construction projects.

The main employers all of whom are government Ministries and parastatals are Road Authority and Ministry of Agriculture and Water Development. The opinion leaders held that, it is for this reason that corrupt practices in Government and Parastatals (Quasi-Government organizations) have such far reaching impact on SMEs in the construction industry in Malawi.

One of the managers interviewed was of the view that corruption in government leads to leakage of resources earmarked for development and denies construction projects the funds to progress to completion thereby adversely affecting all the players in the construction industry.

They observed that corruption in high places in government such as “cash gate” were some of the recorded corruption scandals in the country. Complementary inquiry on this subject revealed some documented cases of corruption and fraud that had great impact on the economy of the Republic of Malawi.

One such case is referred to as the “Cash gate” in which government officials used the IFMIS software to issue cheques and managed to delete the records as recorded I the Economist, 2014 quoted herebelow.

Lilongwe, the capital of Malawi has a population of less than 800,000 people. The big employers are government and aid agencies. Only a few thousand attend university each year. It is harder to escape scrutiny than in most places. So, people took notice last year when lots of civil servants were suddenly buying houses in the city’s new suburbs. In September, a government clerk was found with $300,000 in his car. A week later a treasury official was shot outside his home. This was the genesis of the “cashgate” scandal, a systematic looting of public money. (Economist, 2014)

In October 2013 Baker Tilly Risk Advisory LLP (Baker Tilly) was asked by DFID to provide forensic and system security audit services to the Malawi National Audit

Office (NAO) following a request of support from the Government of Malawi (GoM) following the discovery of irregularities by staff of the Accountant General during a routine examination of the Budget Exception Report. (Baker Tilly, 2014).

In February 2014 Baker Tilly issued a Forensic Audit Report on Fraud and Mismanagement of Malawi Government Finances that found MK 13,671,396,751 of GoM funds had been lost to fraud in a period of three months. *(Baker Tilly, 2014).*.

Resulting from this finding Several of the International Donors including those who supported Common Approach to Budget Support (CABS) met in the capital, Lilongwe and on November 7, 2014, and decided to withhold aid to Malawi in reaction to a growing corruption scandal. Baker Tilly continued with further audit of the government graft known as Cashgate and established that $250 million (MK98.75 billion) had been looted. (Baker Tilly, 2014) It has been said that some of the money obtained fraudulently from this scandal may have been used to finance activities of some of the leading political parties and it is not clear up to what level of seniority in the government hierarchy officials may have been aware of the looting. The donors have not yet resumed full disbursement of the grant as some of the court cases are still ongoing and the donors are observing the national spirit in combating corruption, which shall inform their next actions in support.

Table 5.6 Loss of Government funds to corruption using forensic Audit data from Baker Tilly 2014

Financial Year	Total Budget MK(x10^9)	Development Expenditure MK(x10^9)	Loss to Corruption MK(x10^9)	Loss as % of total Budget	Loss as % of Development Expenditure	MK to 1.0 USD
2010/2011	287.00	86.10	28.34	9.87	32.92	153.50
2011/2012	307.70	69.00	28.34	9.21	41.07	269.50
2012/2013	394.47	175.00	28.34	7.18	16.19	376.90
2013/2014	603.40	175.00	13.67	2.27	7.81	395.45

It was also established that this is not the only major corruption scandal has occurred in Malawi and neither is it the only time Donors had suspended their fiscal support to Malawi due to corruption and mismanagement of resources. The Danish embassy in Malawi’s capital, Lilongwe, withdrew all its development aid to Malawi in 2002 prompted by Malawi's corruption and political intolerance. In a strongly worded statement issued in the capital, Lilongwe, Danish Charge D'Affaires Finn Skadkaer Pedersen said "a weak administration" in Malawi since 1995 made it difficult to implement development programmes (Chiocha, 2009)

The 85 Billion that was recorded by Baker Tilly as the loss before February 2014 gives a total loss of USD 250 Million was distributed over three years as was suggested by the opinion leaders and the local press.

In another huge corruption scandal reported on February 22, 2017, Lameck Masina, of Voice of America reported that "*BLANTYRE — Malawi's president has fired his minister of agriculture after investigators found cash worth nearly $200,000 in the minister's home. The raid was part of ongoing investigations into what has been deemed a suspicious maize procurement process from Zambia. The country's agriculture minister, George Chaponda, is under investigation following a recommendation from a government commission of inquiry that was formed in January to probe the recent purchase of 100,000 tons of maize from Zambia.Chaponda is accused of flouting procurement procedures. Documents leaked to local media in December point to irregularities. They would appear to indicate that Malawi paid $13 million more than it should have. Local media dubbed the scandal "maizegate." (*Masina, L., *VoA, 2017)*

Every time the donors suspend their support, the Government is forced to reduce its budget expenditure and the SMEs in the construction industry suffers because the Government cannot award new contracts and is unable to continue making payments for the ongoing contracts.

In all projects funded by the World Bank, African Development Bank and other financiers, it is normal for the agreement to provide that the Financier provided 85% of the project budget while the borrower contributes an amount equal to 15% of the project contract sum as a "commitment" to the project.

Corruption leads to reduction of the finances available to the Government, leading to difficulties for the government to meet its obligations and therefore defaults in donor funded projects leading to suspension of funding by the Financing Agencies.

The Corruption Perception Index (CPI) published by Transparency International ranks Malawi as 112th out of 167 countries (Transparency International, 2015) (Note that the higher the CPI the higher the perceived incidence of corruption.

The total amounts of resources recorded as misappropriated in table 6,8 above is equivalent to 32.92%, 41.07%, 16.19% and 7.81% of the development budget over the budgetary years indicated. This leads to a situation where the government is unable to meet the 15% commitment fees normally required on World Bank and AfDB funded projects.

In depth interviews with the managers and opinion leaders in the construction industry in Malawi has indicated that corruption occurs at the National level as in the case of "Cash Gate" and *"maizegate."* and at the institutional level.

Corruption at the institutional level occurs when the senior managers of the Institution in question either individually or in an organized manner engages in corrupt practices in the procurement and management of services and Works in the construction industry. The managers and opinion leaders interviewed indicated that when this happens the SMEs in construction industry are affected in the following ways:

- denied opportunities as contracts are awarded to non deserving entities.
- denied of profits as they offer bribes to facilitate approvals of their work
- They suffer unnecessary delays in approval of invoices.
- Their works are at times unfairly rejected
- The most expensive of remedial measures are recommended.

In June 2016 the CEO of one of the parastatals responsible for the management of the largest portion of the development fund was alleged to have used his position to award a $303 823 (K217 million) contract to his own company. This particular contract was financed by the World Bank. It is emerging that investigations have been conducted and findings in their report dated September 29, 2016, confirm the allegations. The matter is yet to be concluded, but the World Bank has not denied or confirmed the accusations.

Some of the Managers interviewed indicated that there is rampant institutional corruption where the procurement processes favour SMEs owned by relatives and friends of the employees of the procuring Entity.

The corruption levels in Malawi were underlined by the Nyasa Times Newspaper on July 13, 2013 when it attributed a statement to the then Director of Malawi Anti-corruption Bureau(ACB), Justice Rezine Mzikamanda as having said that 30% of the Government budget disappears in the corruption abyss. In the Amnesty International Corruption Perceptions Index 2020 Malawi was Ranked 129 out of 180

Malawi is not alone in the throes of the vice of corruption and compares closely to Kenya where the findings of this research were also disseminated and practically applied. Reuters reported that Kenya was losing a third of its state budget , the equivalent of about $6 billion, to corruption every year (Reuters, 2016).

Tom Odula (2015) records that on, 23rd Nov, 2015, the President of the Republic of Kenya declared corruption a national security threat and he presented a raft of measures to fight the graft that is endemic in East Africa's largest economy. Hussein Khalid and Tabatha Pilgrim Thompson (2019) found that the government's own Ethics and Anti-Corruption Commission (EACC) *"… claims that the country is losing one-third of its state budget (approximately $3 billion) to corruption each year*". Oliver Mathenge (2021) records that on 18th January 2021 the President of the Republic of Kenya said that the country was losing Sh2 billion a day to corruption (USD 730 annually) The ambassador of the USA to Kenya Robert Codec described the corruption situation in Kenya as a crisis. (https://www.standardmedia.co.ke › Politics)

Eva Akinyi Okoth (2016) records that The National Youth Service (NYS) may have lost KSh 800M ($8M US) in 22015 through theft from its bank accounts by irregular transfers. This is still under investigation and it came to light when a senior NYS official found out that his particulars had been used to process an irregular payments which L. Muthoni Wanyeki (2018)

Amnesty International 2020/2021 Report, records that the Auditor General of Kenya found that KES2.2 billion (US$20 million) donations in PPEs donated to the government to fight COVID-19 could not be accounted for and may have been stolen. In the Amnesty International Corruption Perceptions Index, 2020 Kenya was Ranked 124 out of 180

5.5.2 Arbitrary Transfer of Risks by the Procuring Entities (PEs)

In Malawi, there is no law regulating either the limiting period of such delays in payments or the compensation that the affected SMEs may claim. The situation is made worse because the contract documents are prepared by consultants hired by the contracting authorities and therefore tend to reduce risks that may affect the Client rather than focusing on fairness to both the Employer and the SMEs who will be contracted to carry out the works contract.

Gerald Mabveka (2014) observes that it is common to find Procurement Entities (PEs) include payment terms that are unfair to the SMEs. The SMEs are forced to accept these terms because during the years, with the diminished volume of construction work, SMEs are under pressure and at times engage in risky 'suicide' bids with little or non-existent profit margins just to sustain the flow of work and stay in business (Lip, 2003) and (Amoako, 2011)

Examples of the conditions of contract used by the Procuring Entities (PEs) to allow them to make insertions in the Special Conditions with a view to transferring some risks to the SMEs and the SMEs is as in extracts from the Special Conditions of Contract below. The unfortunate state of the insertions is that the SMEs are not given an opportunity to challenge the transfer of risks and are left with no option but to accept.

SCC 31.1 Payment shall be made by the Procuring Entity within ----days of receipt of the request for payment and within ----days in the case of the final payment.

SCC 31.4 Interest shall be paid on late payments at the rate of: --- percent above the base lending rate of the Reserve Bank of Malawi.

SCC 32.1 Prices charged by the Supplier shall/ not vary from the prices quoted in the Contract. (Extract from Office of Director of Public Procurement of Malawi)

5.5.3 Procurement Procedures Complementing Payment Paralysis

5.5.3.1 General

The marketplace in the construction industry in Malawi was generally uncontrolled in terms of policy and legislature and until 1996 when the National Construction

Industry Council (NCIC) was established by an act of parliament to organize the Industry. The NCIC brings together, by representation, all the major institutions formed by the key stakeholders in the Construction Industry in Malawi. These stakeholders are; The Ministry of Transport and public Works, the Master Builders', Association and the Malawian Building Contractors and Allied Trades Association (MABCATA); the Board of Architects and Quantity Surveyors, the Board of Engineers, the Association of Consulting Engineers; Material Manufacturers and Board of Registration of Land Economy Surveyors, Valuers, Estate Agents and Auctioneers among others (NCIC Act,1996).

The NCIC is mandated to register, license and regulate the construction industry in Malawi. Since the establishment the NCIC has made a big difference and majority of stakeholders are now registered and Licensed at NCIC and have engaged the industry in an awareness campaign which have rallied the players around the NCIC.

The NCIC has also had a number of legislatures in regard to regulation and interaction of national and international organizations and SMEs working in the construction Industry in Malawi and is involved in dispute resolution.

Once an SME has satisfied the conditions and requirements for registration and licensing by NCIC, procurement of contacts is the next most important focus for SMEs. The Office of the Director of Public Procurement (ODPP) was established under an act of Parliament in 2003 and became operational in 2004 and has taken the lead on public procurement reform in Malawi.

The ODPP is only responsible for oversight to procurement processes up to the point of contact award and signing of the contracts which involve public funds. There is no authority specifically mandated to ensure SMEs are paid in accordance with the provisions of the contract and SMEs can only seek redress from the Courts. Unfortunately the court orders are rarely enforced because the Government appears to have immunity against execution of court orders.

In Tratsel Supplies Limited vs Attorney General; civil cause Number 1798 of 2001 in the High Court of Malawi, the court ruled that "the Constitution creates the immunity of government from execution…" (2003)

David Gaukrodger (OECD 2010) disagreed with the ruling when he found that "……*state immunity may make it difficult for private parties to pursue legitimate claims…."*

However, Suzanne Flynn and Mario Pessoa (2014) found that in Malawi there was no systematic mechanism of tracking outstanding invoices and those Cost overruns in construction of roads beyond contract estimates and budget ceilings, were among the major problems fuelling delayed payments and accumulation of domestic arrears.

There was no evidence of orchestrated or deliberate withholding of payments to contractors and suppliers. However, consequent to "CashGate", processing and payment of majority of the unpaid invoices in many sectors including unpaid invoices in the construction industry were put on hold pending verification by the National Audit Office. The verification exercise for some of the invoices was concluded in 2021.

PEFA (2018) Final Report, recorded that Domestic arrears of over 5 percent of GDP, accumulated during July 2012–June 2017, are in the process of being cleared. As of end-2017, almost all of them were securitized through zero interest promissory notes. About 65 percent of these (in domestic and foreign currency) have already been repaid in cash and the rest will be maturing during 2017/18 and 2018/19.

The IMF Country Report No. 20/168 (2020, p24,) recorded that the objective of improving fiscal transparency to prevent accumulation of domestic arrears and reduce vulnerabilities to corruption which had been pursued and continuously monitored monthly since May 2015 had not succeeded in achieving the set goals.

IMF Country Report No. 20/168 (2020) records that in Malawi, it was necessary to inject liquidity into the economy by paying "domestic arrears" accrued by the Roads Fund during the period 2012 to 2019 estimated at USD 100Million. The IMF report confirms that the Auditor General had verified unpaid bills of close to 1.1 percent of GDP. This confirms that the SMEs in the construction industry, whose invoices have been pending since 2012, have remained unpaid for a period of 9 years.

These have now been verified and the National Audit Office released notices to the Roads Fund and the Roads Authority of Malawi, who had majority of the domestic arrears, in May 2021, notifying them to contact the affected contractors and services providers and initiate the payment processes.

In the Corruption Perception Index (CPI) Transparency International 2019 ranked Malawi at position123 while Kenya was ranked 137out of 180 countries.
Aderonke Olaleye, Marcela Pitelli, and Yannick Morgan (2016) records that the 2014-2015 assessment by the Ethics and Anti-Corruption (EACC) found there was a 41% increase in corruption cases from 2013 which was linked to the establishment of 47 Counties who had not developed sufficient anti-corruption safeguards as the Central Government.
This propelled the country to the third most corrupt country from the Afrobarometer Perception of Corruption Index (PCI) which had in2013, placed Kenya as the sixth most corrupt country in Africa (Richmond& Alpin, 2013).

The President of Kenya acknowledged that corruption in Kenya is prevalent as Tom Odula (2015) records that on, 23rd November, 2015, the President of the Republic of Kenya declared corruption a national security threat and he presented a raft of measures to fight the graft that is endemic in East Africa’s largest economy. https://www.standardmedia.co.ke › Politics

The Associated Press,(November 23, 2015) quotes the President as having said “I believe that corruption is a standing threat to our national security” President Uhuru Kenyatta said in televised remarks. “The bribe accepted by an official can lead to successful terrorist attacks that kill Kenyans. It can let a criminal off the hook for them to return to crime and harming Kenyans.”

A Nation Media Group, court reporter, Sam Kiplagat, on Friday, October 02, 2020 Reported that the Ethics and Anti-Corruption Commission (EACC) is investigating a senior official at a public roads agency who has been has been found with assets in excess of Sh1.5 billion (USD 15.0Million). This is despite the fact that his earnings are a relative modest monthly salary of Sh390,000 (USD3,900), triggering investigations into the source of his wealth.

It must be undoubtedly, under similar circumstances that had prompted Sir Edward Clay, the British High Commissioner to Kenya from 2001 to 2005, to remark that the *“gluttony” of senior officials in the Kenyan government was causing them to “vomit all over our shoes.”* (James Forole Jarso,)

David Indeje a Khusoko’s Digital Editor, records that Kenya’s Achilles heel is impunity in fighting corruption. Corruption remains endemic to Kenya’s public sector, scandals that have been exposed, however, have not ended the vice because of impunity.

The EU Special Report 14/2020, recognized the perception of widespread corruption in Kenya (p5) and underlines that Kenya is in the bottom 21 % of countries ranked in the Transparency (p16) and that the EU’s support for the fight against corruption was limited. The Report recommended that the EU prioritise sectors in Kenya with the potential to fight against corruption (p5).

Muniu Thoithi, et al, (2018) recorded that in their Economic Crime and Fraud Survey, Kenyan respondents reported a 34% incidence rate in Procurement Fraud making it the third most prevalent form of economic crime according to the results of the survey. This incidence rate is only 8% lower than that reported in 2016 and higher than the East African average of 25% and global average of 22%.

Amnesty International Report 2020/21 reported that the Auditor General in Kenya had unearthed a KES2.2 billion (US$20 million) corruption scandal at the Kenya Medical Supplies Agency in which PPE that had been donated to the government was allegedly stolen.

In Kenya, the government’s own Ethics and Anti-Corruption Commission (EACC) *“… claims that the country is losing one-third of its state budget (approximately $3 billion) to corruption each year”* (Hussein Khalid and Tabatha Pilgrim Thompson, 2019) Special Report No. 456; September 2019

In Kenya, the current, data from the Treasury shows that the total domestic arrears, as at September 2020 stood at Sh346.2 billion (USD 3.46Billion), having risen from

Sh334.2 billion (USD 3.34Billion) in June 2020. The central Government and the County Governments owe this amount to SMEs for a long period.

In Kenya, the larger proportion of the “domestic arrears” is called “Pending Bills” to give the delay legitimacy. Unstructured interviews with project managers and Contractors in Kenya indicate that the “domestic arrears” acquire the label “Pending Bills” through a process which starts by some suspicions being introduced into the project management processes. This is done by accusations of impropriety on the part of the contractor, the project manager or both which then leads to suspension of all payments pending a thorough audit. This process keeps the overdue invoices “pending’ as verification and audit processes are ongoing.

The prevailing corruption perception in Kenyan environment is fertile ground for sowing seeds of suspicion and the general mistrust causes National and County Government institutions to appear to be frequently misled into believing that some contracts are being mismanaged and invoices from some suppliers, contractors or services providers were irregularly claimed and should therefore not be paid. In some cases, politicians get involved and blame the project managers and the contractors and escalate the allegations into national issues involving the media, the anticorruption police and eventually the auditor general’s office.

Some informal interviewees posit that some of the audits are stage managed to deny political opponents who had won contracts and could be cronies of previous political group which had just lost in the elections.

These invoices are labelling “pending bills” and take a long time to resolve. Usually after a lengthy verification process, a few of the invoices may be found to be irregular and after repeated audits they are eventually approved for payment. Sadly such process subject many SMEs to payment Paralysis due to extended delayed payments for periods of upto 10years.

Currently Kenya is coming to terms with a cycle of “Pending Bills” some of which were due for payment in 2013.The audit experts have verified the pending Bills and approved them for payment. The Central Government has instructed the Institutions and the County Governments concerned to effect payments immediately. However payments are yet to be made even after several repeat audits

The Public is further puzzled at the reluctance on the part of the procuring Agencies to pay their contractors and suppliers even after the verification process has been concluded and invoices approved for payment. Such a situation is current with pending bills approved in 2018 remaining unpaid to date.

On June 1, 2019 the President of the Republic of Kenya ordered all accounting officers to pay all verified pending Bills by the end of the month of June 2019.

Following the President's order to the accounting officers, on June 1, 2020, on June 16, 2020, the National Treasury Cabinet Secretary Ukur Yatani wrote Treasury Circular No.10/2020 to all Cabinet Secretaries(Ministers) and all Accounting Officers instructing all government departments and institutions to prioritise payment of Pending Bills by State Corporations and Semi Autonomous Agencies (SAGAS). It is significant to note that the part of the introductory paragraph of the Circular opens with the following words ***"Despite numerous Circulars and Directives requiring State Corporations to prioritise payment of pending Bills it has been noted that the level of compliance with these Directives has been very low......."***

The author observes that the response from this Circular No.10/2020 was not satisfactory because the National Treasury Cabinet Secretary Ukur Yatani sought approval of the Parliament's for the Treasury to temporarily stop disbursing funds to County Governments which have consistently failed to pay their suppliers. In his presentation of the National Budget for the financial year 2021/2022 on June10, 2021, Hon. (Amb.) Ukur Yatani, EGH, Cabinet Secretary for the National Treasury and Planning, Republic of Kenya, proposed that:

"*Mr. Speaker, I urge this House to support our efforts towards enforcing compliance in payment of all verified pending bills by County Governments by backing our proposal under Article 225 of the Constitution of Kenya to temporarily stop transfers to County Governments that persistently fail to comply with the directive to clear pending bills by 30th June, 2021."*.

To date September 21 2021, these payments have not been made and observing the actions of the National Government and the reactions from the County Governments, one is persuaded that the legal provisions do not give the National

Government sufficient power to direct the County Governments and the payments may well be dependent upon the cooperation of the County Government.

This legal status could mean that the SMEs who have waited for so long to be paid, may have to wait longer because majority of the Governors and Members of the County Assemblies are serving their second and final term in office which shall end in August 2022.

Informal Discussions and unstructured interviews with affected directors of the affected SMEs, senior engineers working within the entities withholding payments (while conducting prolonged repeated audits) the following views on the root causes of the delayed payments were mentioned:

1) Procurements had been done without the necessary budgetary support,

2) Corruption may have led to depletion of funds within the procuring entity leading to inability to pay the SMEs

3) Change of political leadership(immediately after elections) may lead to a desire by the new leaders to muzzle the opposition by reducing their income whose sources are sometimes perceived as the various SMEs with links to the outgoing politicians or their allies.

4) The project managers and the supervising teams are in most cases vindicated as the payments are eventually approved, making the whole process a bleach of contract by the procuring entity.

5.5.3.2 SMEs for Services (Architects, Engineers and Quantity Surveyors)

Malawi benefitted from the joint World Bank/OECD Development Assistance Committee (DAC) Procurement Round Table Initiative established in 2002 where developing countries and donors worked together from 2003 – 2004 to develop tools and standards comparable to the International Standards for improvement of procurement systems.

The procurement methods recommended by the World Bank for Borrowers countries for projects financed by the World Bank is the Quality- and Cost-Based Selection (“QCBS”).

This method requires the Services SME to detail their strengths and competence to carry out the specific project in their Technical proposal in which they also give details of the methodology they propose to adopt, the personnel and the equipment they would deploy at various stages of the project and the detail of Reports and drawings that they would prepare and deliver to the PE. The second envelop in the Bid contains a Financial Proposal derived from the time inputs of the various professional staff and consultants to be deployed on the project and associated reimbursable costs and taxes as applicable. The evaluation process is as prescribed in the Request for Proposals for the bids.

The World Bank Procurement method has been adopted by the ODPP and is used with minor project specific alterations for locally financed Projects in Malawi on majority of as the PEs for whose procurement is supervised by the ODPP also use the recommended Quality- and Cost-Based Selection ("QCBS") methods for Procurement of services.

In Malawi and majority of the neighbouring countries no fees or cost framework for paying for services rendered and for this reason the QCBS is the preferred method for selecting SMEs to provide services because it requires SMEs to demonstrate their capacity and experience to carry out the works in a Technical Proposal. In Technical proposal, the SMEs highlight their experience the key personnel available and methodology to be used to achieve the client's objectives. A financial proposal is also submitted separately with the SME providing a breakdown of the cost for the services to be offered.

The bidders who achieve the highest scores when the scores for both Technical and Financial Proposal are combined, is considered the bidders with the "Lowest Evaluated" Price and is recommended for the award of the contract subject to a " no objection" from the Bank successful contract negotiations.

One observes that without a framework for standardized fees determination, It would not be possible to apply the Quality Based Selection (QBS) method where Quality alone is evaluated.

The banks and the PEs are also desirous of monitoring the inputs of the professional personnel and this is best accomplished using the QCBS method. The Cost Based

Selection (CBS) method, where cost is the dominant selection criteria and the Single Source Selection (SSS), and the Fixed Cost (FC) methods are very rarely used in Malawi.

As is the case for engagement of SMEs to provide Services, the World Bank, ADB, EU and a few other financiers will require short listing of interested SME by an expression of interest (EoI) where the PE performs a “due diligent” process for the interested SME and international Organizations interested to carry out the woks. This helps the Procuring Entity to establishing the capacity and capability, of the instersted SMEs, to carry out the proposed works and enable them to select about six pre-qualified bidders to be included in the shortlist and invited to prepare a bid.

5.5.3.3 Setting Eligibility Criteria above the reach of Local SMEs

The Senior Managers and Opinion Leaders in the Construction Industry who were interviewed indicated that eligibility and evaluation criteria adopted by the Procurement entities and the Bank financing the construction projects, are not favourable to local SMEs and are sometimes not considered reasonable.

The SMEs interviewed indicated that the contract documents should be prepared and interpreted bearing in mind the capacity of the local SMEs. Some of the Conditions to which attention was drawn are the experience of personnel for Consultants and the turnover and experience for Contractors. The experts interviewed indicated that the requirement that the SMEs have liquid cash at the levels indicated or suggested in Table 5.6 and 5.7 below is not Practice for the majority of the local SMEs.

This requirement indicates a direct conflict which may have been caused by simple fact that the SME in developed world, the definition of an SME is a firm with a maximum of 250 employees” (European Commission, 2005) and which has an annual turnover not exceeding 50 million Euros, and/ or an annual balance sheet total not exceeding 43 million euro (Vedanthachari L.N., 2007).

Considering that in Europe, construction remains primarily a local industry with a majority of small and medium-sized enterprises (FIEC, 2009,p.3), one may draw some similarities with the Malawi scenario, but as can be observed from table 4.2 above, respondents indicated that 56.2% of SMEs in the Construction Industry in

Malawi have an annual turnover of less than MK4 Million (1USD=450MWK) and for 92% of the SMEs, the turnover is below MK 400Milion (below € 1.0 Million) . This indicates that the SMEs in Europe, would have a turnover about 50 times higher than that realized by SMEs in Malawi.

Table 5.7: Eligibility and Evaluation Criteria considered unreasonable

No.	Position	years of professional experience	Specific experience
1	Team Leader / Contract Document Specialist	15 years	The Team Leader / Contract Specialist shall have undertaken a minimum of 10 similar projects as a Team Leader or Contract Specialist but not less than 4 projects in either capacity Estimated total time-input is 8 man-months.
2	Pavement/ Materials Engineer	10 years	Shall have undertaken a minimum of 7 similar projects as a Pavement / Materials Engineer. Estimated total time-input is 3 man-months.
3	Highway Design Engineer	7 years	Experience in the geometric design of at least seven similar sized road project. Estimated total time-input is 3 man-months.

Table 5.8: Eligibility and Evaluation Criteria considered unreasonably by local SMEs

Eligibility and Qualification criteria			Compliance Requirements				Documentation
No.	Subject	Requirement	Single Entity	Joint Venture (existing or intended)			Submission Requirements
				All Parties Combined	Each Member	One Member	
3. Financial Situation and Performance							
3.1	Financial Capabilities	(i) The Bidder shall demonstrate that it has access to, or has available, Liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as MKxxx or equivalent in a freely convertible currency for the subject contract(s) net of the Bidders other commitments	Must meet requirement	Must meet requirement	must meet 25% (Twenty Five Percent) of the Requirement	Must meet 60% (Sixty Percent) of the Requirement	Form FIN – 3.1, with attachments
		(ii) The Bidders shall also demonstrate, to the satisfaction of the Employer, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments.	Must meet requirement	Must meet requirement	N/A	N/A	
		(iii) The audited balance sheets or, if not required by the laws of the Bidder's country, other financial statements acceptable to the Employer, for the last Five years shall be submitted and must demonstrate the current soundness of the Bidder's financial position and indicate its prospective long-term profitability.	Must meet requirement	N/A	Must meet requirement	N/A	

The SMEs in the Services sector of the Construction Industry are also subjected to unfavourable eligibility criteria which focus on “similar Projects” as indicated in table 5.7 below. The interpretation of this phrase by many of the procurement entities is that experts to be engaged must have offered such services for projects of the same costs or above and with the same or larger components.

Thus, if a PE is seeking a consultant for the design a 10km long 600mm diameter pipeline an expert who has previously carried out design of 12km long 450mm diameter pipeline will be ranked lower than one who has designed an 8km 650mm diameter pipeline. The author views the two as being equally qualified to deliver the assignment at hand and would therefore recommend the evaluation criteria to be interpreted in a manner that would rank equally. The author also agrees with those who indicated that PEs were not justified in requiring that an expert would only be deemed qualified if they had carried out a number of “similar projects” set as four (4No.) and seven (7No.) similar as set down in table 5.7 below as the numbers used have no scientific foundation and that one successful assignment should be considered the minimum requirement.

The author finds that in the technical sense and particularly in engineering design the word “similar” should focus on the similarity in the technical sense of the design processes and subsequent measurement and determination of costs. It is acknowledged that the “large project” in Africa is in some cases equivalent to a “small project” in the developed world and majority of the experts in the developed countries have carried out similar or bigger projects of such nature and they are therefore qualified for all projects in Africa. These experts also qualify to carry out frontier breaking projects in their countries because they would be similar to those they had carried out before. A similar yardstick should therefore be applied to SMEs in Africa and Malawi. Observing that the “large projects” in Africa, are made up of similar elements that local industry has handled before only in smaller quantities and sizes and noting that the process of delivery of the assignment including the software

Table 5.9. Eligibility and Evaluation Criteria considered unreasonable

No.	Position	years of professional experience	Specific experience
1	Team Leader / Contract Document Specialist	15 years	The Team Leader / Contract Specialist shall have undertaken a minimum of 10 similar projects as a Team Leader or Contract Specialist but not less than 4 projects in either capacity Estimated total time-input is 8 man-months.
2	Pavement/ Materials Engineer	10 years	shall have undertaken a minimum of 7 similar projects as a Pavement / Materials Engineer. Estimated total time-input is 3 man-months.
3	Highway Design Engineer	7 years	experience in the geometric design of at least seven similar sized road project. Estimated total time-input is 3 man-months.

and technology are the same the local SMEs have used before.

5.5.3.4 Corruption

The SMEs in the survey did not rank corruption as ranking highly on the list of factors affecting them negatively but in the one-on-one interviews with senior project managers and it emerged that corruption contributed a great deal as a cause of nonpayment and delayed payments to SMEs. The managers interviewed agreed that corruption was at high levels of government was difficult to relate to particular procurement processes or projects and the SMEs could not directly show evidence of the effects of corruption on the market environment or on their performance.

In all projects funded by the World Bank, African Development Bank and other financiers, it is normal for the agreement to provide that the Financier provided 85% of the project budget while the borrower contributes an amount equal to 15% of the project contract sum as a “commitment” to the project.

Corruption leads to reduction of the finances available to the Government, leading to difficulties for the government to meet its obligations and therefore defaults in donor funded projects leading to suspension of funding by the Financing Agencies.

In 2014 the Auditor General of the Republic of Malawi, was investigating loss of K92Billon through corruption in Malawi. The UK Department for International Development (DFID) offered the Government of Malawi assistance and financed the forensic review by Baker Tilly Business Services Limited. (Baker Tilly, 2013)

As at March 2014, Baker and Tilly recorded that a total of MK13.67 Billion (UK£20.25Million) may have been misappropriated during the year 2013 as in Table 5.10 below.

The National budget for the year 2013/2014 was MK603.4 billion ; MK463.1 billion recurrent expenditure and K175.0 billion in development expenditure.

This was the first known Forensic Audit carried out in Malawi and it recorded the possible magnitude of financial mismanagement covering transactions and controls for the six months period covering April 1, 2013, to 30 September 2013.

The Budget for the fiscal year 2013/2014 was MK603.4 billion of which MK363.1 billion, representing 60.0 percent of total revenue (collected from Malawi) and grants, while K240.3 billion are donor grants, representing 40.0 percent of total revenue and grants. The budget totalling MK603.4 billion comprised of MK463.1 billion recurrent expenditure and K175.0 billion development expenditure. (2013/14 Budget Statement, May 2013)

The Annual Budget for the Government of Malawi for the 2014/2015 financial Year was MK742.7 Billion of which MK535.1 Billion is the recurrent expenditure and MK194.6 Billion was for development projects (2014/2015 Budget Statement, 2014)

Table 5.10 Outcome of Forensic Audit by Baker and Tilly for the Year 2013/2014

No.	Type of misappropriation	Amount (MK)	% of development budget	Equivalent in UK£
1	Cash gate Transactions	6,096,490,705.00	3.48	9,031,838.08
2	payments with no supporting documents	3,955,366,067.00	2.26	5,859,801.58
3	Inflated procurement prices	3,619,539,979.00	2.07	5,362,281.45
Total		**13,671,396,751.00**	**7.81**	**20,253,921.11**

Exchange rate as of March 2014 was MK675 to 1£ (Stg) (Baker and Tilly,2013)

On July 2, 2016, Andrian Kitimbo, wrote in the Global Risks Insights that during the course of 'Cashgate', several senior government officials embezzled more than $30 million from state coffers. The donor community, concerned by the scandal, pulled funding out of Malawi, leaving the heavily aid-dependent country with a budget crisis.

The Corruption Perception Index (CPI) published by Transparency International ranks Malawi as 112th out of 167 countries (Transparency International, 2015) (Note that the higher the CPI the higher the perceived incidence of corruption.

The total amounts of resources recorded as misappropriated in the table 5.10 above is MK13.67 Billion representing 8% of the development budget for the year 2013/2014. This is a huge amount and therefore affects the ability of the government to meet its obligations to pay 15% of the cost of World Bank funded projects.

The donor community met in Lilongwe, Malawi on November 7, 2013 and decided to withhold disbursement of funds to Malawi in reaction to the scandal. Noting that Malawi depends on the donor community grants to finance 40% of the annual budget, one may realize what big financial blow such a withholding of funds dealt the Malawi economy. The total amounts embezzled in the cash gate scandal is not yet confirmed, but some estimates have been published and Lameck Masina of Voice America stated that as of November 2013, more than$250 million had been siphoned from Government coffers. This is a lot higher than had been declared by

Bakaer & Tilly who had not concluded the audit. This withholding of donor funds means that the Government will not be in a position to pay works carried out on the majority of the ongoing construction projects and payment paralysis will be experienced by many SMEs who have contracts with the Government.

In depth interviews with the managers and opinion leaders in the construction industry in Malawi has indicated that corruption occurs at

a) The National level as in the case of “Cash Gate” and at the institutional level and budgetary constraints affect the SMEs who have contracts
b) at the institutional level when the senior managers of the procuring entity in question either individually or in an organized manner engages in corrupt practices in the procurement and management of services and Works in the construction industry. The managers and opinion leaders interviewed indicated that when this happens the SMEs in construction industry are affected in the following ways:

- They are denied opportunities as contracts are awarded to non deserving entities
- They are denied of profits as they offer bribes to facilitate approvals of their work
- They suffer unnecessary delays in approval of invoices.
- Their works are at times unfairly rejected
- The most expensive of remedial measures are recommended.

In June 2016 the CEO of one of the parastatals responsible for the management of the largest portion of the development fund was accused of having used his position to award a \$303 823 (K217 million) contract to his own company. This particular contract was financed by the World Bank. It is emerging that investigations have been conducted and findings in their report dated September 29, 2016 confirm the allegations. The matter is yet to be concluded, but the World Bank has not denied or confirmed the accusations.

Some of the Managers interviewed indicated that there is rampant institutional corruption where the procurement processes favour SMEs owned by relatives and friends of the employees of the procuring Entity.

5.5.3.5 Bank Lending Interest Rate higher in Malawi than for competing Foreign SMEs

The opinion leaders interviewed, and literature reviewed confirmed that there exists an astronomical disparity in the prevailing bank lending interest rate in Africa and particularly in Malawi, compared to those of the home countries of the competing foreign SMEs. This disparity gives the foreign SMEs an advantage over the local SMEs in Malawi since the cost of their borrowed resources is much lower than those incurred by the local SMEs. Data collected on interest rates over the last 16 years (2000 to 2015) in the tables here below indicate that the local average lending interest rate is 2.79% in the United Kingdom, 2.14 in the European Union, 2.61 in the United States of America and 33.85% in Malawi. This single factor leads to the loss of competitive advantage of local SMEs by a margin of over 30% on the financial aspects of the bids.

Table 5.11 Bank lending interest rate Malawi (% p.a)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
53.1	**56.2**	**50.5**	**48.9**	**36.8**	**33.1**	**28.3**	**21.7**	**19.3**	**19.3**	**18.6**	**17.8**	**25.7**	**38.5**	**36.8**	**37.1**

Source: Reserve Bank of Malawi

Table 5.12 Bank lending interest rate in the European Union (EU) (% p.a.)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
4.3	3.8	2.8	2.5	2.0	2.3	3.3	4.0	3.8	2.0	1.0	1.3	0.8	0.2	0.1	0.05

Data Source: European Central Bank Link to ECB: www.ecb.int No responsibility is taken for them correctness of this information.

Table 13 Bank lending interest rate in the United States of America (USA) (% p.a.)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
6.0	7.0	2.0	1.8	1.5	3.0	5.0	5.8	5.8	1.5	0.4	0.4	0.4	0.4	0.4	0.4

Source: US Federal Reserve, Quartz, Money morning Research

5.5.3.6 Failure to Apply the Available Tools for Leveling the Playing Fields

a) Local Preference

In 1961 Canada experienced a decline in manufacturing with related high unemployment rate and the Governments adopted the strategy of “local preference policies” in order to ensure that the public funds used in majority of procurement of manufactured goods, services and works contracts went into pockets of Canadian SMEs and Canadian work force. Notwithstanding the trade protocols with other countries, the Government encouraged a 100% local procurement preference for manufactured goods and approved a “Buy Canadian” slogan, which was regularly broadcast on the Canadian Broadcasting Service (CBS) (Baldwi, *et al*, 2009)

Governments can empower local SMEs by adopting affirmative action supported by policies that allow public procurement to be used as a means to direct resources from the government institutions, which form the single largest consumer, in favour of domestic or regional SMEs (Mabveka, 2010)

The local or domestic preference policy is the strategic tool used by various governments to give the local and domestic SME a competitive boost (or head start) to “provide a comparatively level playing field with the better placed competing foreign SMEs. This policy is regulated by ensuring that the “preference margin” applied does not give the domestic and local SMEs undue advantage over their international competitors.

Domestic and local preference policies are practiced in many countries such as Canada, Swaziland, South Africa, Malaysia, China, and USA (in some states and counties) with public contracts awarded to local SMEs with a preference margin decided by the Procuring entity (Mabveka, , 2010)

The local preference policies have been supported by the World Bank Guidelines for Procurement Under IBRD Loans and IDA Credits of May 2004, Article 1.3 (page 3) provides for “Open competition as the basis for efficient public procurement and allows Borrowers to select the most appropriate method for the specific procurement properly administered, with the allowance for preferences for domestic SMEs for manufactured goods, services and works.

In June 2003, the Government of Malawi adopted the preferential procurement policy when it published The Public Procurement Act No.8 of and included Article 31 subsection (17) which provided that *“In the evaluation of tenders, a procuring entity may apply a margin of price preference in favour of domestic bidders in accordance with the Regulations: Provided that the application of such a margin of price preference has been disclosed in the bidding documents”.*

The African Development Bank also provides an advantage to the regional SMEs in order to encourage and support their growth and allows the borrower to apply a domestic or a regional preference but determines that the maximum domestic preference margin that can be allowed, subject to approval by the Bank's Board of Directors. The Domestic preference margin is 15% of (CIF) for goods, 10% for Works and 10% for goods and 7.5% for works for regional preference margin (African Development Bank Group, 2016).

The World Bank has supported the growth of local SMEs in many countries and has sponsored seminars and workshops to study and make recommendations with this objective. In one such a meeting, a presentation made by Seth, S. of World Bank and Andreski, A., at the 2006 SSATP 2006 Annual Meeting in Maseru, recommended unspecified local preference margins for bidding and removal of tax breaks for foreign firms. This is in agreement with the Malawi Public procurement act No.8 where it is left to the procuring Entity to determine the appropriate preference margin.

As demonstrated by the trend of the bank lending interest rates in tables presented above, the foreign companies can enjoy offshore borrowing at a bank lending rate 30% lower than that available to the local SMEs in Malawi; which would mean that without considering other factors such as technological advantage, equipment and other resources; the minimum preference margin would be 30%.

Procurement processes for International Competitive Bidding (ICB) are recommended for contracts valued above the indicative thresholds specified below for various elements of inputs required of SMEs in the Construction Industry in Malawi and it is for such procurement processes that the domestic preference margin is applicable.

This domestic preference margin of 30%, shall not afford the local SMEs any advantage over the foreign SMEs involved in the bidding but will merely attempt to have a level "economic environment' playing field.

Surprisingly, the World Bank who are the main promoters of SMEs in Africa, have made the application of a domestic preference margin of 30% as has been derived above impossible as the Bank has contradicted and challenged their own objective and benevolence in publication of the World Bank Sponsored "Malawi Country Procurement Assessment Report (CPAR)" of May 2004.

The main findings and recommendations in the CPAR, included a view that some Interim Guidelines applied by the Government of Malawi at the time of study, were not in line with sound international public procurement practices. The CPAR also concluded that among the Interim Guidelines applied by the Government, those singled out was: *"Application of excessive and inappropriate margins of preference - 25% for locally manufactured goods, 20% for local retailers and 15% for works'.* (Ben, et al, 2004)

The African Development Bank has provided limits for Domestic preference margin as 15% of (CIF) for goods and 10% for Works (African Development Bank Group, 2015) which may be seen as supportive of the position held by the World Bank as stated above, but it provides a guiding baseline for the application of the domestic preference margin.

The author had one-on-one interviews with senior government and private corporate managers in the Construction Industry who have had intensive experience in the processes of procurement and management Construction works carried out by SMEs in Malawi and served at positions where they had influence on formulation and application of government policy. When the matter of domestic preference margin was discussed, they indicated that there were no studies carried out in Malawi to support the application or the margin applicable.

The Author, therefore, proposes that the position held by both the World Bank and the African Development Bank which has been influenced by lack of information on this subject, be reviewed based on this study and the available data on bank lending interest rates which has provided sufficient evidence leading to the conclusion that application of a 30% domestic preference margin is neither excessive nor inappropriate but just adequate to provide an equal playing field in respect to this single variable.

The guiding principles in Public procurement focus on encouraging full and open competition, best value, equity and impartiality. Patricia M. Innocenti of Fairfax County Government, Virginia, asserts that "adequately reconciling local preference policies with public procurement principles has historically proved challenging. (Innocenti, et al, 2015) and this is clearly demonstrated by the position taken by the

World Bank and the African Development Bank in regard to the assessment and determination of the correct and appropriate local preference margin in Malawi.

The author observes the rapid variations of economic parameters occurring in Malawi and directly affecting the Construction Industry, that the applicable domestic preference margin be regularly reviewed and modified to reflect the actual needs in Malawi.

The views held by the World Bank and the African Development Bank and the inability of Procurement Entities (PE) to justify the application of a specific margin of domestic preference margin has led the majority of the public procuring entities to avoid possible criticism by completely abandoning the application of domestic preference. This is even though they have the legal support and mandate as contained in the Public Procurement Act No.8 in Article 31 subsection (17) of June 2003.

Some procurement Entities have inserted a standard clause here below which gives the PE the option of not applying the Domestic Preference

30 Domestic Preference

30.1 If so, indicated in the BDS, domestic Bidders or other Bidders using Malawian nationals to carry out the works shall receive a margin of preference in Bid evaluation in accordance with the procedure and criteria specified in Section 3, Evaluation and Qualification criteria.

As a result, many of the World Bank and African Development Bank funded projects in Malawi, the domestic preference margin was not applied, which denied the domestic SMEs the legal advantage as prescribed by law.

Table 53 below shows some projects by different public procuring entities as examples of the many cases where domestic preference was not applied.

In the course of reviewing the data collected for this study, it has emerged that there exists two hidden variables which are ignored in assessment of the competitive advantage obtaining to foreign SMEs in the construction Industry which has made the stakeholders, the managers and the financial institutions (World Bank, African

Table 5.15 Application of the Domestic Preference Margin in Bid Evaluation

Procurement Entity	Project and Financing (ICB)	Date	Clause 33 Preference. Margin of
Roads Authority	Loan/Credit/Grant No. 881 Thyolo – Thekerani – Muona – Makhanga - (S151) Road Construction Works	October, 2015	Unless otherwise specified in the BDS, a margin of preference for domestic bidders shall not apply
Ministry of Natural Resources Energy and Environment	No. MNREE/CFL/10/2011 Energy Efficient Lighting project: Supply and Delivery of Compact Fluorescent Lamps (CFLs)	7 March 2011	35. 35.1 Unless otherwise specified in the BDS, a margin of preference shall not apply. **ITB 35.1** A margin of preference shall not apply.
Ministry of Agriculture, Irrigation and Water Development	Proc.Ref.No.:021/SRWIHL/W/2017/016 Construction and rehabilitation works of the Phalombe Major and Sombani Gravity Fed Piped Water in Phalombe District	22nd July, 2017	35. 35.1 Unless otherwise specified in the BDS, a margin of preference shall not apply. **ITB 35.1** A margin of preference shall not apply.

Development Bank and others) to conclude that a given group of international and local SMEs participating in an International Competitive Bidding are of equal strength because they satisfy the set qualification criteria. These hidden variables are:

a) Definition of an SME in Malawi and the corresponding definition in the country of Origin of foreign SMEs leads to a situation where the International Competitive Bidding (ICB) processes is flawed because the SMEs are "mismatched" rendering the processes "uncompetitive"

b) Foreign SMEs enjoy banking services in both their country of origin and the country of the project and are paid upto 80% of the contract sum in foreign currency at home. In compensation for delayed payments, a uniform percentage is applied above the bank lending rate both in Malawi and the home country of the foreign SME. This gives the foreign SMEs a significant advantage arising from the relatively low interest rates in the foreign countries.

c) An SME in Malawi is considered to be a firm with a maximum of 250 employees as defined by the European Union and in agreement with

Verheugen G. (2005) and Vedanthachari LN. (2007). However, one observes that the European Union defines an SME as an entity with less than 250 employees and has an annual turnover not exceeding 50 million Euros, (Vedanthachari LN.2007) and/or an annual balance sheet total not exceeding 43 million euro (European Commission, 2005).

As specified in the Malawi Country Procurement Assessment Report (CPAR); 2004 the value of goods contracts procured in accordance with the International Competitive Bidding (ICB) method is US$200,000.00 and US$500,000.00 for works contracts. The local SMEs in Malawi are discouraged from bidding if they are committed in more than two current contracts of similar nature in consideration that the resources available to local SMEs would be overstretched, with such workload, and there would be genuine grounds for concern that such a scenario represented a high risk of default.

This leads to the observation that in the event that a local 'best performer' SME had two works contracts running concurrently and had two goods supply contracts and that the contract values were all double of the lower margins set in the Malawi CPAR, 2004 and had a contract period of two years, the turnover realized would be about US$ 1,400,000.00 as set out in the table below.

Table 5.16 The Turnover of well performing SMEs in Malawi

No.	Contract type	No.	value of each contract US$	Total value of all contracts US$	Contract Period (yrs)	Annual Turnover (US$)
1	Supply of Goods	2	400,000.00	800,000.00	2	400,000.00
2	Works construction	2	1,000,000.00	2,000,000.00	2	1,000,000.00
Total		4	1,400,000.00	2,800,000.00	2	1,400,000.00
The contract period of each of the contracts has been taken as two years						

The table above shows that the turnover of a well performing SME in Malawi would generate an annual turnover of US$1.4 Million (1.18 € Million) which is only 2% of the 50.0 million Euros set as the maximum turnover for SMEs in the European Union.

This clearly shows that the financial capacity of the best performing and biggest SMEs in Africa and Malawi in particular has a relatively very low financial base and cannot approximate the capacity of organizations classified as SMEs in Europe where the majority of the SMEs participating in International competitive Bidding in Malawi are registered.

This conforms with view of the Malawi Country Procurement Assessment Report (CPAR) May 24, 2004, which observes that "The capacity of the construction industry is too small to bid for larger contracts (even the largest domestic contractors have an annual turn-over of not more than US$ 5 million). The consulting industry (including general consultancy, architects and surveyors, economists, auditing and finance) consists mostly of one-person firms.

b) Disparity in the level of compensation in the event of Delayed Payments

Under the provisions of Clause 14.8 of the General Conditions of the Bank Harmonized Edition of the conditions of Contract for Construction Works prepared and copyrighted by the International Federation of Consulting Engineers (Fèdèration Internationale des Ingèniuers-Conseils, or FIDIC), FIDIC 2017 which is exclusive for the use of Multilateral Development Banks' Borrowers and their project implementing agencies as provided under the License agreement between AfDB and FIDIC.(all rights reserved) *"*(FIDIC, 1999 Second Edition 2017) *unless otherwise stated in the particular Conditions, these financing charges shall be calculated at the annual rate of three percentage points above the discount rate of the central Bank in the country of the currency of payment or if not available, the interbank offered rates, and shall be paid in such currency*" .(all rights reserved)

This clause appears quite in order in text, content and intent until one looks at a simulation of the actual expenses and payments which occur during the contract period and the impact this Clause has on two SMEs; one local Malawian compared to foreign SMEs who have been awarded similar contracts of say MK100,000,000.00, with similar management and challenges in January 2014 with a contract period of 12months upto December 2014. The contractors will be assumed to have both suffered delayed payments of one year for each of the 12 Interim Valuation certificates.

The local SME will price his works fully in Malawi Kwacha and will bank in Malawi while the SME from Europe will price the works at 20% in Malawi kwacha and 80% in USD or other convertible currency. When the two SMEs are compensated for delayed payments at 3% above the above the discount rate of the central Bank in the country of the currency of payment as provided under the provisions of Clause 14.8 of (FIDIC, 1999 Second Edition 2017) the "3% above" will have a different proportion of the net payment for delayed payment as indicated in the outcome in tables 5.14 and 5.15 here below.

TABLE:5.14 ANALYSIS OF INTEREST PAID THE LOCAL AND FOREIGN SMES RESPECTIVELY AND THE CORRESPONDING COMPENSATION PROVIDED FOR IN THE CONTRACTS

LOCALSME

	Month	submission of invoice (No)	Payment of invoice (No)	total Monthly invoice for local currency component (MK)	total Monthly invoice for foreign currency component (MK)	cummulative total local currency invoiced but due (MK)	cummulative total foreign currency invoiced but due (MK)	interest paid to the bank on local currency (%)	interest paid to the bank on foreign currency (%)	late payment interest paid to SME by Employer on local currency (%)	late payment interest paid to SME by Employer on local currency (%)	Total amount paid to the Bank by SME in iterest on local currency (MK)	Total amount paid to the Bank by SME in interest on foreign currency (MK)	Total amount paid to SME by Employer for late payment on local currency in (MK)	Total amount paid to SME by Employer for late payment on foreign currency in (MK)	Total amount paid to the Bank by SME in interest for borrowed money in (MK)	Total amount paid to SME by Employer for late payment on both local and foreign currency in (MK)
2014	January	1		10,000,000.00	-	10,000,000.00	-	40.2	0.25	43.19	3.25	334,895.83	-	359,895.83	-	334,895.83	359,895.83
	February	2		10,000,000.00	-	20,000,000.00	-	38.6	0.25	41.56	3.25	653,470.35	-	704,307.59	-	653,470.35	704,307.59
	March	3		10,000,000.00	-	30,000,000.00	-	37.1	0.25	40.13	3.25	948,341.74	-	1,024,975.41	-	948,341.74	1,024,975.41
	April	4		10,000,000.00	-	40,000,000.00	-	37.1	0.25	40.13	3.25	1,266,839.32	-	1,369,210.18	-	1,266,839.32	1,369,210.18
	May	5		10,000,000.00	-	50,000,000.00	-	37.1	0.25	40.13	3.25	1,586,067.84	-	1,714,234.94	-	1,586,067.84	1,714,234.94
	June	6		10,000,000.00	-	60,000,000.00	-	37.1	0.15	40.13	3.15	1,905,318.97	-	2,059,284.14	-	1,905,318.97	2,059,284.14
	July	7		10,000,000.00	-	70,000,000.00	-	35.1	0.15	38.10	3.15	2,103,480.25	-	2,283,243.55	-	2,103,480.25	2,283,243.55
	August	8		10,000,000.00	-	80,000,000.00	-	34.3	0.15	37.33	3.15	2,349,071.80	-	2,554,330.50	-	2,349,071.80	2,554,330.50
	Septemb	9		10,000,000.00	-	90,000,000.00	-	34.3	0.05	37.33	3.05	2,642,209.55	-	2,873,082.23	-	2,642,209.55	2,873,082.23
	October	10		10,000,000.00	-	100,000,000.00	-	34.3	0.05	37.33	3.05	2,936,707.66	-	3,193,313.19	-	2,936,707.66	3,193,313.19
	Novemb	11		10,000,000.00	-	110,000,000.00	-	37.9	0.05	40.88	3.05	3,564,564.84	-	3,846,906.60	-	3,564,564.84	3,846,906.60
	Decembe	12		10,000,000.00	-	120,000,000.00	-	38.2	0.05	41.21	3.05	3,934,330.07	-	4,243,241.48	-	3,934,330.07	4,243,241.48
						120,000,000.00	-					-	-	-	-	-	-
2015	January		1	(10,000,000.00)	-	110,000,000.00	-	38.2	0.05	41.21	3.05	3,502,430.56	-	3,777,430.56	-	3,502,430.56	3,777,430.56
	February		2	(10,000,000.00)	-	100,000,000.00	-	38.2	0.05	41.21	3.05	3,295,546.14	-	3,554,302.22	-	3,295,546.14	3,554,302.22
	March		3	(10,000,000.00)	-	90,000,000.00	-	38.2	0.05	41.21	3.05	2,970,556.10	-	3,203,794.97	-	2,970,556.10	3,203,794.97
	April		4	(10,000,000.00)	-	80,000,000.00	-	38.2	0.05	41.21	3.05	2,641,805.55	-	2,849,231.94	-	2,641,805.55	2,849,231.94
	May		5	(10,000,000.00)	-	70,000,000.00	-	38.2	0.05	41.21	3.05	2,312,935.27	-	2,494,539.78	-	2,312,935.27	2,494,539.78
	June		6	(10,000,000.00)	-	60,000,000.00	-	38.2	0.05	41.21	3.05	1,984,061.17	-	2,139,843.51	-	1,984,061.17	2,139,843.51
	July		7	(10,000,000.00)	-	50,000,000.00	-	38.2	0.05	41.21	3.05	1,655,186.95	-	1,785,147.10	-	1,655,186.95	1,785,147.10
	August		8	(10,000,000.00)	-	40,000,000.00	-	33.4	0.05	36.43	3.05	1,160,430.50	-	1,264,568.46	-	1,160,430.50	1,264,568.46
	September		9	(10,000,000.00)	-	30,000,000.00	-	33.4	0.05	36.43	3.05	868,067.50	-	945,968.57	-	868,067.50	945,968.57
	October		10	(10,000,000.00)	-	20,000,000.00	-	33.4	0.05	36.43	3.05	581,342.77	-	633,512.94	-	581,342.77	633,512.94
	November		11	(10,000,000.00)	-	10,000,000.00	-	33.4	0.05	36.43	3.05	294,775.12	-	321,228.48	-	294,775.12	321,228.48
	December		12	(10,000,000.00)	-	-	-	33.4	0.05	36.43	3.05	8,211.85	-	8,948.79	-	8,211.85	8,948.79
												-	-	-	-	-	
				Totals								45,500,647.70	-	49,204,542.96	-	45,500,647.70	49,204,542.96
				Total interest compentation paid by the Procuring Entityn to SME													3,703,895.26
				Total compensation in interest paid to SME by the Employer (Procurement Entity) in percentage points of interest paid by SME to the Bank													8.14

TABLE 5.15 ANALYSIS OF INTEREST PAID THE LOCAL AND FOREIGN SMES RESPECTIVELY AND THE CORRESPONDING COMPENSATION PROVIDED FOR IN THE CONTRACTS

FOREIGN SME

	Month	submission of invoice (No)	Payment of invoice (No)	total Monthly invoice for local currency component (MK)	total Monthly invoice for foreign currency component (MK)	cummulative total local currency invoiced but due (MK)	cummulative total foreign currency invoiced but due (MK)	interest paid to the bank on local currency (%)	interest paid to the bank on foreign currency (%)	late payment interest paid to SME by Employer on local currency (%)	late payment interest paid to SME by Employer on local currency (%)	Total amount paid to the Bank by SME in interest on local currency (MK)	Total amount paid to the Bank by SME in interest on foreign currency (MK)	Total amount paid to SME by Employer for late payment on local currency in (MK)	Total amount paid to SME by Employer for late payment on foreign currency in (MK)	Total amount paid to the Bank by SME in interest for borrowed money in (MK)	Total amount paid to SME by Employer for late payment on both local and foreign currency in (MK)
2014	January	1		2,000,000.00	8,000,000.00	2,000,000.00	8,000,000.00	40.2	0.25	43.19	3.25	66,979.17	1,666.67	71,979.17	21,666.67	68,645.83	93,645.83
	February	2		2,000,000.00	8,000,000.00	4,000,000.00	16,000,000.00	38.6	0.25	41.56	3.25	130,694.07	3,333.68	140,861.52	43,392.01	134,027.75	184,253.53
	March	3		2,000,000.00	8,000,000.00	6,000,000.00	24,000,000.00	37.1	0.25	40.13	3.25	189,668.35	5,000.69	204,995.08	65,117.52	194,669.04	270,112.60
	April	4		2,000,000.00	8,000,000.00	8,000,000.00	32,000,000.00	37.1	0.25	40.13	3.25	253,367.86	6,667.71	273,842.04	86,843.03	260,035.57	360,685.06
	May	5		2,000,000.00	8,000,000.00	10,000,000.00	40,000,000.00	37.1	0.25	40.13	3.25	317,213.57	8,334.72	342,846.99	108,568.53	325,548.29	451,415.52
	June	6		2,000,000.00	8,000,000.00	12,000,000.00	48,000,000.00	37.1	0.15	40.13	3.15	381,063.79	6,001.04	411,856.83	126,284.99	387,064.84	538,141.82
	July	7		2,000,000.00	8,000,000.00	14,000,000.00	56,000,000.00	35.1	0.15	38.10	3.15	420,696.05	7,000.75	456,648.71	147,331.50	427,696.80	603,980.21
	August	8		2,000,000.00	8,000,000.00	16,000,000.00	64,000,000.00	34.3	0.15	37.33	3.15	469,814.36	8,000.88	510,866.10	168,386.75	477,815.23	679,252.84
	September	9		2,000,000.00	8,000,000.00	18,000,000.00	72,000,000.00	34.3	0.05	37.33	3.05	528,441.91	3,000.33	574,616.45	183,427.98	531,442.24	758,044.43
	October	10		2,000,000.00	8,000,000.00	20,000,000.00	80,000,000.00	34.3	0.05	37.33	3.05	587,341.53	3,333.46	638,662.64	203,799.55	590,674.99	842,462.18
	November	11		2,000,000.00	8,000,000.00	22,000,000.00	88,000,000.00	37.9	0.05	40.88	3.05	712,912.97	3,666.81	769,381.32	224,184.66	716,579.77	993,565.98
	December	12		2,000,000.00	8,000,000.00	24,000,000.00	96,000,000.00	38.2	0.05	41.21	3.05	786,866.01	4,000.15	848,648.30	244,569.80	790,866.17	1,093,218.10
						24,000,000.00	96,000,000.00					-	-	-	-	-	-
2015	January		1	(2,000,000.00)	(8,000,000.00)	22,000,000.00	88,000,000.00	38.2	0.05	41.21	3.05	700,486.11	3,666.67	755,486.11	223,666.67	704,152.78	979,152.78
	February		2	(2,000,000.00)	(8,000,000.00)	20,000,000.00	80,000,000.00	38.2	0.05	41.21	3.05	659,109.23	3,333.49	710,860.44	203,901.82	662,442.71	914,762.26
	March		3	(2,000,000.00)	(8,000,000.00)	18,000,000.00	72,000,000.00	38.2	0.05	41.21	3.05	594,111.22	3,000.14	640,758.99	183,518.25	597,111.36	824,277.24
	April		4	(2,000,000.00)	(8,000,000.00)	16,000,000.00	64,000,000.00	38.2	0.05	41.21	3.05	528,361.11	2,666.79	569,846.39	163,133.11	531,027.90	732,979.50
	May		5	(2,000,000.00)	(8,000,000.00)	14,000,000.00	56,000,000.00	38.2	0.05	41.21	3.05	462,587.05	2,333.44	498,907.96	142,747.96	464,920.50	641,655.92
	June		6	(2,000,000.00)	(8,000,000.00)	12,000,000.00	48,000,000.00	38.2	0.05	41.21	3.05	396,812.23	2,000.10	427,968.70	122,362.82	398,812.33	550,331.52
	July		7	(2,000,000.00)	(8,000,000.00)	10,000,000.00	40,000,000.00	38.2	0.05	41.21	3.05	331,037.39	1,666.75	357,029.42	101,977.67	332,704.14	459,007.09
	August		8	(2,000,000.00)	(8,000,000.00)	8,000,000.00	32,000,000.00	33.4	0.05	36.43	3.05	232,086.10	1,333.40	252,913.69	81,592.53	233,419.50	334,506.22
	September		9	(2,000,000.00)	(8,000,000.00)	6,000,000.00	24,000,000.00	33.4	0.05	36.43	3.05	173,613.50	1,000.06	189,193.71	61,207.38	174,613.55	250,401.10
	October		10	(2,000,000.00)	(8,000,000.00)	4,000,000.00	16,000,000.00	33.4	0.05	36.43	3.05	116,268.55	666.71	126,702.59	40,822.24	116,935.26	167,524.82
	November		11	(2,000,000.00)	(8,000,000.00)	2,000,000.00	8,000,000.00	33.4	0.05	36.43	3.05	58,955.02	333.36	64,245.70	20,437.09	59,288.39	84,682.79
	December		12	(2,000,000.00)	(8,000,000.00)	-	-	33.4	0.05	36.43	3.05	1,642.37	0.01	1,789.76	51.94	1,642.38	1,841.70
												-	-	-	-	-	
				Totals								9,100,129.54	82,007.81	9,840,908.59	2,968,992.46	9,182,137.35	12,809,901.05
				Total interest compentation paid by the Procuring Entity to SME													3,627,763.71
				Total compensation in interest paid to SME by the Employer (Procurement Entity) in percentage points of interest paid by SME to the Bank													39.51

Table 5.19: Cost of Project Financing

	Balance Due	Local SME		Foreign SME	
Year 2014	Amount (MK)	interest rate(%)	interest amount(MK)	interest rate(%)	interest amount(MK)
January	102,000,000.00	**40.2**	3,415,937.50	0.25	21,250.00
February	93,500,000.00	**38.6**	3,004,661.46	0.25	19,479.17
March	85,000,000.00	**37.1**	2,629,687.50	0.25	17,708.33
April	76,500,000.00	**37.1**	2,366,718.75	0.25	15,937.50
May	68,000,000.00	**37.1**	2,103,750.00	0.25	14,166.67
June	59,500,000.00	**37.1**	1,840,781.25	0.15	7,437.50
July	51,000,000.00	**35.1**	1,491,927.08	0.15	6,375.00
August	42,500,000.00	**34.3**	1,215,972.22	0.15	5,312.50
September	34,000,000.00	**34.3**	972,777.78	0.05	1,416.67
October	25,500,000.00	**34.3**	729,583.33	0.05	1,062.50
November	17,000,000.00	**37.9**	536,562.50	0.05	708.33
December	8,500,000.00	**38.2**	270,642.36	0.05	354.17
	(1,500,000.00)		20,579,001.74		111,208.33

5.5.3.7 The appropriate Domestic Preference Margin in Malawi

Tables 5.17 and 5.18 and 5.19 above shows the simulation of a scenario where a local and a foreign SME are concurrently engaged on similar contracts in Malawi, of MK120 Million, over a period of 12months and experience similar contractual challenges and 12 months delays in payment, (during the study period) starting January 2014 to December 2015.

a) Foreign SMEs have a 20% advantage on cost of finance

The result in this simulation is the finding that the foreign SMEs have significant advantage over the local SMEs in the cost of project financing capital as measured from the interest they pay for financial facilities from their respective banks. Table 5.16 shows that if the two SMEs were of equal efficiency and were both to make a profit of 15% of the contract price, then their capital inputs would be MK 102.0Million and the financial cost of the capital would be MK20,579,001.74 equivalent to 20% of the contract sum for the local SME and MK111,208.33 equal to 0.11% of the contract sum for the foreign SME.

b) The financial inputs needed by the local SME is 30.2% higher

Tables 5.14 and 5.15 above, show that over the 24months that the contract remains active, the local SME pays MK45, 500,647.70 to his bank in interest for extending financing agreements as a result of delayed payments while during the same period, the foreign SME pays his bankers MK 9,182,137.35. Therefore, the local SME spends MK 36,318,510.35 or 36.3% of the contract price more “out of pocket” than the foreign SME. This implies that that while the consideration in a) above is that the MK102.0 Million would be required as capital costs, delayed payments result in additional financing costs of MK45,500,647.70 for the local SME and MK 9,182,137.35. for the foreign SME.

This scenario means that the local SME needs MK36,318,510.35 (30.2%) more than the foreign SME to successfully deliver the contract. This also implies that the profit margin enjoyed by the local SME is reduced as the inputs increase.

c) Foreign SMEs compensated at 39.5% for delayed payments while the local SME is compensated at compensated at 8.14%

It has emerged that the wording of the clause providing for compensation for delayed payments offered a fixed percentage above the interest an SME paid for financial facilities provided by their banks. Therefore, the SME paying a higher interest to their bank received a significantly lower compensation. This arrangement favoured foreign SMEs.

The simulation indicates that under the provisions of the contract the local SMEs receives a total of Mk3,703,895.26 or 8.14% above the amount of MK45,500,647.70 in interest he paid to his bank while the foreign SMEs receive a total of MK 3,627,763.71 or 39.51% above the MK 9,182,137.35 interest he paid to his bank as compensation for late payments over the same duration and equal periods of delay.

This disparity occurs because the procurement processes apply a “fixed percentage points above” the bank interest rate without due consideration that the bank rates in Europe are much lower than those charged in Malawi.

5.5.3.8 Determination and application of preferential Margin

This analysis shows that the position advanced by the World Bank Sponsored “Malawi Country Procurement Assessment Report (CPAR)” of May 2004 application of a local preference margin of 15% for works is “excessive and inappropriate” is not accurate and requires to be reviewed from time to time to give the competing SMEs a level playing field.

The discussion above and the data used shows that in consideration of the cost of financing alone, as in a) above, the local SME should be given a 20% preference margin which should be improved to include for the relatively higher financial costs the local SME is required to provide in interest for delayed payments. At the moment many of the contracts reviewed did not have a domestic preference margin.

The depreciation of local currencies automatically excludes the local SMEs from qualifying to compete in the ICB processes as their resources value and the value of works carried out reduce far below those defined in table 35 above. If an SME was qualified for ICB in 2012 it would have to increase its value 4.7times in local currency to remain within the ICB threshold. (1USD=MWK168.88 in 2012; 1USD=MWK785.60 in 2021)

This may have contributed to the elimination of some SMEs in the 5Million and 15Million categories whom in 2014/2015 were 631 or 76.8% of the field. The bigger contracts would therefore attract less bidders as the unlimited category have only 3.3% of all the SMEs.

It will also be of interest to note that out of the 1056 SMEs licensed in 2013/2014 more than 232 had not renewed their license and therefore were out of play. This figure could be much higher than 232 as there were new entrants in the register during the year.

5.5.3.9 Influence of market environment on bidding.

In 2013, NCIC licensed a total of 2240 SMEs in the construction industry in Malawi and the major Employer in the market; the Roads Authority invited bids for 154 contracts for routine maintenance for SMEs in the Categories in indicated in Table 58, here below.

Table 5.20: Contracts awarded in 2013 for annual routine maintenance

SME Classification (MK)	0-10	10-15	16-100	100++
No. Registered	603	233	276	53
Jobs advertised	15	66	43	30
No. without Job	588	167	276	32
% to be employed	2.49	28.33	15.58	56.60
% remaining unemployed	97.51	71.67	84.42	43.40
Probability of engagement	0.02 (1 :40)	0.28 (1 in 4)	0.16 (I in 6)	0.57 (1 in 2)

Source: Road Authority Malawi

As indicated in table 58 above 97.5%, 71.7%, 84.4% in the three lowest categories were not awarded contracts. These observations lead to the conclusion that the market environment is very competitive, and a high number of SMEs missed an opportunity to work for a whole year and have to wait until the following year for new bids to be invited for them to make another attempt. The environment is very harsh for start-ups which creates desperation, at the lower end of the construction services supply chain, which has driven several SMEs both in the services and the Construction sector of the construction industry in Malawi to progressively lower their rates to such levels that their profit margins too low for them to invest in human, technical or financial capital development. Bidding at such low rates is referred to as "suicidal bidding" as it renders the SMEs vulnerable to risks and therefore compliments the negative effects of payment paralysis when it occurs and completely eliminates the possibility of survival of such an SME in current market environment in Malawi.

As indicated in section 5.4.3 some employees of the procurement Entities influence the procurement processes to favour local SMEs owned by relatives and friends of the employees of the procuring Entity. This situation makes the relevant institutions lose sight of the national policy goals of encouraging growth of local SMEs as they corruptly favour a few of the SMEs while others are driven to unsustainable levels leading closure.

The figure below summarizes the interrelation of the five factors found to be the main enablers of payment paralysis for local SMEs who are losing their market niche' to foreign SMEs. Figure 5.5 here below indicated the five Key Factors causing payment paralysis and their interaction.

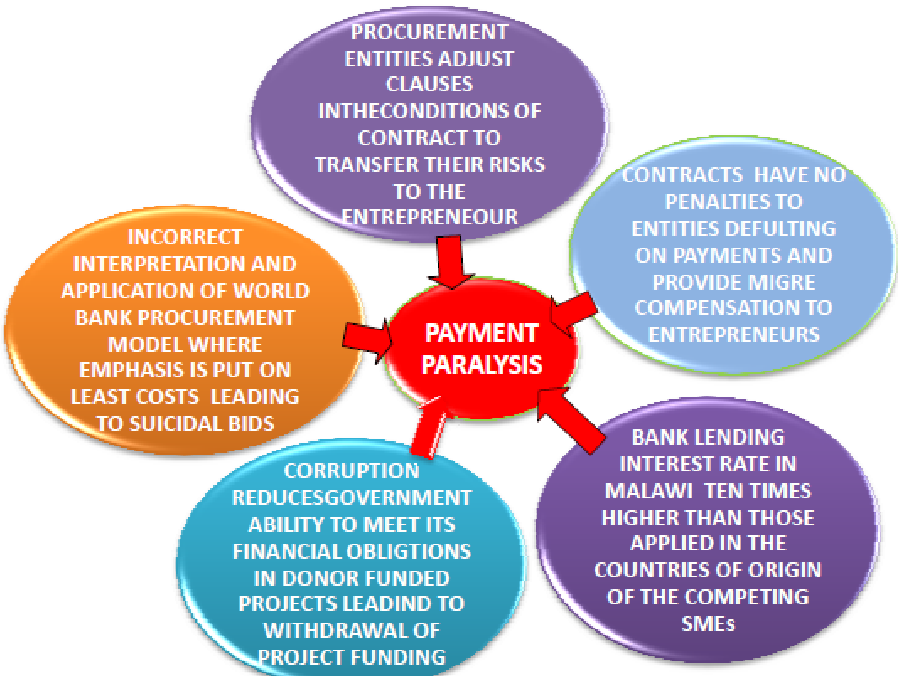


Figure 4: Drivers of payment paralysis in the construction Industry in Malawi

5.6 Defining and Measuring Contribution to Knowledge

Handfield & Mylnyk (1998) assert that data and experience constitute "what" has been observed and theory explains "why" the observation was made and may recur while knowledge is the resultant understanding created by research and the ability to influence the event (Morrison, JM., 2003).

Reynolds, (1971, p. 4) cited by Handfield & Mylnyk (1998) stipulate that successful contribution to knowledge "must achieve at least one of the five objectives of knowledge" listed here below:

* *A method of organizing and categorizing "things," (a typology)*
* *Predictions of future events*
* *Explanations of past events*
* *A sense of understanding about what causes events, and in some cases,*
* *The potential for control of events*

Knowledge is therefore the understanding of "why" an event occurs and most importantly "how" to influence the phenomenon to the benefit of the mankind and the environment.

A Research should result in a contribution of "new knowledge" embracing the concepts of originality, creativity and innovation (Baptista et al, 2015). Saunders et al (2007) suggests that knowledge development may not involve development of a new theory but if the research answers a specific problem in a particular field, it may be considered to have developed new knowledge.

This research was conducted with the aim of establishing the leading factor in causing negative impact on the sustainability of SMEs in the construction Industry in Africa: case of Malawi and develop a strategic framework for reducing these effects and enhance growth, competitiveness and sustainability of local SMEs.

The research has established that Malawi has a development budget averaging 26.6% of the total budget which on average has been in the sum of about USD431Million during the period 2013 to 2018, although in Malawi Kwacha, the development budget has quadrupled from MK287.0 Billion in 2011 to M1.297 Trillion in 2018 as the value of the Kwacha slid from MK153.50 to the US dollar in 2011 to

MK765 to a dollar in 2018. SMEs in the construction industry benefit from the Development budget which is used to fund construction works which are part of development.

It was also found that local SMEs in the construction industry have challenges in sustainability due to some factors in the marketplace environment with payment paralysis as the leading factor. This research further found that the leading drivers of payment paralysis are as here below.

- Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)
- Incorrect Interpretation and Application of World Bank Procurement Model
- Corruption
- Bank Lending Interest Rate in Malawi is generally higher than those in the Countries of Origin of the competing Foreign SMEs
- Influence of market environment on bidding.
-

The five factors above which were found to be the drivers of payment paralysis which is the most significant cause of unsustainability of the SMEs in the construction industry, can be considerably reduced with regular monitoring and appropriate modification of relevant legislation to improve the currently uncontrolled situation which has resulted in a volatile business environment for SMEs. Table 60 below indicates the proposed strategic framework for reduction of the effects of payment paralysis in Africa; case of Malawi

5.7 Influence of market environment on bidding.

In 2013, NCIC issued licenses to a total of 2240 entities and the major player in the market; the Roads Authority invited bids for 154 contracts for routine maintenance for SMEs in the Categories in indicated in Table 5.21, here below

Table 5.21: Contracts awarded in 2013 for annual routine maintenance

SME Classification (MKx106)	0-10	10-15	16-100	100++
No. Registered	603	233	276	53
Jobs advertised	15	66	43	30
No. without Job	588	167	276	32
% to be employed	2.49	28.33	15.58	56.60
Probability of engagement	0.02 (1 :40)	0.28 (1 in 4)	0.16 (I in 6)	0.57 (1 in 2)

Source: Road Authority Malawi

As indicated in table 5.21 above 97.5%, 71.7%, 84.4% in the three lowest categories were not awarded contracts in 2013.

The procurement method prescribed is not the best suited for an environment where such a high number of SMEs miss an opportunity to work and have to wait until next year to make another attempt. The method has driven the SMEs both in the services and the Construction to progressively lower their rates to very low levels which provides very low profit margins and no room for human, Technical or Financial capital development. This makes the SMEs vulnerable to risks and therefore compliments the negative effects of payment paralysis when it occurs.

This study explores this phenomenon with a view to suggest some adjustments in the procurement procedures or the market environment in which they are applied, to encourage the SMEs to offer and for the Procurement Entities to accept rates which are within a reasonable economic range to allow the SMEs make reasonable profit to foster growth and sustainability of the SMEs generally. The proposed changes resultant from this study are in Chapter 6 of this thesis.

5.8 Research Conclusions

Table 4.6 indicates that 86.3% the SMEs interviewed have suffered delayed payments of upto 2 years and suffered the negative impact of rapid accumulation of compounded interest on loans from the banks. It was also established that 62.1% (Table 4.8) of SMEs worked on contracts which had inadequate provisions for compensation for losses incurred due to the interest charges and escalation of prices which arise and made worse by the longer completion period which result due to slow progress as a result of delayed payments. The 62.1% SMEs found that Contract Documents are unfairly prepared and do not protect the SMEs as they do not allow adequate compensation to SMEs in regard to:

- Delayed payments
- Escalation of prices during the initial contract period
- Extension of time arising from slow performance as a result of non-payment.

- The tender Documents have some clauses which allow the Employer to fill as he finds it best suits his position particularly in regard to duration set for him to meet his obligations in the contract.
- The contract Models used in majority of the construction contracts make the contractor subservient to the Employer as majority of the works are designed by the Employer and he retains authority during the construction implementation phase where the "Employer" is the "Engineer" and the Supervising Consultant is designated "The Engineer's Representative" and operates within the scope of Delegated Powers from the Engineer. The Resident Engineer, who is an employee of the Supervising Consultant has even less powers delegated to him. This arrangement results in an environment which is skewed to the Employer enjoying more rights and power in the contract than the Contractor to a situation where the term "Parties in the Contract" is compromised because they are not equal parties.
- The tender documents have some declarations that are required of the bidding SMEs to make which are seen as intimidating and sometimes cause the SMEs to hesitate in exercising some their rights under the contract as this would lower their scores in the bid and affect their prospects of being shortlisted or winning future bids. An example of such requirement is to state whether the SME has had a litigation history. The narrative of SMEs during their experiences of hardships one observes that their counter actions do not include taking the matter to the court because they are afraid of losing a chance of getting another contract with the particular employer and their partners in their supply chain.

5.9 Recommendations

Observing that a contract in force and a contractor has carried out works and submits invoices (Interim Payment Certificate) for which the works (or supplies) and the goods or works have been confirmed, checked for quality, quantity and measured in accordance to the Contract Bills of quantities and evaluated using the contract rates and the Invoice value determined accurate and certified by the designated officers, the Amount certified becomes due to the Contractor, while the works carried out by the contractor, as certified, is considered satisfactory within the provisions of the contract, and equal to amount Certified which should be paid on the “contractual due date”

A Government, a County government or any department or government institution are considered to be permanent as the sovereign state they are associated and administrative and financial governance of such institutions should be continue seamlessly despite the regular change of governments after elections, or change of individual officials from time to time.

Stakeholders partnering with Governments and government institutions do so with the understanding that governments are sovereign and any contract with a government or its affiliated entities endures any political or administrative changes that may occur in governments from time to time. Management of changes in Government including transitions which include administration and obligations, is the responsibility of the Government as confirmed in Graham et al., (2003) record of Congressional Joint Hearing before the Committee on the Judiciary and the Committee on Rules and Administration of the United States of America on September 16,2003 which reveals that there are sub-committees with responsibilities “…focusing on continuity of Government and succession issues…” (Graham et al., 2003, p3, 6,&7) and ensuring Continuity of the Government, the Presidency and important governance institutions including the congress.

The author advocates that once invoices are certified by the office(r) so authorised to certify such invoices, for and on behalf of the Government, the certificate shall become the possession of the contractor and shall have the value as certified thereof and the Government shall cease to have any authority to review or to vary such an invoice and any queries arising there from shall become internal issues to be responded to by the government representatives on the works. The author recommends the following:

1. Exclude the Term “Pending Bills” in Contracts

Under the circumstances the delays are caused by internal inefficiencies and competing interests within the body of the Employer and the term “Pending Bills” should, therefore, be outlawed because of the following reasons:

a) The Employer is in default on failure to approve payment within the period specified in the contract.
b) there was a lapse in government operations which allowed “defective approvals”
c) audit of previously approved invoices by the “same approving authority” has no room in the contract and should not affect the contractor or the supplier.
d) failure in Government organs to carry out their responsibilities should be fully borne by the Government and no Contractor should suffer delayed payments occasioned by any Employer declaring duly certified IPCs, “pending Bills” under audit.

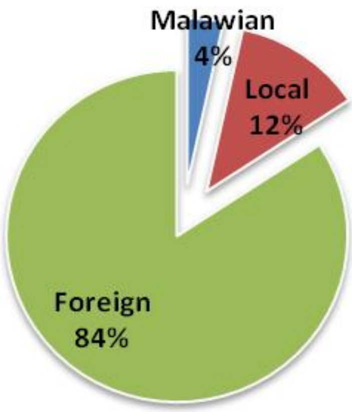
CHAPTER SIX

6 STRATEGIC LEGAL FRAME WORK FOR PROMOTING SUSTAINABLE GROWTH OF SMEs IN THE CONSTRUCTION INDUSTRY

6.1 Overview of Findings

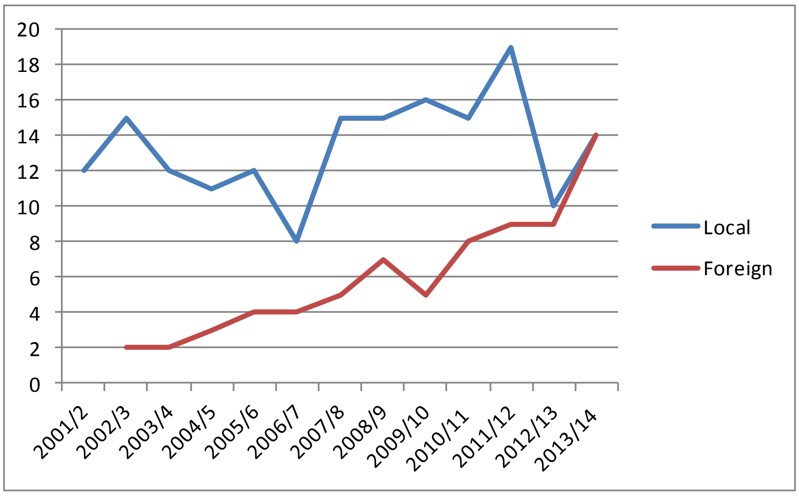
Observing the market niche, the local SMEs in the construction industry in Malawi share among themselves and that taken by the foreign SMEs, as indicated in figure Fig. 6 (copied below), it is clear that despite all the support from World Bank, AfDB, NGOs and other development partners, Malawi has received, the local SMEs in the construction industry have not made the projected progress in growth and sustainability.

Figure 6: Distribution of Construction works by values among Firms in Malawi (Market Niche)



Source: NCIC

Figure 7: Distribution of Construction Works by Values among Firms in Malawi



Source: NCIC

6.2 Strategic Framework to Reduce Effects of Payment Paralysis

It is indeed a matter of concern that upon projection of the data available on growth trend, as illustrated in Figure 7 above, the result indicates that the local SMEs are declining both in economic contribution to the GDP and in numbers compared with the steady growth of foreign SMEs who usually work on donor funded projects in construction industry in Malawi and their market share is growing.

It is therefore important that a strategic framework be crafted with the objective of eliminating or weakening the five major drivers of pay-paralysis towards eliminating or reducing the incidence and effects of “payment paralysis”.

The development of a strategic legal framework to eliminate or weaken the five major drivers of pay-paralysis was the third objective towards the achievement of the aim of this research, which is improving sustainability of SMEs in the construction industry in Africa; Case of Malawi.

This objective involves conducting an in-depth review and understanding of the dynamics and nourishment of each of the five drivers to assess and determine the aspect feature to be addressed in the process of development of the strategic legal framework to eliminate or weaken the identified drivers of the leading factor in impacting negatively on sustainability of SMEs in the construction Industry in Africa: case of Malawi identified in a) above, and develop a strategic Legal framework (Matrix) . Interview with the 20 failed SMEs and the 5opinion leaders, literature review offered valuable data for this research.

The strategic Legal framework shall therefore, be designed centring on breaking down each of the drivers listed here below into their constituent elements or their mode of entry and operation so as to disadvantage the SMEs in Contracts entered into with the Procurement Entities, so as to be the lessee party in the agreement and therefore to suffer delayed payments or non-payment and a sustained inability to obtain justice even in courts of law.

a) Inhibit Procurement entities from transferring own risks to SMEs

a) Review Eligibility Criteria for inclusion of local SMEs i and improve bid evaluation
b) Elimination of Corruption in the Country
c) Address high bank interests which disadvantage Local SMEs
d) Strengthening Weak Contract laws, for an SME friendly market Environment

Table 6.1 strategic legal framework for reduction of the effects of payment paralysis

Item	Drivers enabling and contributing to payment paralysis	**Proposed element or process to be regulated for Reduction of incidences**	**Mitigating the effects**
1	Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)	1. The standard document from the ODPP or FIDIC should not be changed except for project specific adjustment. 2.An oversight body to be formed	A legislation to declare modifications illegal and compensate the SME accordingly
2	Incorrect Interpretation and Application of World Bank Procurement Model	In tender evaluation, the PEs must stop focusing on the lowest price and focus on quality as well as defied in Cost and Quality Based Section (CQBS)	World Bank and the ADB provides for 80:20 points for cost: quality and this should be enforced.
3	Corruption	Enact legislations which will discourage corrupt practices.	Recover corruptly obtained wealth
4	Bank Lending Interest Rate in Malawi is generally higher than those in the Countries of Origin of the competing Foreign SMEs	A standard approach to determine appropriate Domestic preference margin to be provided to enable the foreign and local SMEs compete on equal terms.	An audit similar to Construction Sector Transparency (CosT) Introduced by DFID to monitor compliance
5	Influence of market environment on bidding	Introduce procurement rules that ensure as many as possible of the SMEs in the industry who are qualified and registered by NCIC are employed.	Malawi has enacted a legislation requiring foreign SMEs to sublet for 30% of works to local SMEs. Enforce the law while ensuring that the SMEs are productive and not parasitic.

6.2.1 Approach development of a Strategic Legal Framework

The (Natural Resource Government Institute, 2015) defines a legal frame work as the “ rules, rights and obligations of governments, companies, and citizens as set forth in a system of legal documents. The inclusivity and the order of these instruments is as listed below. While the order of importance and power decrease down the order of the list, they become more aspect specific and progressively more detailed down the ladder (Natural Resource Government Institute, 2015) .

a) The Constitution
b) Legislation and Policy
c) Regulations, Rules and Model Contracts
d) Contracts

As indicated above a constitution covers broad principals and is more difficult to change than the lower echelon of documents in a legal framework such as the laws and contracts are easier to change as posited by the (Natural Resource Government Institute, 2015).

The Strategic legal framework conceptualised in this research design was focused on working on legal provisions in the documents listed above from item b) to item d). The stakeholders in the construction industry in Kenya, the SMEs, society and the author collectively and individually engaged each other with the singular intent of preparing a strategic legal framework to improve sustainability of SMEs, particularly in the constructions industry.

To develop the Strategic Legal Framework, the author was informed by the research findings in regard to pay-paralysis being the leading factor in impacting negatively and the five drivers of pay-paralysis established in this research.

I was also important to study the current provisions in law to establish the shortfalls in the law which are creating space for the five drivers to thrive in the current legal framework environment and cause pay-paralysis to continue devastation of the sustainability of SMEs in the construction industry.

As explained in section 6.2 above, the Strategic Legal Framework could be progressively refined based on future research and the degree and the depth of breakdown of the processes each of the target drivers into many smaller but individually deserving in development into an actionable legislation . in the cause of identification of the proposed element or process to be regulated or controlled further towards elimination or weakening the driver even further to disable it.

6.2.2 **Economic Benefits of a Functional** Legal Framework

The strategic Legal framework will create a suitable environment for the transformation of the SMEs into sustainable and growing organizations which shall meet the national, social and investor expectations and spur the economic growth of the developing nations by achieving the following:

- ❑ Make SMEs in the construction industry in Malawi and the region sustainable
- ❑ Generation of sustainable employment and alleviation of poverty.
- ❑ Development of a pool of technological experts within the local SMEs and
- ❑ Improve Donor Fund retention; currently over 83.23% is paid to foreign SMEs

6.2.3 **Academic Benefits arising from this research**

The Research discovered new facts which open up new areas if research. The new frontiers in the improvement of growth and sustainability of local SMEs particularly in the construction industry in Africa; Case of Malawi can now be defined as described below.

b) The research fulfilled four objectives a follows:

a) The Research discovered the leading factor impacting negatively to sustainability of SME in the construction industry in Africa: case of Malawi is payment paralysis.

b) This research established that the five major Drivers of the leading factor,   pay-paralysis are:

- Corruption,
- Weak Contract laws,
- PEs skewing risks in their favour,
- poor bid evaluation and
- high bank interests.

c) The research determined the process of targeting each of the drivers and development of a strategic approach to derive a legal provision that will eliminate or weaken the identified drivers towards reducing the incidence and severity of payment paralysis.

d) The author disseminated the findings and recommendations of this research widely, in Malawi, Zambia and Kenya, engaged with the industry and society, and jointly found sponsors for drafting and tabling of Bills in Parliament for enactment of some elements of the strategic legal framework into actionable laws towards improvement of the sustainability of SMEs inn Kenya where Five No. Bills were tabled In Parliament in Kenya.

c) The Research also identified six personalities whom the author considers to have contributed enormously towards development, growth and sustainability of the construction industry, not only in their countries of origin but also in the whole world.

6.2.4 Contributed to Knowledge

The Structural Adjustment Programme (SAPs) (1990-2000) was the genesis of SMEs in Africa as it encouraged governments of developing countries to privatise nonstrategic commercial activities and the SMEs emerged to fill the commercial space that was created as the governments disengaged in these areas. The SMEs Sector in Africa is therefore relatively young, and as posited by Celine Kauffmann (2005) and Bill Kendrock and Jason Agar (2007) very few countries had working definitions of SMEs and therefore there were limited policy initiatives and studies on SMEs. The lack of clarity on definition of SMEs has remained unresolved as Finance Forum (2003), Chris Darroll (2012, p8), EU 2011/12 and Byson B. Majanga (2015) all agree that there is no clear definition.

Literature review indicated that there was limited literature on SME in construction Industry.

Thwala et al, (2009) stated that “Little or inadequate effort has been made to identify the causes of failure among the local contractors in Swaziland” Kauffmann (2005), and Atsede Woldie (2008) found that there was limited research on SMEs, and none was available on the subject of SMEs in the Construction Industry in Malawi. Kulunga (2012) and Emuze, F. and Kandangwe, S., (2013) confirm this position when they found that, literature on SMEs in the construction Industry in Malawi is limited.

The literature available focuses on the increase of SMEs as a result of growth of the private sector, consequent to the success of transfer of nonstrategic commercial activities from the governments to the private during the period of 1980-2000 in the course of IMF and WB SAPs. There are some dissenting voices such as Salih O. Nur (2015) who insists that (SAPs) policies had horrific economic and social consequences and Dzodzi Tsikata(1995) who argues that SAPs were based on wrong assumptions about Africa. The transfer of commercial activities to the private was successful as African Development Report (2011,p12) records that the private Sector accounts over 80% of total production, 67% of total investments and employs 90% of total work force. Zimbabwe Cameroon and Tanzania lag behind with private sector contributing about 20% of the national employment (Katua, 2014; Ayyagari, M. et al, 2005; Nuwagaba, A., 2015, p147;).

This research has established from literature reviewed that the SMEs in the construction industry in Africa are collapsing at an alarming rate of 90%-100% failure within 10 years of operation (Fatoki, O.,2014; Chimucheka, T., & Mandipaka, F., 2015; Kalane, L.,2015; Mumba, E.,2017; and Nuwagaba, A .,2015.)

The research findings are that the single factor that is the major cause of failure of SMEs in the construction industry in Africa; case of Malawi is payment paralysis which is caused by Delayed Payments.

The research also found that there are 5No. main drivers of payment paralysis which are:

a) Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)
b) Incorrect Interpretation and Application of World Bank Procurement Model
c) Corruption

d) Bank Lending Interest Rate in Malawi is generally higher than those in the Countries of Origin of the competing Foreign SMEs

e) Influence of market environment on bidding.

Saunders et al (2007) observes that if the research answers a specific problem in a particular field, it may be considered to have developed new knowledge. This research has met the criteria by bridging the knowledge gap that previously existed in regard to understanding the causes of failure of SMEs in the construction industry in Africa; case of Malawi, by research processes which generating the information below:

- compiling relevant information specific to growth and sustainability of SMEs in the construction industry in Malawi
- discovered five major drivers of payment paralysis which is new and useful information on this topic which is a contribution to knowledge (Rajasekar, S. *et al* 2006),
- Development of a strategic framework for reduction of the incidence payment paralysis underpinned on legislation discouraging entities from engaging in payment paralysis.

The research also reveals that the Tilly Baker 2014 Report records that corruption and mismanagement of Government funds resulted in misappropriation of funds equal to 33%, 41% and 16% of the development budget of the 2010/11, 2011/12 and 2012/13 financial years respectively as summarised in table 43 above. This means the government could not meet its o ligations pay its suppliers on time during the period and the subsequent years.

The Strategic Framework for reduction of negative effects on the SMEs in the construction industry in Malawi has also addressed and proposed ways of weakening the five drivers of payment paralysis. The research has made a contribution of “new knowledge” embracing the concepts of originality, creativity and innovation (Baptista *et al*, 2015).

6.2.5 Personalities who influence Construction Industry and this Research

This research recognized the six personalities here below as having made a huge impact and influenced the construction industry, particularly in knowledge, policy and financing its growth into a specialized private sector of SMEs who are creating employment and contributing significantly in the GDP.

6.2.5.1 **Hammurabi the law giver** (1810BC to 1750BC),

He gave the first recorded contract laws. *If a builder constructs a house for a man but does not make it conform to specifications so that a wall then buckles, that builder shall make that wall sound using his own silver.* (Horne, 1915).

6.2.5.2 **Benjamin Strong Jr.** (December 22, 1872 – October 16, 1928).

American Economist who served as Governor (President) of the Federal Reserve Bank of New York for the first 14 years after its formation (1914 to 1928) until his death. He exerted great influence over the policy and actions of the entire Federal Reserve System and indeed over the financial policies of all of the United States and Europe. A believer in the construction industry and its ability to "…*employ more labour, bring in to use more materials and create more spending power, which permeate through into the trades and the general price level….. when we have very cheap money for corporations and individuals to borrow in order to extend their businesses which results in construction…...*" (Wheelock, 1992 p21).
He played a major role in policy and funding of reconstruction in the United States and Europe after the Second World War, and is credited with enabling the resuscitation of Economies in Europe using the construction industry as the tool of reviving the economy due to its ability to recycle funds to many sectors in the shortest time cycle. This made construction a very important economic sector.

6.2.5.3 **Judge Lord Alfred Thomson Denning** (1899 to1999).

He was called to the Bar of England and Wales in 1923. He became a Judge in 1944 and the Lord Justice of Appeal in 1948. He was referred to as "the people's judge" and in the construction industry he is remembered for his ruling that *"Cash flow is the life blood of the building industry".* He provided the legal grounding and precedent bench mark in the importance of paying contractors and suppliers on time. He played a big role in entrenching laws and procedures that enhanced sustainability of the construction industry.

6.2.5.4 Robert Strange McNamara (1916-2009)

A Berkeley and Harvard graduate, he excelled, was nicknamed “whiz Kid”, and rose to become a one-month president of Ford Motor Company in 1960, transiting to be the secretary of State in Defence and presidential advisor to Presidents Kennedy and Johnsons. He was the fifth president of the World Bank 1968-1981.
(https://www.worldbank.org/en/archive/history/past-presidents/robert-strange-mcnamara).
In 1975 he dissuaded the Directors of the World Bank against setting up a new World Development Fund to provide long term adjustment loans and instead, he advised them to give an approval for the Bank to offer “structural adjustment” loans. This gave rise to the Structural Adjustment Programs (SAPs) and the Structural Adjustment Loans (SALs) (Gavin Williams, 1994), which were a game changer in governance and business structure in Africa and the developing world in general.
Structural Adjustment Programmes (SAPs), (1990-2000) was the genesis of SMEs, in Africa and other developing countries, as it encouraged governments of developing countries to privatise nonstrategic commercial activities and the SMEs emerged to fill the commercial space that was created as the governments disengaged in these areas and particularly in the construction Industry.

6.2.5.5 Sir Michael Latham (1943-2017)

Sir Michael Latham was Chairman of the Construction Industry Training Board and a Conservative MP for 18years. In 1994, he prepared the joint Government and Construction Industry Report “*Constructing The Team:” fondly referred to the Latham Report,* led to the prohibition of ‘pay-when-paid’ contingency clauses in The *Housing Grants, Construction and Regeneration Act, 1996. This came to effect in October 2011 in England and Wales and November 2011 in Scotland*.. “*The Latham Report”* had several aims including improving cash flows in the construction Industry and is sometimes referred to as *“the whirlwind that hit the construction industry”.*

6.2.5.6 **Rolffe W. Peacock**

Rolffe W. Peacock is the author of the book *Understanding small business: practice, theory and research (2004)*. In the book which has been cited widely, he gave clear and measurable economic and the legal definitions of failure of SMEs. The defination can be applied uniformly to all types of SMEs thereby providing benchmarks for investors and researchers to use as tools to determine point of failure of an SME and therefore understand the growth and sustainability of individual SMEs. This development has made it easier to understand the most critical milestone of SMEs' life cycle. This has made it possible for researchers to study the incidence of failure of SMEs under similar circumstance, which has helped to draw strategic plans incorporating interventions to enhance growth and sustainability. (Olawale Fatoki, 2014 p923).

1. *In economic terms, failure occurs when an SME earns at a rate of return on investment which is insufficient to cover its opportunity cost*.

2. *In legal terms failure occurs when:*
   a) an SME is formally liquidated

   or

   b) in the case of an unincorporated enterprise the owner becomes bankrupt for business reasons and the owner(s) or SME(s) exits the small business sector.

The author has broken the definition of failure in legal terms into two elements a) and b) in observance of the fact that very few SMEs in developing countries and particularly in Malawi go through the legal processes of liquidation with the majority quietly exiting the SME sector.

6.2.6 Publications by the Author

The author has published the papers and reports listed here below.

6.2.6.1 Published papers this research

1 Kaggiah, G.M.B., 2018. Contract Documents and Procedures which appropriately secure the interests of the Procurement Entity (PE), the Financing Agency and the Contractor, Kenya Engineer Journal,(p 26-35) September
https://www.kenyaengineer.co.ke/kenya-engineer-september-october-2018/

2 Kaggiah, G.M.B.,.Salimi, Z., and Danny, (2022),'Legal Framework for Reversing the Waning Sustainability of SMEs in the Construction Industry Due to Payment Paralysis in Malawi and Kenya', (p. 102–118), April.
https://ijfscfrtjournal.isrra.org/index.php/Formal_Sciences_Journal/index

6.2.6.2 Publications on other subjects

1. Kaggiah, G.M.B., 2005, Dealing with Nairobi's traffic problems Kenya Engineer. Volume 26 #1. p. 28-30 January-February.

2. Lyson Kampira, *et al*, December 2019), Rehabilitation and Construction of Priority Water Transmission Mains and the Associated Facilities in the City of Lilongwe and the Surrounding Areas; World Bank Document
 http://documents1.worldbank.org › curated › pdf
 https://documents1.worldbank.org/curated/en/568581583238456552/pdf/Abbreviated- Resetlement-Action-Plan-for-the-City-of-Lilongwe-and-the-Surrounding-Areas.pdf

3. Kampira, L. and Kaggiah*, G.M.B., 2017,* Environmental and Social Impact Assessment Report
 for Construction and Rehabilitation of Various Facilities at Chitedze Research Station, World Bank Document, December.
 https://documents1.worldbank.org › curated › pdf

4. Kampira, L. *et al,* 2017; Lilongwe Water and Sanitation Project Environmental and Social Management Plan Report, ***SFG3667*** Republic of Malawi Lilongwe Water Board;October http://documents.worldbank.org/curated/pt/405191507045593819/text/SFG3667
5. Kampira, L. *et al*, 2017, Environmental and Social Management Plan Report for Upgrading, Rehabilitation and Operation of the Water Distribution Networks in the City of Lilongwe, WB-P163794_UhvpNDO-Lilongwe Water; Lilongwe Water and Sanitation; World Bank Document, September.
https://ewsdata.rightsindevelopment.org/files/documents/94/WBP163794_UhvpNDO.pdf

6. Kaggiah, G.M.B.,2013 Is Kenya Sleep Walking into a Trap?
 African News, Constitution, Holland, Human Rights, World News, October.

 https://blog.jaluo.com/?p=36210

CHAPTER SEVEN

7 PRACTICAL APPLICATION OF THE RESEARCH TO IMPROVE SUSTAINABILITY OF SMEs IN THE CONSTRUCTION INDUSTRY IN MALAWI AND KENYA

7.1 Engagement with Industry and Society

The author has always had a passion for contributing towards the improvement of engineering profession in East and Central Africa and particularly in Kenya and Malawi where the author lived and worked during the majority of his professional career.
In pursuit of this objective, the author took interest in engineering professional Organizations at an early stage and was thus privileged to obtain mentors and guidance which enabled the author to qualify as a professional Engineer Kenya in 1988, MICE) (UK) in 1995 and a Chartered Engineer (C.Eng.) (UK) in1996, and a Fellow (F1257) of the IEK (Kenya) in 2003.

Upon qualification, author encouraged young Engineers to pursue professional qualifications, by highlighting the benefits and offering assistance.

The author was posted to Malawi in 1998, and immediately engaged with the Malawi Institution of Engineers (MIE) and was given opportunity by the Ministry of Works and the Roads Authority who seconded young engineers to projects under the authors leadership to train an qualify as professional Engineers. The author also participated and made presentations towards growth of the Malawi Institution o Engineers (MIE). He was honoured to be among the six pioneer Fellows of the Malawi Institution of Engineers in 2008, led by the President of the Republic of Malawi, H.E. Bingu Wa Mutharika (F001).

The author had experience and witness of the challenges faced by the SMEs in the construction industry as a design and construction manager on projects in the East, Central and Southern Africa, which informed the general direction of choice of the Research subject, which the DoS and the supervisors assisted to narrow down and focus.

The Objectives of this research are as follows:

a) To discover the leading factor in impacting negatively on sustainability of SME in the construction industry in Africa: case of Malawi

b) To establish the major Drivers of the leading factor discovered in a) above

c) To develop a strategic legal framework to eliminate or weaken the identified drivers towards reducing the incidence and severity of leading factor identified in objective i. above.

d) To have the findings and recommendations of this research practically applied and have the various elements of the strategic legal framework enacted into actionable laws towards improvement of the sustainability of SMEs in Africa.

This research sought answers to “what the factor impacting most negatively on sustainability of SMEs in the construction Industry in Africa; case of Malawi and what are the major drivers (or enablers) of the leading factor discovered? The research was to provide information towards answering these questions, which shall form a contribution to knowledge as well as offering a practical solution.

7.2 The Research Findings and recommendation

The leading cause of unsustainability of SMEs in the construction Industry in Africa; case of Malawi is payment paralysis which is caused by delayed payments.

The five leading drivers of delayed payments are:

a) Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)
b) Incorrect Interpretation and Application of World Bank Procurement Model
c) Corruption and Political Rivalry
d) Bank Lending Interest Rate in Malawi is generally higher than those in the Countries of Origin of the competing Foreign SMEs
e) Influence of market environment on bidding.

7.3 Enactment of Laws to improve sustainability of SMEs

The practical Solution to put in place strategic legal framework for improving sustainability of SMEs in Malawi and Kenya, as recommended in table 60 in section 6.2.1 of this thesis was achieved through the support and efforts of all those who committed themselves to spearhead, sponsor and support the preparation and enactment of laws in Kenya to improve sustainability of SMEs. Five Bills below, **for improving the sustainability of SMEs in the construction industry** listed below were tabled in Parliament in quick succession from May 2019 to November 2020. The Bills tabled are as follows:

a) **The Public Procurement and Asset Disposal (Amendment) Act 2019;**
Payments of invoices within 90 days Hon, Moses Kuria Bill (May 2, 2019)

b) **The Public Procurement and Asset Disposal (Amendment) Act 2019;**
Raise the Threshold of International Competitive Bidding to Ksh. 1.00 Billion (USD 10.0Million) and ensure local SMEs got at least 30% share of works awarded to foreign SMEs (Hon. Rigathi Gachagua, May 13, 2019)

c) **The Prompt Payment Bill 2020**
Where there is no written contract, or the written contract does not provide for the date of payment, shall be made within ninety days after receipt of approved invoice.
(Senators Farhiya Haji and Johnson Sakaja February 28, 2020)

d) **Public Procurement and Disposal (Amendment Act 2020)**
This Bill focuses on transfer of expertise from foreign SMEs offering specialized expertise and skills which are not available in Kenya and to ensure that the period of such a transfer is defined and adhered to in accordance with the provisions of the Act. (Hon Richard Tongi Bill; October 13, 2020)

e) **The Prompt Payment Bill, 2020 in The Constitution of Kenya**
The Constitution of Kenya (Amendment) Act, 2020,

7.4 The Prompt Payment Bill, 2020 in The Constitution of Kenya .

The efforts of those well wishers who facilitated the preparation of the four pieces of legislation above were also crowned in the conclusion of the works of a Steering Committee appointed by the President of the Republic of Kenya H.E. Uhuru Muigai Kenyatta by Gazette Notice No. 264, of January 10, 2020, mandated to conduct validation of the Task force Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith based organizations, cultural leaders, the private sector and experts; and propose administrative, policy, statutory or constitutional changes that are necessary for the implementation of the recommendations of the Task force for action towards a United Kenya.

The Task force prepared the Constitutional (amendment) Bill 2020, which is a Bill to amend The Constitution of Kenya 2010; to be cited as The Constitution of Kenya (Amendment) Act, 2020, The Prompt Payment Bill, 2020 at the top of a list of twelve (12No.) proposed Bills in Annex E of the Constitution of Kenya (Amendment) Act 2020.

The sections here below present the details of the path the researcher took and were fortunate and privileged to find support directly and indirectly towards the achievement of the goal of the research to provide a practical solution to the research problem.

7.5 Rallying Support of Relevant Organizations and Professionals

The author's professional background and active interest, involvement and participation in the activities of the Engineering professional bodies in Malawi, Kenya and the United Kingdom and the Engineering community at large and being a PhD Research student with the University of Bolton, increased my interaction with leaders in the engineering profession and was active in a number of engineering social media groups.

The author freely discussed the progress and the findings of my research and in Malawi, the author had opportunity to discuss my findings and recommendations with the Malawi Building and Civil Allied Traders Association (MABCATA), National Construction Industry Council (NCIC) and members of the Malawi Institution of Engineers MIE).

In Kenya, the author engaged with the Engineers Board of Kenya (EBK) the Institution of Engineers of Kenya (IEK) and several Senior Engineers social media fora. In this process the author also became a Continuing Professional Development (CPD) Facilitator in for EBK and a member of the Professional Review Panel in Kenya and had a wider field of interaction with fellow engineers to talk about my research.

7.5.1 **Research finds Sponsors in Kenya**

On October 2, 2015, the author received an email from a "frustrated local Contractor" complaining of the difficulties faced overcoming some "over stringent eligibility criteria" to enable inclusion and participation in the bidding process.

The email had been sent to over one hundred (150No.) recipients who included H.E.The Deputy President of the Republic of Kenya, the Governors of all the 47 County Governments of Kenya, the Government regulatory Authorities in the construction industry in Kenya, SMEs in the Construction Industry, the Media and other important stakeholders.

The circulation would reach over one thousand opinion leaders in the construction industry in Kenya some of whom are listed here below:

1. H.E. The Deputy President of the Republic of Kenya
2. The Parliament of the Republic of Kenya
3. The Council of Governors of the 47 Counties of Kenya
4. The Governor of Machakos County"
5. Public Procurement Regulatory Authority
6. The Kenya Anti Corruption Commission (KACC)
7. National Construction Authority of Kenya (NCA)
8. Roads and Civil Engineering Contractors Association
9. The Architectural Association of Kenya
10. Athi Water Works Development Agency
11. The Permanent Secretary, Ministry of Water
12. The Engineers Registration Board of Kenya (EBK)
13. The Institution of Engineers of Kenya (IEK)
14. The Law Society of Kenya (LSK)
15. The Nation Newspapers
16. The Standard Newspapers

17. Public Procurement Oversight Authority
18. Over 100 other important Stakeholders in the Construction Industry

Observing that the subject was in his area of study the author took keen interest and was very interested in finding out what the response would be as he believed that he would benefit from the response in informing this research further. It was therefore rather disappointed when two weeks passed, and none responded. It was at this point that the author realized that perhaps, no one in the field had as much information on the matter as the he had, having constantly researched on the subject for four years in which time he had collected and analyses data on the subject matter. The author concluded that he was the one best placed to keep the question active and perhaps encourage the relevant organization(s) to respond. The author therefore responded on October 26, 2015, as in the email attached here below, which was copied to all, with the aim of drawing the relevant and responsible organization to state how the complainant's frustrations could be assuaged.

The author received aresponse which did not come from any of the expected organizations but, four days later, on October 30, 2015 the author received a surprise in an email, which was circulated to all previous recipients, from the Roads and Civil Engineering Contractors Association (RACECA) of Kenya inviting me to their meeting on November 24, 2015, to discuss the contents of my email.
The author was excited with this development, and accepted the invitation on October 30, 2015. The author then realized that this was a great opportunity to present and highlight the research findings and recommendations of the research, and to engage with the industry and seek support, sponsors and influence to activate the proposals for improving sustainability of SMEs in the construction Industry in Keny. The author therefore wrote, RACECA on November 14, 2015, requesting for 15 minutes to make a presentation covering the subject to introduce the matter of discussion sufficiently. The author was granted the time, and he circulated a modified extract of the draft research thesis covering the area of discussion with the title "Reviewing Bid Documents and Eligibility Criteria".
On November 24, 2015, the author made the presentation and had discussions with the members where the author had opportunity to clarify and answer questions on

the presentation and the matter of “Over-Stringent Requirements by the Procurement Entities (PEs).

The presentation and the discussions were very successful because the executive committee of RACECA formed a three member committee constituted of two members of their legal team and nominated the author as the third member. The committee was mandated to Review the issues raised in the discussions and to propose an approach to the National Construction Authority, the Law Society of Kenya and the Public Procurement Oversight Authority to correct the exclusion of Local Contractors from bidding processes due to over stringent prequalification requirements.

The Author continued to work with the committee and to disseminate the research findings and recommended solutions towards improving sustainability of the SMEs in construction industry. To energise the process and reach more stakeholders, the author had nine (9No.) pages of the research findings and recommendations published with the title "Contract Documents and Procedures which appropriately secure the interests of the Procurement Entity (PE), the Financing Agency and the Contractor" . The paper was published in the Journal of the Institution of Engineers of Kenya (The Kenya Engineer) Volume 39 No.5 September/October 2018 Edition.

This development was communicated to the RACECA on 29 May 2019 while the researcher also acknowledged the first Act of Parliament to be tabled requiring that payments be made within 30 days of PE’s receipt of approved Invoice or Certificate,

7.6 Enactment of laws in Parliament to improve sustainability of SMEs

The Roads and Civil Engineering Contractors of Kenya Association (RACECA) of Kenya afforded the author a platform to effectively disseminate and promote the findings and recommendations of this Research and build up support by linking him with all those persons and organizations involved in the registration, management, employment, control development and regulation of the construction industry in Kenya.

circulating the paper on the findings and recommendations of this research to the mailing list described above and successfully presenting the research findings, recommendations to RACECA on November 24, 2019 and winning their support created the opportunity that led to the realization of the goals laid out in Chapter 6 of and particularly the recommendations that sustainability of SMEs in the Construction Industry would be improved if the strategic legal framework set out in table 6.5 in sections 6.2.1 is put in place beginning by specifically targeting the five leading drivers of payment paralysis here identified in the research as below:

a) Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)
b) Incorrect Interpretation and Application of World Bank Procurement Model
c) Corruption
d) Bank Lending Interest Rate in Malawi is generally higher than those in the Countries of Origin of the competing Foreign SMEs
e) Influence of market environment on bidding.

This presentation and the manner it was conducted provided the best possible forum creating awareness and passing the findings and recommendations of the research to the its intended beneficiaries and affected parties as represented by the RACECA, the Government, Parliament, all the procuring Entities, the promoters and the regulatory authorities of SMEs in the construction industry, the law Society of Kenya and the public at large.

The active involvement of RACECA and well-meaning members of the groups mentioned above initiated and led to the preparation and sponsorship of three significant Acts of Parliament and the eventual inclusion of “the Prompt Payment Bill, 2020” as Bill No.1 of the 12No. Bills underpinning “The Constitution of Kenya (Amendment) Bill, 2020” proposed to amend the Constitution of Kenya, 2010, which has already been circulated to the public and shall be tabled in Parliament in April 2021.

7.6.1 The Blocks to Building a Legal Framework towards Sustainable SMEs

This section describes the interaction between the researcher and the leaders in the construction industry in Kenya and particularly his most valuable sponsor, RACECA, who nominated the author to a Three-Member RACECA Legal Committee on November 27, 2015, to Review Issues Raised in the researcher’s Presentation of

November 24, 2015, and Propose Appropriate Measures to Improve sustainability of SMEs

The description includes the Bills tabled and passed in parliament and the most important is a proposed change of the constitution to include “Prompt Payment Bill, 2020” which bears the same name as ‘*The Prompt Payment Legislation in the Construction Industry* which came *to effect in October 2011 in England and Wales and November 2011 in Scotland’* and the “Prompt Payment Act” is in force in Europe, Australia, the UK, Canada and Malaysia where delays in payments are unacceptable.

7.6.1.1 Email from a Disappointed and Frustrated Contractor!!

----- Forwarded message -----
From: CONSTRUCTION TENDERS <constructiontenders2015@gmail.com>
To:
Sent: Friday, 2 October 2015, 16:49:39 GMT+3

Subject: **OVERSTRINGENT REQUIREMENTS: Nairobi Bulk Water Supply: Construction of Raw and Treated Water Gravity Mains from Thika Dam to Kigoro Treatment Works**

Dear sir,

I wish to express disappointment and shock at the over-stringent requirements stated in this tender (see attached). Is there a contractor being targeted?
This type of requirements are the ones 'destroying' the ability of local contractors to grow.
Something is not right, and it is better to explain now than waste time tendering and it becomes a PPOA issue.

Regards

Disappointed and Frustrated Local Contractor!!

7.6.1.2 Author Responds to Frustrated Contractor

From: George Kaggiah <kaggiah1@yahoo.com>
To: CONSTRUCTION TENDERS <constructiontenders2015@gmail.com>

Sent: Monday, 26 October 2015, 12:04:08 GMT+3

Subject: Re: **OVERSTRINGENT REQUIREMENTS: Nairobi Bulk Water Supply: Construction of Raw and Treated Water Gravity Mains from Thika Dam to Kigoro Treatment Work**

Dear All,
The contents of this e-mail is as interesting as the manner in which it was received!
It is even more interesting to note that no one appears to have owned and responded to it unless the communication went directly to the author, perhaps with an advice on circulation limits of such a letter!

The subject needs attention; The procuring entities (PEs) Must tailor their needs within the national context and indicate that they are conversant with the national policies formulated to foster growth of local SMEs in the construction Industry and retention (at home) of the Lion's share of the Funding even when such a procurement process is open to international players as required by free trade protocols.
The designers can be required to have distinct nodes within the project layout to afford flexibility in packaging of the works contract(s) in size and time as may become necessary. The procurement entity must also ALWAYS take responsibility of project cash flows FULLY whenever he is not in a BOT arrangement.

In other words, the Contract documents must be prepared within a legislation inhibiting the PEs from stretching their rights and encroaching on the rights of their yet to be appointed "CONTRACTOR or Consultant"
Perhaps the NCA and other relevant organizations already have an answer to this and could perhaps share in the "right" forum.

7.6.1.3 The Roads and Civil Engineering Contractors Association (RACECA) of Kenya Invite the Researcher to Discuss the Issues Raised by "Frustrated Local Contractor"!

To: George Kaggiah

and 89 more...

Dear Mr. Kaggiah,

The roads and Civil Engineering Contractors Association have received your email with interest and would like to discuss it with you at their next meeting at the Sikh Union on Forest Road at 4:30p.m. on Tuesady, 24th November, 2015 to which you are invited.

Kind regards,

....

From:
To: 'George Kaggiah' kaggiah1@yahoo.com
Cc:

Subject: RE: OVERSTRINGENT REQUIREMENTS: Nairobi Bulk Water Supply: Construction of Raw and Treated Water Gravity Mains from Thika Dam to Kigoro Treatment Work

Dear Mr. Kaggiah,

The roads and Civil Engineering Contractors Association have received your email with interest and would like to discuss it with you at their next meeting at the Sikh Union on Forest Road at 4:30p.m. on Tuesday, 24th November,2015 to which you are invited.

Kind regards

Author **<u>Accepts Invitation and offers to Present a Paper to Anchor the Discussions on Issues of Frustrating SMES</u>**

Re: OVERSTRINGENT REQUIREMENTS: Nairobi Bulk Water Supply: Construction of Raw and Treated Water Gravity Mains from Thika Dam to Kigoro Treatment Work

30 Oct 2015 at 11:13am Print Raw message

From: George Kaggiah kaggiah1@yahoo.com
To:

Dear Eng.

I am honoured to receive the invitation by The Roads and Civil Engineering Contractors Association and will be delighted to attend the meeting (address removed) on Tuesday, 24th November 2015, to discuss my email on the subject presented by the "Disappointed and Frustrated Local Contractor!!"

Please let me have further details as you may find appropriate.

Best Regards

George Kaggiah
CONNEX Consultants Ltd

………………………………………………………………………………………………………

From: George Kaggiah <kaggiah1@yahoo.com>
To:
Sent: Saturday, 14 November 2015, 14:16:27 GMT+3
Subject: Re: OVERSTRINGENT REQUIREMENTS: Nairobi Bulk Water Supply: Construction of Raw and Treated Water Gravity Mains from Thika Dam to Kigoro Treatment Work

Dear Eng.

Further to our communication, to kick start the discussion, I request that you allow me a 15 minute window, to make a presentation on the subject which shall be built around the attached abstract.
I will post the paper (4 pages) to you on November 20, 2015.
Best Regards

George Kaggiah

-

Sent: Monday, 16 November 2015, 13:31
Subject: FW: OVERSTRINGENT REQUIREMENTS: Nairobi Bulk Water Supply: Construction of Raw and Treated Water Gravity Mains from Thika Dam to Kigoro Treatment Works to Gigiri Tanks - SH/0837/PFS/mnk

Dear George,

Thank you for your email on 14th November 2015.
We look forward to your presentation during the RACECA meeting at 4:30 p.m. in the Sikh Union on Forest Road on Tuesday, 24th November 2015.

Don't post your paper to me. Let me know when it is ready, and I will collect it from your office or send me a soft copy for email that I can circulate to our members.

Kind regards,

--

From: George Kaggiah <kaggiah1@yahoo.com>
To:
Sent: Saturday, 21 November 2015, 00:52:24 GMT+3

Subject: Re: OVERSTRINGENT REQUIREMENTS: Nairobi Bulk Water Supply: Construction of Raw and Treated Water Gravity Mains from Thika Dam to Kigoro Treatment Work

Dear Eng,

Please find attached my write up. Please let me have your feedback.
Best Regards

George Kaggiah
…….……….

From:
To:
Sent: Monday,23 November 2015, 14:24

Subject: Re: - Polite Reminder for the Roads and Civil Engineering Contractors Association Executive Committee Meeting to be Held on Tuesday, 24th. November 2015 at the Sikh Union - SH/0837/PFS/mnk

Dear Members,
Herewith the agenda for the RACECA meeting which will be held tomorrow Tuesday, 24th November 2015 at 4:30 p.m. in the Sikh Union on Forest Road the previous minutes of the last RACECA meeting held on Tuesday, 27th October 2015 and the paper prepared by George Kaggiah for your information.

Please attend or send a representative to this important meeting.
Best regards,

7.6.1.4 The Paper and presentation grounding the discussions

The subject of the presentation was "Reviewing Bid Documents and Eligibility Criteria" the content was a derivative from my research and tailored to respond to the concerns of the "the frustrated local contractor" under the title "OVERSTRINGENT REQUIREMENTS". The researcher prepared his paper to address the needs of all the parties involved in construction procurement and delivery of the complete works, with the title "Reviewing Bid Documents and Eligibility Criteria" and subtitled"

Contract Documents and Procedures which appropriately secure the interests of the Procurement Entity (PE), the Financing Agency and the Contractor.

……………………………………………………………………

Abstract

Construction industry is an important sector which utilizes the most abundant resource in Kenya: human resource. Donor Agencies have assisted Kenya in economic development particularly in the construction industry where they support policy development, institutional framework and provide affordable financing for infrastructure development to spur employment which contributes to eradication of poverty by creation of sustainable employment. This also result is growth of local Small and Medium Entrepreneurs (SME) in the construction industry and increase of the proportion of finance retained in the country as the

involvement of international construction companies is reduced as the local SMEs build technological, human and capital resource capability.

Bid documents are designed to suit and give equal opportunity to international and/or local SMEs involved in the bid as would be specified either as "International" or "National" competitive bidding.(ICB/NCB)

The bid documents for construction works and related services in Kenya are based on FIDIC and should be acceptable to all stakeholders since they guarantee the needs of the Procurement Entity (PE), the Small and Medium Entrepreneur (SME) in the Construction Industry while securing the interests of the Financing Agency.

The Document allow the Procurement Entities (PE) to modify, delete or add sub clauses to make the documents "project specific" and also to reflect the PE's Project management processes. In majority of cases the donor agency also requires that they are involved at all stages of the procurement process and give a "no objection" at the product of each activity in the process.

This paper considers in broad terms the major effects of the freedoms exercised by the PEs and the Donor Agencies involved and to what extent the resultant modifications of the standard bidding documents may affect the bidders who are not represented at these stages.

Key words: FIDIC, SMEs, Employment, conditions of contract, payment paralysis Construction Industry, sustainability, and competitiveness.

7.6.1.5 Author Nominated to a Three Member RACECA Legal Committee

From: >
To:
Cc: kaggiah1@yahoo.com
Sent: Tuesday, 1 December 2015, 15:56
Subject: RE: - Minutes of the Roads and Civil Engineering Contractors Association Executive Committee

Meeting Held on Tuesday, 24th. November 2015 at the Sikh Union - SH/0837/PFS/jao

Dear Members,

Please see attached the minutes of the above meeting for your information and comment.

Kind regards,

Table 7.1: Minute 11/1 of the meeting of 24.11.2015

Minutes	**Deliberation**	**Action by**
11/1	**Over Stringent Requirements Paper Presented by Eng. George Kaggiah** Eng. Kaggiah presented his paper to the meeting which had been circulated to all members and the Legal Secretariat by e-mail on Monday, 23rdNovember, 2015. 11111 was asked to look into the issues raised by Eng. Kaggiah and to propose an approach to the National Construction Authority, the Law Society of Kenya and the Public Procurement Oversight Authority to correct the exclusion of Local Contractors from bidding processes due to over stringent prequalification requirements.	11111/ George Kaggiah/ 33333

From: George Kaggiah
Sent: Saturday, December 05, 2015, 1:27 PM
To:
Cc:
Subject: Reversing the progressive exclusion of Local Contractors from bidding processes due to over-stringent prequalification requirements.

Dear

I have received the minutes of the RACECA Executive Committee and Members Meeting Held on Tuesday, 27th October, 2015 at 4:30 P.M. at the Sikh Union – SH/0837/PFS/jao and note that you (111 with 333 and myself) will be looking at the issues discussed and propose to RACECA, an approach to the National Construction Authority, the Law Society of Kenya and the Public Procurement Oversight Authority to correct the exclusion of Local Contractors from bidding processes due to over-stringent prequalification requirements.

Please advise how you wish to proceed with this process and whether you would wish us to have a meeting and discuss the task in detail and define areas of further action and a time frame.

The focus shall be drawing of a draft framework upon which we could develop and an appropriate legislation, to correct the exclusion of Local Contractors from bidding processes due to over-stringent prequalification requirements, may eventually emerge after successive discussions with RACECA, NCA, LSK, PPOA, EBK and other stakeholders.

Best Regards,

George Kaggiah

From:
To: 'George Kaggiah' kaggiah1@yahoo.com
Cc:
Sent: Monday, 7 December 2015, 8:47
Subject: RE: Reversing the progressive exclusion of Local Contractors from bidding processes due to over-stringent prequalification requirements.

Thank you, George.

I propose that we schedule a meeting for mid next week where the team assigned the task can brainstorm.

7.7 Legislation for Improvement of Sustainability of SMEs in Kenya Parliament

This research found that Payment Paralysis is the single most devastating factor to SMEs as it led to immediate cash flow challenges bankruptcy and closure followed as matter of course. The research also identified five (5No.) leading drivers of Payment Paralysis and recommended that appropriate legislation focusing directly on Delayed payments or disabling any one of the five drivers would be a significant contribution towards improving sustainability of SMEs in the construction industry among others.

Thus, the six targets of effectively disabling payment paralysis would be legislation to stop the following:

a) Delayed payments
b) Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)
c) Incorrect Interpretation and Application of World Bank Procurement Model
d) Corruption
e) Bank Lending Interest Rate in Malawi is generally higher than those in the Countries of Origin of the competing Foreign SMEs
f) Improve market environment on bidding and apply local preferential margin

On February 18, 2019, the MP for Gatundu North Hon. Moses Kuria gave notice to table the first Bill aiming to reduce outlaw Delayed payment to all SMEs and the Bill here below was tabled on Thursday May 2, 2019 and on May 8, 2019.

The Bill was necessary at this time as Delayed payments to SMEs had reached unprecedented levels as of 2018, enterprise survey for Kenya recorded that 12% of the SMEs surveyed, had suffered delayed payments (Gideon Keter2019), .

7.7.1 **Presentation made to RACECA by Eng. Kaggiah Published in the Journal of the Institution of Engineers of Kenya (The Kenya Engineer)**

In recognition that no legislation in support of sustainability of SMEs in the construction industry in Kenya and Malawi which is the objective of this research as stated in the

had been enacted re-energise the effort to achieve the objective of having a legal framework to support

had been enacted re-energise the effort to achieve the objective of having a legal framework to support

the SMEs in the construction Industry in Malawi and Kenya, and to reach out and inform more stakeholders and get comments from a wider audience in the construction industry and peer review feedback, I submitted the paper presented and circulated to RACECA to the Kenya Engineer in August 2018 and it was published in The Kenya Engineer, Volume 39,No.5 : September/October 2018 Edition. I notified the RACECA team and took the opportunity to circulate copies as appended here below to the members.

As stated in the communication to RACECA the efforts of all the stakeholders

The publication is attached in AppendixA (i) for ease of reference and is also easily accessible in the Google and Yahoo search engines

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message Edit

----- Forwarded message -----
From: George Kaggiah <kaggiah1@yahoo.com>
To:
Cc:
Sent: Wednesday, 29 May 2019, 16:31:49 GMT+3
Subject: Curing the Disease of Payment Paralysis in the Construction Industry,

Dear 111,

I am confident that since our last communication you have done a lot of work to improve the market environment for SMEs in the Construction Industry in Kenya.
The incidence of delayed Payment is at its highest level and "payment paralysis" is probably at the worst level in the recent history of engineering in Kenya, due to pending Bills at county governments and the general poor performance of the economy occasioned by many factors including global warming and draught in many parts of the country.

In August 2018, I wrote an article titled " Contract Documents and Procedures which appropriately secure the interests of the Procurement Entity (PE), the Financing Agency and the Contractor" which was Published in the Journal of the Institution of Engineers of Kenya (The Kenya Engineer) Volume 39No.5 September/October 2018 Edition.

It is good to note that attention has come to bear at the right quarters, as one appreciates that, the Kuria Bill (Public Procurement and Disposal Act) which requires payments be made within 90 days of receiving invoices and certificates was passed early this month. This is a huge leap forward. The manner of enforcing this desired outcome will be the next challenge.

Best Regards

George Kaggiah

7.8 Bills Drafted and Tabled in Parliament

In May 2019 the first two Bills concerning delayed payment were tabled in parliament as per the attachments here below.

7.8.1 Hon, Moses Kuria Bill (May 2, 2019)

The Public Procurement and Asset Disposal (Amendment) Act 2019;

Proposes within payment within ninety days from the date of receipt of invoices and certificates and that in the event payment is not made, the SME be issued with equivalent value of promissory note which shall be valid for a period not exceeding forty-eight months from the date of issue. The promissory notes are to protect the SMEs from lenders and auctioneers.

4) Notice is given that Member for Gatundu South (Hon. Moses Kuria) intends to move the following amendments to the Statute Law (Miscellaneous Amendments) Bill (No. 2) 2018 at the Committee Stage—

SCHEDULE

THAT, the Schedule to the Bill be amended in the proposed amendments to the Public Procurement and Asset Disposal Act by inserting the following new amendments immediately after the proposed amendments to section 80—

New 87— Insert the following new sections immediately after section

Payment. **87A.**(1) The procuring entity shall pay a successful tenderer within ninety days from the date of receipt of invoices and certificates for works, goods or services executed or delivered.

(2) Despite subsection (1), the procuring entity shall pay a successful tenderer within thirty days from the date of receipt of invoices and certificates for works, goods or services executed or delivered by the following groups of tenderers—

(a) women;
(b) youth;
(c) persons with disabilities; and
(d) other disadvantaged groups.

Issuance of Promissory note by the procuring entity

87B.(1) Where the procuring entity fails to make payment within the periods prescribed under section 87A, the procuring entity shall issue the tenderer a promissory note which shall be valid for a period not exceeding forty-eight months from the date of issue

. (2) The promissory note referred to in section (1) shall—

(a) be eligible for use as a financial instrument by any licensed bank;

(b) accrue interest payable by the procuring entity.

(Proposed Amendments are Subject to Article 114 of the Constitution)

(Pursuant to Article 114 of the Constitution, the Budget and Appropriation Committee has recommended consideration of the Amendments by the House) - Speaker's Communication of April 30, 2019)

(Question, that the new section be added to the Bill, put and agreed to)

New Section 87A

Hon. Moses Kuria (Gatundu South, JP): Hon. Temporary Deputy Chairlady, I beg to move:

THAT, the Schedule to the Bill be amended in the proposed amendments to the Public Procurement and Asset Disposal Act by inserting the following new amendments immediately after the proposed amendments to section 80—

New Payment. Insert the following new sections immediately after section 87—

87A.(1) The procuring entity shall pay a successful tenderer within ninety days from the date of receipt of invoices and certificates for works, goods or services executed or delivered.

(2) Despite subsection (1), the procuring entity shall pay a successful tenderer within thirty days from the date of receipt of invoices and certificates for works, goods or services executed or delivered by the following groups of tenderers—

(a) women;
(b) youth;
(c) persons with disabilities; and
d) other disadvantaged groups.

The import of this section is to address the issue of prompt payments and the pending bills and to require that the procuring entity be successful tenders 30 days from the day of receipt of invoices and certificates for women, youth and persons living with disabilities and other disadvantaged groups to address the issues where people are getting auctioned and there is no records from the procuring entities.

I beg to move

(Question of the new section proposed)

(New Section read the First Time)

(Question, that the new Section be read a Second Time, proposed)

Hon. Aden Duale (Garissa Township, JP): Hon. Temporary Deputy Chairlady, I want to support this amendment but I want to tell Moses Kuria it is not practicable for 30 days, maybe he moves a further amendment to 60 days. I do not think you can be considered when you submit your invoice and when you supply. With the payment system under the new system of IFMIS, we need to ask him to do a further amendment of 60 days or 45 days. We do not want to pass a law that will not be implemented. It would be very difficult to implement it. If you do not do that, then there will be penalties.

7.8.2 Hon. Rigathi Gachagua Bill (May 13, 2019)

The Public Procurement and Asset Disposal (Amendment) Act 2019;

This Bill seeks to raise the threshold for International Competitive Bidding (ICB) Process which refers to a bidding and procurement process where donors are involved and therefore the interests of International bidders, particularly the ones from member countries of the funding institution, are protected and they are allowed to bid for works in other member countries. However, while SMEs from the developed countries are able to carry out works inn all the member countries, the SMEs from the developing countries particularly in Africa do not have capacity to carry out works outside their country of origin. The SMEs have no competitive advantage and majority of all tenders are won by foreign SMEs.

The Rigathi Gachagua Bill aims at increasing the works opportunities for local SMEs by raising the ICB threshold. This is taking into account the competitive imbalance between the local and International Bidders due to the difference in resource base due to the loose definition criteria which allows incomparable entities to fall into one category of SMEs as discussed in section

It also require that when a foreign SME is awarded a contract, that winning foreign SME sets aside some of the activities for at least 30% the value of the works to be sublet to local upcoming SMEs.

SPECIAL ISSUE

Kenya Gazette Supplement No. 67 (National Assembly Bills No. 36)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

NATIONAL ASSEMBLY BILLS, 2019

NAIROBI, 13th May, 2019

CONTENT

Bill for Introduction into the National Assembly—

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILL, 2019

A Bill for

AN ACT of Parliament to amend the Public Procurement and Asset Disposal Act.

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Public Procurement and Asset Disposal (Amendment) Act, 2019. Short title.

2. The Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as "the Principal Act") is amended in section 2 by inserting the following new definition in the proper alphabetical sequence— Amendment of section 2 of No. 33 of 2015.

"local firm" means a firm which is wholly owned by a Kenyan and duly incorporated in Kenya; and

"foreign firm' means a firm whose shareholding is more than thirty per cent owned or is wholly owned by a non-Kenyan and duly incorporated in or outside Kenya;

"joint venture procurement" means a procurement that is jointly undertaken by a grouping of two or more persons.

3. Section 53 of the Principal Act is amended— Amendment of section 53 of No. 33 of 2015.

(a) by inserting the following new subsections immediately after subsection (6)—

(6a) Any procurement of less than one billion shillings shall be awarded to a local firm.

(6b) A foreign firm shall be eligible for procurement of contracts of more than one billion shillings where the foreign firm has entered into joint venture procurement with a local firm for not less than thirty percent of the value of the procurement."

(b) by inserting the following new subsections immediately after subsection (12)—

(12) A person who registers a company on behalf of a non-Kenyan with the intention of benefiting from procurement under this section commits an offence and shall be liable upon conviction to a fine not exceeding five million shillings or to a term of imprisonment not exceeding three years or to both.

(13) A foreigner who registers a company on behalf of a non-Kenyan with the intention of benefiting from procurement under this section commits an offence and shall be liable upon conviction to a fire not exceeding five million shillings or to a term of imprisonment not exceeding five years or to both.

4. Section 70 of the Principal Act is amended by inserting the following new subsection immediately after subsection (6)— Amendment of section 70 of No. 33 of 2015.

(6a) Where a procurement is of a value exceeding one billion shillings, in addition to the requirements set out in subsection (6), a procuring entity shall set out specific goods, works and services to be undertaken by a local firm under joint venture procurement.

MEMORANDUM OF OBJECTS AND REASONS

Statement of Objects and Reasons for the Bill

The objective of this Bill is to amend the Public Procurement and Asset Disposal Act.

Clause 1 of the Bill provides for the short title of the Bill

Clause 2 provides for definition of new terms to be introduced in the Act.

Clause 3 seeks to amend section 53 of the Act by inserting new subsections (6a) and (6b) that will prescribe threshold for procurement by a local firms and a foreign firm in order to promote of local industries; and to provide for a penalty for any person who registers a firm on behalf of a non-Kenyan for purposes of benefiting g for a procurement that falls within a prescribed threshold.

Clause 4 seeks to amend section 70 of the Act; this will ensure that procuring entities shall set out specific goods, works and services to be undertaken by a local firm in a joint venture procurement.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill does not delegate any legislative powers, and it does not limit fundaments rights and freedoms.

Statement on how the Bill does concerns county governments

The Bill does not concern county governments in terms of Articles 110(1)(a) of the Constitution.

Statements that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The Bill is a not money Bill for the purposes of Article 114 of the Constitution, the enactment of this Bill may not occasion loss of revenue to the Government.

Dated the 28th March, 2019.

RIGATHI GACHAGUA,
Member of Parliament.

7.8.3 Senators Farhiya Haji and Johnson Sakaja February 2020

The Prompt Payment Bill 2020

Payment within 90days of receipt of Invoice

This Bill seeks to improve sustainability of SMEs by reducing the incidence of Payment Paralysis by introducing the Prompt Payment Bill 2020.

SPECIAL ISSUE

Kenya Gazette Supplement No. 14 (Senate Bills No. 3)

REPUBLIC OF KENYA

KENYA GAZETTE SUPPLEMENT

SENATE BILLS, 2020

NAIROBI, 28th February, 2020

CONTENT

Bill for Introduction into the Senate—

THE PROMPT PAYMENT BILL, 2020

ARRANGEMENT OF CLAUSES

Clause

THE PROMPT PAYMENT BILL, 2020

A Bill for

AN ACT of Parliament to provide for prompt payment for the supply of goods, works or services to the government; and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART I – PRELIMINARY

1. This Act may be cited as the Prompt Payment Act, 2020. Short title.

2. In this Act – Interpretation.

"accounting officer" means —

(a) an accounting officer of a national government entity referred to in section 67 of the Public Finance Management Act;

(b) an accounting officer of a county government entity referred to in section 148 of the Public Finance Management Act; No. 18 of 2012.

(c) in the case of the Judiciary, the Chief Registrar of the Judiciary; or

(d) in the case of the Parliamentary Service Commission, the Clerk of the Senate in respect of the Senate and the Clerk of the National Assembly in respect of the National Assembly; No. 18 of 2012.

"amount due" means the principal sum owing based on a commercial transaction, including the applicable taxes, duties, levies or charges specified in the invoice, or provided for in the contract and relating to the said transaction;

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to finance;

"commercial transaction" means a transaction between a supplier and a purchaser for the supply of goods, works or services;

"interest" means the prevailing central bank interest rate provided for under section 6 of this Act;

"invoice" means a written document, including an electronic document, provided by a supplier requesting for payment for the supply of goods, works or services to or on the directions of a purchaser;

"prescribed payment date" means in relation to a commercial contract –

(a) the date on which payment is due under the terms of any written contract for the supply of goods, works or services, or

(b) where there is no written contract or the written contract does not provide for the date of payment, ninety days after –

(i) receipt by the purchaser of an invoice for the amount due, where the invoice is received after the completion of works or completed delivery of the goods or provision services;

(ii) the completion of works, delivery of the goods or provision of services, where the completion or delivery is made at the time of or after receipt by the purchaser of an invoice; or

(iii) such lesser number of days as the Cabinet Secretary may, by notice in the *Gazette* under section 10(2), prescribe;

"procuring entity" means a public entity making a procurement to which the Public Procurement and Asset Disposal Act applies; No. 33 of 2015.

"services" means any objects of procurement or disposal other than works and goods and includes professional, consultancy services, technical services, non-professional and commercial types of services as well as goods and works which are incidental to but not exceeding the value of those services;

"supplier" means a person who enters into a procurement contract with a procuring entity to supply goods, works or services; and

"works" means a combination of goods and services for the construction, repair, renovation, extension, alteration, dismantling or demolition of buildings, roads or other structures and includes —

(a) the designing, building, installation, testing, commissioning and setting up of equipment and plant;

(b) site preparation; and

(2) In determining which debts shall be given priority under subsection (1), a procuring entity shall have regard to the dates upon which payment fell due and shall pay debts in chronological order.

Return of invoice.

6. (1) A procuring entity who disputes an invoice may, within fourteen days of receipt of the invoice –

(a) return the invoice to the supplier; and

(b) identify in writing any defects in the invoice and require the supplier to correct the defects.

(2) Where a procuring entity returns an invoice under subsection (1), the procuring entity shall pay the supplier at least fifty percent of the amount due or as the procuring entity and the supplier may agree.

(3) A supplier who receives an invoice from a procuring entity under subsection (1) shall, within fourteen days, deliver a corrected invoice to the procuring entity.

(4) Interest shall accrue upon the expiration of fourteen days after the receipt by the procuring entity of a corrected invoice or after the prescribed payment date, whichever is the later.

Interest.

7. (1) Where a supplier has fulfilled all contractual and legal obligations relating to the supply of goods, services or works and a procuring entity fails to pay for the goods, works, or services by the prescribed payment date the procuring entity shall pay to the supplier interest on the amount due under the relevant contract.

(2) The maximum interest rate chargeable under subsection (1) shall be based on the base rate set and published by the Central Bank of Kenya.

Fair dealing.

8. A supplier and a procuring entity shall, at all times, deal with each other fairly and lawfully.

Offences.

9. Where a supplier has delivered an invoice to the procuring entity and the accounting officer or the responsible officer of the procuring entity negligently, maliciously or without reasonable cause fails to –

(a) return the invoice as provided for under section 5 of this Act; or

(b) pay the amount due by the prescribed payment date or the interest,

commits an offence and is be liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.

10. (1) The Cabinet Secretary shall, within one year of coming into force of this Act, make regulations for the better carrying into effect of any provisions of this Act. Regulations.

(2) Without prejudice to the generality of subsection (1), the Cabinet Secretary may make regulations to provide for –

(a) the prescribed payment date that is earlier than the ninety days prescribed in the definition of the word "prescribed payment date" in section 2 of this Act;

(b) any fee which may be charged for anything done under this Act; and

(c) any other matters as may be necessary for the promotion of the objects this Act.

(3) For the purpose of Article 94(6) of the Constitution —

(a) the purpose and objective of the delegation under this section is to enable the Cabinet Secretary to make regulations to provide for the better carrying into effect the provisions of this Act

(b) the authority of the Cabinet Secretary to make regulations under this Act shall be limited to bringing into effect the provisions of this Act and fulfilment of the objectives specified under this section;

(c) the principles and standards applicable to the regulations made under this section are those set out in the Interpretation and General Provisions Act and the Statutory Instruments Act. Cap. 2. No. 23 of 2013.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The principal object of this Bill is to put in place a legal framework to facilitate prompt payment for supply of goods, works and services procured by government entities both at the national and county level.

Clauses 1 to 3 of the Bill provide for the title of the Bill, interpretation of various terms used and application of the law. The Act shall apply to all procurement transactions by the national government and the county governments.

Clauses 4 to 6 of the Bill provide for processing of payment. The Bill requires that a procuring entity shall pay for the goods, works or services provided by the prescribed payment date. Failure to pay amount due within the stipulated time, a procuring entity shall be liable to pay an interest calculated on the basis of the Central Bank base rates.

Clause 8 of the Bill provide for offences. An accounting officer who, without reasonable cause or negligently fails to pay the amount due commits an offence and shall be liable to pay a fine not exceeding one million shillings or to imprisonment for a term not exceeding five years or to both fine and imprisonment.

Clauses 7 and 9 on the other hand provide for the requirement for the procuring entity and the supplier to deal with each other fairly and lawfully, and the power to make regulations by the Cabinet Secretary.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

Clause 9 of the Bill delegates legislative powers to the Cabinet Secretary to make regulations generally for the better carrying into effect of any provisions of this Act. However, the Bill does not limit fundamental rights and freedoms.

Statement on how the Bill concerns county governments

The Fourth Schedule to the Constitution provides for the functional areas of both the county governments and the national government. In the performance of these functions and exercise of powers, a county government may procure goods, works or services. This Bill seeks to put in place a legal framework to fast-track the payment for works, goods or services procured. The Bill therefore concerns county governments in terms of Articles 110(1)(a) of the Constitution in that it contains provisions that affect the functions and powers of the county governments as set out in the Constitution.

The Bill is therefore a Bill concerning county governments in terms of Article 110(1)(a) of the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

The Bill is not a money Bill within the meaning of Article 114 of the Constitution.

FARHIYA HAJI,
Senator.

JOHNSON SAKAJA,
Senator.

7.8.4 Hon Richard Tongi Bill; (October 13, 2020

Public Procurement and Disposal (Amendment Act 2020)

This Bill focuses on transfer of expertise from foreign SMEs offering specialized expertise and skills which are not available in Kenya and to ensure that the period of such a transfer is defined and adhered to in accordance with the provisions of the

(Hon Richard Tongi Bill; October 13, 2020)

THE PUBLIC PROCUREMENT AND ASSET DISPOSAL (AMENDMENT) BILL, 2020

A Bill for

AN ACT of Parliament to amend the Public Procurement and Asset Disposal Act, 2015 and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Public Procurement and Asset Disposal (Amendment) Act, 2020. Short title.

2. Section 155 of the Public Procurement and Asset Disposal Act (hereinafter referred to as the "principal Act"), is amended in subsection (5) by— Amendment of section 155 of No.33 of 2015.

(a) inserting the following new paragraph immediately after paragraph (b)—

"(c) the procuring entity shall, require successful bidders to give preference to registered Kenyan brokerage firms where brokerage services are required."

(b) inserting the following new subsection immediately after subsection (5)—

"(6) Where a procuring entity seeks to procure specialized services that are not wholly or partly available in Kenya, the accounting officer shall—

(a) ensure that the specialized skills are procured only for a defined period; and

(b) require successful bidders to cause transfer of the specialized skills to the relevant persons.

3. Section 157 of the principal Act is amended in subsection (9) by deleting the words "at least forty percent of their" and substituting therefor the words "all their locally available". Amendment of section 157 of No.33 of 2015.

MEMORANDUM OF OBJECTS AND REASONS

Statement of Objects and Reasons for the Bill

The principal object of the Bill is to amend the Public Procurement and Asset Disposal Act, No. 33 of 2015 to provide that all foreign tenderers participating in international tenders shall source all their locally available supplies from citizen contractors.

The proposed amendment seeks to promote the growth of local industries and contractors by requiring foreign tenderers participating in Kenyan international tenders to source all their locally available supplies from citizen contractors.

Statement on delegation of legislative powers and limitation of fundamental rights and freedoms

This Bill does not delegate legislative powers neither does it limit fundamental rights and freedoms.

Statement on how the Bill affects county governments

This Bill concerns county governments in terms of Article 110 (1) of the Constitution as is affects the functions and powers of county governments as set out in the Fourth Schedule to the Constitution.

Statement as to whether the Bill is a money Bill, within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 13th October, 2020.

RICHARD TONGI,
Member of Parliament.

7.8.5 Constitution of Kenya (Amendment) Act, 2020

The President of the Republic of Kenya by Gazette Notice No. 264, of January 10, 2020 appointed the Task force Report on Building Bridges to a United Kenya. The task force was mandated through consultations with citizens, civil society, the faith based organizations, cultural leaders, the private sector and experts, to conduct a a study, validation and propose administrative, policy, statutory or constitutional changes that are necessary for the implementation of the recommendations of the Task force for action towards a United Kenya.

The Task force prepared the Constitutional (amendment) Bill 2020, Constitutional (amendment) Bill 2020, which is a Bill to amend the Constitution of Kenya 2010 and is to be cited as The Constitution of Kenya (Amendment) Act, 2020.

The Task force also advised that twelve (12No.) proposed Bills in the Annex E if the Constitution of

Kenya (Amendment) Act 2020 would provide for the statutory mechanisms necessary for the implementation of the recommendations contained in the Task Force Report and The Constitution of Kenya (Amendment) Act, 2020 (Building Bridges to a United Kenya, 2020).

The Proposed Bills to support the amended constitution are:

1) The Prompt Payment Bill, 2020
2) The Public Finance Laws (Amendment) Bill, 2020
3) Micro and Small Enterprises (Amendment) Bill, 2020
4) Election Laws (Amendment) Bill, 2020
5) National Economic and Social Council Bill, 2020
6) The Devolution Laws (Amendment) Bill, 2020
7) The Public Fundraising Bill, 2020
8) The Public Participation Bill, 2020
9) The Ethics and Integrity Laws (Amendment) Bill, 2020
10) The Anti-Corruption and Economic Crimes (Amendment) Bill, 2020
11) Health (Amendment) Bill, 2020
12) The Statute Law (Miscellaneous Amendment) Bill, 2020

His Excellency the President of the Republic of Kenya
and Commander-in-Chief of the Defence Forces,
Hon. Uhuru Kenyatta, C.G.H.,
State House,
Nairobi.
16 October, 2020

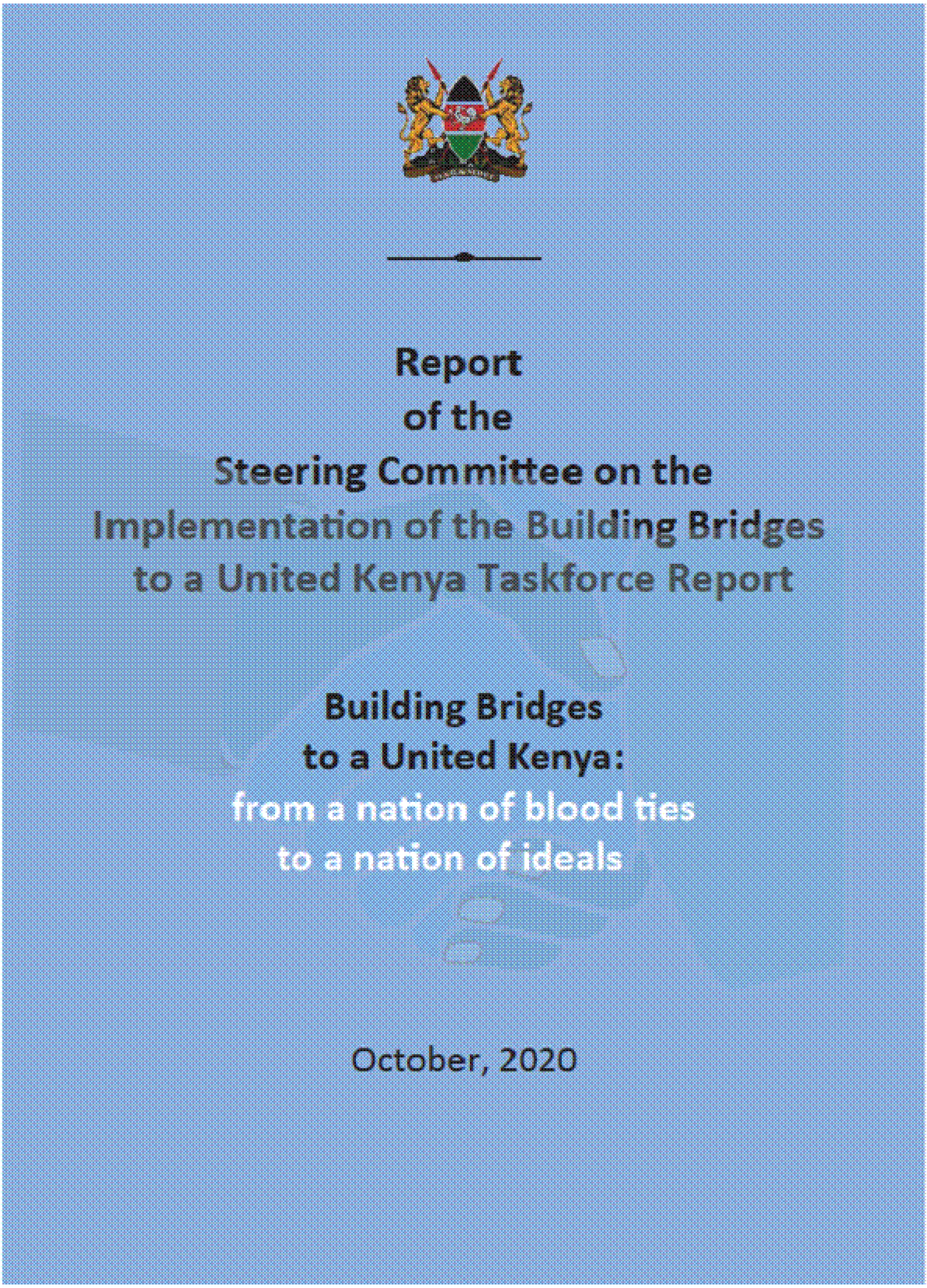
Your Excellency,

You appointed this Steering Committee by Gazette Notice No. 264, published on 10th January, 2020. It was our privilege, as per the mandate, to conduct validation of the Task force Report on Building Bridges to a United Kenya through consultations with citizens, civil society, the faith-based organizations, cultural leaders, the private sector and experts; and propose administrative, policy, statutory or constitutional changes that are necessary for the implementation of the recommendations contained in the Task force Report, taking into account any relevant contributions made during the validation period.

We conducted comprehensive validation of the Task force Report using the following approaches: Reviewing the contents of the Taskforce Report; holding a total of 93 stakeholder validation meetings at the K.I.C.C., Laico Regency Hotel and at our offices in Nairobi. These meetings were attended by representatives from civil society, faith-based organisations, women's groups, youth groups, persons with disability (PWD) groups, cultural leaders and government institutions; participated in regional delegates' meetings where we received written validation submissions from the leaders at the end of each of the meetings; participated in regional public meetings where we received written submissions from Kenyans through their leaders.

Your Excellency, the committee also hosted governors from the Rift Valley region in Nairobi on 20th March, 2020 where they presented memoranda from their counties following postponement of a regional meeting due to the Covid-19 pandemic. The committee also processed a total of 124 hand-delivered memoranda and 223 emailed memoranda, invited external experts and drafters to provide technical information, and also undertook desktop review of relevant documents and international good practices to inform and enrich the report.

The result is the following policy, administrative, statutory and constitutional instruments that addresses the national challenges outlined in the Joint Communiqué of 'Building Bridges to a New Kenyan Nation'.


Report
of the
Steering Committee on the
Implementation of the Building Bridges
to a United Kenya Taskforce Report

Building Bridges
to a United Kenya:
from a nation of blood ties
to a nation of ideals

October, 2020

ANNEX D: Summary of the Legislative Bills (The Draft Bills contained in a stand-alone Document)

The following proposed Bills provide for the statutory mechanisms necessary for the implementation of the recommendations contained in the Task Force Report as well as other relevant contributions made during the validation period.

1. THE PROMPT PAYMENT BILL, 2020

The proposed Bill provides a legal framework for the prompt payment of invoices for goods and services procured by public entities. It seeks to address the perennial issue of delayed payment for goods and services procured by public entities. This impacts negatively on the suppliers of those goods and services, and the promotion of commerce. The Bill will apply to all public procurement undertaken under the Public Procurement and Asset Disposal Act, 2015.

The Bill requires for the settlement of invoices for the supply of goods and services within thirty days of submission of the invoice. Any query on an invoice should be communicated to the supplier in writing ten days from the date of presentation of the invoice. Every public procuring entity is required to establish an internal appeals system. This shall be the first port of call to a supplier who is aggrieved by a decision made by a public entity not to honour an invoice.

The Bill makes failure to make prompt payments for goods and services procured by a public entity an offence. It establishes the Public Invoices Settlement Tribunal to hear appeals from any decisions made by internal appeals mechanisms of every public entity declining to pay an invoice.

To foster transparency, the proceedings of the Tribunal shall be open to the public except where a dispute before the Tribunal emanates from procurement of classified items by a national security organ.

Decisions of the Tribunal shall be enforced by the respective accounting officers of public entities to whom they are directed. In rendering its decisions, the Tribunal may make recommendations on appropriate reforms a public institution needs to make to its system, in order to foster prompt payments of invoices.

In discharging its mandate, the Tribunal can seek technical advice as it may require. A party aggrieved by the decision of the Tribunal may appeal to the High Court for redress.

2. THE PUBLIC FINANCE LAWS (AMENDMENT) BILL, 2020

The Public Finance Laws (Amendment) Bill, 2020 (the Bill) seeks to make amendments to various finance-related laws, which do not merit the publication of separate Bills. The Bill contains amendments to the following statutes—

REPUBLIC OF KENYA

NAIROBI, 25th November, 2020

CONTENT

Bill to amend the Constitution of Kenya, 2010—

The Constitution of Kenya (Amendment) Bill, 2020

PRINTED BY THE GOVERNMENT PRINTER, NAIROBI

Report

of the

Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report

ANNEX E: DRAFT BILLS

October, 2020

INTRODUCTION

The Steering Committee drafted the following twelve bills. Other bills required to give effect to some of the proposed constitutional changes will be drafted. These bills are as follows:

1. The Prompt Payment Bill, 2020
2. The Public Finance Laws (Amendment) Bill, 2020
3. Micro and Small Enterprises (Amendment) Bill, 2020
4. Election Laws (Amendment) Bill, 2020
5. National Economic and Social Council Bill, 2020
6. The Devolution Laws (Amendment) Bill, 2020
7. The Public Fundraising Bill, 2020
8. The Public Participation Bill, 2020
9. The Ethics and Integrity Laws (Amendment) Bill, 2020
10. The Anti-Corruption and Economic Crimes (Amendment) Bill, 2020
11. Health (Amendment) Bill, 2020
12. The Statute Law (Miscellaneous Amendment) Bill, 2020

Sample checklist for the responsibilities of Accounting Officers in Government entities.

> A sample checklist for the responsibilities of Accounting Officers in the National Government is attached to this annex report for awareness creation and administrative interventions.

THE PROMPT PAYMENT BILL, 2020

A Bill for

AN ACT of Parliament to make provision for the prompt payments to suppliers of goods and services, resolution of disputes over invoices for public supplies, promote business and commerce through efficiency, transparency, accountability and public confidence in public accounting processes

ENACTED by the Parliament of Kenya, as follows—

Short title.

1. This Act may be cited as the Prompt Payment Act, 2020.

Application.

2. This Act shall apply to all public procurement undertaken in accordance with the Public Procurement and Asset Disposal Act.

Interpretation.

3. In this Act, unless the context otherwise requires—

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for finance;

"invoice" means an invoice which is prepared and presented to a public procuring entity in accordance with the requirements that have been specified by the entity for submission of invoices;

"public entity" has the meaning assigned to it under section 2 of the Public Procurement and Asset Disposal Act, 2015;

"supplier" means any person who supplies goods or services to any public procurement entity under this Act; and

"Tribunal" means the Public Invoices Settlement Tribunal established under section 6;

No. 34 of 2015

Prompt settlement of invoices.

4. (1) An invoice for goods or services procured shall, unless another date of payment is provided in a supply contract, be honoured and settled within sixty days of submission by the supplier.

(2) Any query to an invoice shall be raised and communicated to the supplier of goods or services in writing within ten days of the presentation of the invoice.

(3) A supplier of goods or service shall provide responses to an invoice query within ten days after receipt of communication from the public procuring entity.

(4) All queries to an invoice shall be resolved and communicated to the supplier of goods or services within five days from the date of receipt of the response from the supplier and a decision not to honour and settle an invoice shall be made before the expiry of the said five-day period.

(5) Every public procuring entity shall establish an internal appeals system to review all decisions made not to honour an invoice.

(6) A supplier in respect of whom a decision not to pay has been communicated shall be entitled to an internal appeal mechanism to review the decision not to honour an invoice.

(7) Once a supplier seeks recourse to the internal appeal mechanism for the review of a decision, the timelines stipulated in this section shall stop running until the internal appellate process is concluded.

(8) All internal appeal mechanism decisions shall be reached within ten days from the day they are submitted by the supplier for review.

Act to apply in timelines in supply contract.

5. If a supply contract has prescribed a date for the payment of goods or services, the timelines prescribed in section 4 shall apply, with respect to those goods or services, from the date the invoice falls due for payment .

Offence and penalty.

6. (1) A person who directly or indirectly, fails to comply or obstructs another person from complying or induce or attempt to induce another person not to comply with the provisions of this Act, commits an offence.

(2) In determining, for the purposes of subsection (1), whether there is obstruction or inducement, it shall be sufficient if there is failure to approve or disapprove payment within the time stipulated.

(3) A person who commits an offence under this Act shall be liable on conviction to imprisonment for a term not exceeding seven years or a fine not exceeding five hundred thousand shillings, or both.

Establishment of the Tribunal.

7. (1) There is established a Tribunal to be known as the Public Invoices Settlement Tribunal to hear appeals from any decisions made by internal appeals mechanisms of every public authority not to pay an invoice.

(2) The Tribunal shall consist of—

(a) a chairperson with the qualifications of a Judge of the High Court of Kenya, nominated by the Judicial Service Commission;

(b) a certified procurement and supply practitioner of not less than ten years' experience nominated by the Kenya Institute of Supplies Management;

(c) an advocate of not less than seven years' experience nominated by the Law Society of Kenya;

(d) an accountant of not less than ten years' experience nominated by the Institute of Certified Public Accountants of Kenya; and

(e) one person with experience in financial management.

(3) The members of the Tribunal shall elect a Vice-Chairperson amongst themselves and the Chairperson and the Vice-Chairperson shall be persons of the opposite gender.

(4) All appointments to the Tribunal shall be by name and by Gazette Notice issued by the Cabinet Secretary.

Sittings of the Tribunal.

8. (1) The Tribunal shall sit at such times and in such places as it may appoint.

(2) Subject to subsection (3), the proceedings of the Tribunal shall be open to the public.

(3) The hearings of the Tribunal shall be closed to the public where a dispute emanates from procurement of classified items by a national security organ.

Tenure of members of Tribunal.

9. (1) The Chairperson of the Tribunal shall serve for a term of four years which may be renewed for a further and final term of four years.

(2) A member of the Tribunal shall serve for a term of three years which may be renewed for a further and final term of three years.

(3) A member of the Tribunal shall serve on a part-time basis.

Disqualification.

10. A person shall not be appointed as the Chairperson or member of the Tribunal if the person—

(a) is of unsound mind;

(b) is an undischarged bankrupt;

(c) is convicted of a felony; or

(d) has been removed from any office for gross violation of the Constitution or any other written law.

Resignation of members of the Tribunal.

11. (1) A member of the Tribunal may resign from office by a written notice addressed to the Cabinet Secretary.

(2) A resignation shall be effective upon being received by the Cabinet Secretary.

Vacancy in the office of chairperson or member of the Tribunal.

12. (1) The office of the chairperson or member of the Tribunal shall become vacant if the holder—

(a) dies;

(b) resigns from office by notice in writing addressed to the appointing authority;

(c) is convicted of a felony;

(d) completes their term of office;

(e) is absent from three consecutive meetings of the Tribunal without good cause; or

(f) is removed from office on any of the following grounds—

(i) gross violation of the Constitution or any other written law;

(ii) gross misconduct or misbehavior;

(iii) inability to perform functions of the office arising out of physical or mental infirmity;

(iv) incompetence or neglect of duty; or

(v) bankruptcy.

(2) A vacancy under this section shall be filled within one month from the date of occurrence.

General principles.

13. Subject to this Act or any other law, the Tribunal when seized of a matter—

(a) conducts its proceedings with the minimum formality;

(b) hears and determine the matter expeditiously;

(c) is not be bound by the rules of evidence and procedure;

(d) undertakes investigation of fact if the Tribunal is of the opinion that such investigation is necessary for the ends of justice; and

(e) promotes commerce, good governance and equity.

Quorum.

14. (1) The Chairperson of the Tribunal shall preside at all sittings of the Tribunal at which the Chairperson is present and in the absence of the Chairperson, the Vice-Chairperson shall preside.

(2) The quorum of the Tribunal shall be three members including the chairperson or the person presiding, as the case may be.

Tribunal may seek technical advice.

15. (1) The Tribunal may seek technical advice from persons whose specialized knowledge or experience may assist the Tribunal in its proceedings.

(2) A person whose advice is sought under subsection (1) shall disclose any interest they may have in the matter before the Tribunal or any subsequent interest acquired relating to the matter in question.

Power to review own decision.

16. The Tribunal may, on its own motion or upon application by an aggrieved party, review its decision.

Enforcement of decisions.

17. (1) A decision of the Tribunal shall be enforced by an accounting officer of a public entity to whom it is directed.

(2) The Tribunal may make such recommendations on appropriate reforms to the systems of a procuring entity as it may consider necessary.

Appeals.

18. A party who is dissatisfied with the decision of the Tribunal may appeal to the High Court within fourteen days of the date of the decision.

Oath of office.

19. Members of the Tribunal shall, on appointment, subscribe to the oath or affirmation of office set out in the Schedule.

Regulations.

20. (1) The Cabinet Secretary shall make regulations generally for the better carrying into effect the provisions of this Act.

(2) Without prejudice to the generality of subsection (1), regulations may provide for—

(a) guidelines on the establishment of internal appeals mechanisms in public entities;

(b) the rules and procedures of the Tribunal.

SCHEDULE (s. 19)

OATH/AFFIRMATION

I……….. do swear/affirm that I will well and truly serve the Republic of Kenya in the office of chairperson/member of the Public Invoices Settlement Tribunal, and that I will do justice in accordance with the Constitution of Kenya as by law established, and in accordance with the laws of the Republic without fear or favour, affection or ill will. So help me God.

7.9 Review of progress to date and Recommendations for Future Work

7.9.1 Summary of Achievements made in Combating Payment Paralysis

Table 7.2: Bills to improve SMEs sustainability Presented to Parliament

	Sponsor(s) and Bill Title	Proposal
1	Hon. Moses Kuria Bill The Public Procurement and Asset Disposal (Amendment) Act 2019 (May 2, 2019)	Payment within 90 (ninety) days from the date of receipt of invoices and certificates and that in the event payment is not made, the SME be issued with equivalent value of promissory note which shall be valid for a period not exceeding forty-eight months from the date of issue. The promissory notes are to protect the SMEs from lenders and auctioneers.
2	Hon. Rigathi Gachagua Bill The Public Procurement and Asset Disposal (Amendment) Act 2019 (May13, 2019)	Protect the interests and include local SMEs in International Competitive Bidding (ICB) processes have the minimum (ICB) raised to USD10.0Million, and the local SMEs to take 30% share of works awarded to international SMEs.
3	The Prompt Payment Bill 2020 Senators Ho. Farhiya Haji and Hon.Johnson Sakaja(February 2020)	Payment within 90days of receipt of Invoice. This Bill seeks to improve sustainability of SMEs by reducing the incidence of Payment Paralysis by introducing the Prompt Payment Bill 2020
4	Hon Richard Tongi Bill; Public Procurement and Disposal (Amendment Act 2020) October 13, 2020	This Bill focuses on transfer of expertise from foreign SMEs offering specialized expertise and skills which are not available in Kenya and to ensure that the period of such a transfer is defined and adhered to.
5	The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report Prompt Payment Bill, 2021 A Bill for an Act of Parliament to provide for prompt payment for he supply of goods, works or services; and for connected purposes. March 12, 2021	This Act shall apply to payment due for all goods, works, and services procured by the national government, county governments and private entities. (1) A procuring entity shall pay a supplier by the prescribed payment date. the prescribed payment date. (2) A procuring entity who fails to pay a supplier by the prescribed date shall, pay an interest to the supplier in accordance with this section on the amount due for the supply of goods, works, or services. (3) A procuring entity shall pay an interest under this Act for the period beginning on the day after the prescribed payment date and ending on payment.

7.9.2 Progress towards a Strategic Legal Framework for Sustainability of SMEs

Table 7.2 above summarizes the particulars of bills tabled in the Parliament of the Republic of Kenya in the period between May 2019 and March 2021, which is significant progress towards Control of Payment Paralysis for all SMEs in Kenya.

The bills tabled play a major role in creating legal awareness and clearly setting up and defining the legal requirements and responsibly for procurement Entities to make payments on due time. It also sets a solid platform upon which Kenya, Malawi and other countries in Africa can launch and enforce suitable strategic legal frameworks to improve sustainability of SMEs in the construction industry in their individual States.

However, the five legislations in table 7.2 targets only two of the five drivers of payment paralysis which were identified in this research as highlighted in Fig.2, and are the subject of the strategic legal framework presented in Table 6.1. Table 7.3 below reviews the 5 Bills and matches them with the driver that they specifically target in the legal framework.

Table 7.3: Drives addressed by the 5No. Legislations proposed to date.

Bill No.	Intended goals of the proposed legislation	Driver
1	• Payment within 90 (ninety) of the date of receipt of invoices. • 48month Promissory Notes for protection from auctioneers	1
2	• Protect the interests and include local SMEs • Raises the threshold for International Competitive Bidding (ICB) thus giving local SMEs more space as the range of value of works for National competitive bidding (NCB) increased.	5
3	Payment within 90days of receipt of Invoice	1
4	Transfer of expertise and skills from foreign SMEs to local SMEs	5
5	• A P.E shall pay by due date. A procuring entity who fails to pay on due date shall pay an interest	1

The result of the review is that three of the drivers (Nos 2,3 and 4) have not been addressed at all, and therefore there is yet a lot of work to be done..

7.9.3 Barriers to the successful Application of the New Legislations

In re course of reviewing the progress in development of the new strategic legal framework the author also reviewed the environment for barriers in the application of the legal provisions.

In section 5.5.3.1 of this research, literature reviewed had showed that in the matter of (Court *et al.*, 2020) Tratsel Supplies Limited vs Attorney General; civil cause Number 1798 of 2001 in the High Court of Malawi, before Judge D.F. Mwaulungu, the court pronounced that:

"…This case and others before it, therefore raise the question of immunity of government from execution. Government recently has overlooked judgment debts.
…….This does not mean that the subject has no remedy against Government. It means the particular modes of enforcing judgment between subjects are inappropriate for judgments against Government."……

….. "As a matter of public policy, general provisions making subject to execution, garnishment, or liens are construed to apply only to property of private persons and corporations, and not to that of public corporations or bodies."…….

……..In requiring appropriation for satisfying judgments debts, Government, for two reasons, far from impinges the subjects' right to an effective remedy under the Constitution. First, there is no denial of a remedy. The Constitution creates a process for ensuring the remedy. Secondly, it is the Constitution, the Constitution that creates the right to an effective remedy, that itself creates the immunity of Government from execution.

……..The Registrar was, in my most considered opinion, right to refuse the garnishment of funds in the Reserve bank. The appeal is dismissed with costs. December 16, 2003……"

David Gaukrodger (OECD 2010) disagreed with the ruling in Malawi when he found that "……*state immunity may make it difficult for private parties to pursue legitimate claims*…."

In June 2010 in Kisumu Kenya, a petition No. 29 of 2010 was filed in the matter between Nahashon Omwoha & 66 others (Petitioners) and the Attorney (Respondent) and Kenya Section of International Commission of Jurists (Open Society Justice Initiative) an Amicus Curiae.

The matter was before Hon. Judges D.S. Majanja, E .Maina and Hon T.W. Cherere .

“During the pendency of the petition and more particularly on 3rd May, 2012 Samwel Apwoka & 66 Others who had decrees issued in their favor in various courts were enjoined to this petition ….on 24th July, 2014”.

On December 21, 2017 at Kisumu, the three Judgers bench delivered their ruling using the Malawi case of Tratsel Supplies Limited v Mwakalinga 12 MLR 72 and stated that:

“In the present case the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree.

We however recommend that the Government establishes a Fund which will provide for funds to state organs which should be used to pay debts as a matter of statutory duty without recourse to orders of mandamus and contempt proceedings against accounting officers. The establishment of such a fund would be part of the State duty to promote, protect and facilitate compliance with Article 48 of the Constitution.

…..,.,for the reasons we have set out above, we dismiss the petitioners’ case…”..

The author supports the position taken by David Gaukrodger (OECD 2010) that state immunity makes pursuit of legitimate claims by private parties difficult. It also encouraging that despite their tulings the judges in the two cases agrees that:

a) *This does not mean that the subject has no remedy against Government.* On case No. 1798 of 2001

b) the Government should establish a Fund to provide for paying debts in petition No. 29 of 2010

7.9.4 Recommendation

The judges presiding over the two cases; No. 1798 of 2001 in Malawi and petition No. 29 of 2010 in Kisumu Kenya, is that there exists a legal opportunity to create an opening in the existing wall of “state immunity”.

This opening could perhaps start from the observation by the Royal Institute of Chartered Surveyors (RICS) that:

It is a truism that cash flow is the ‘very lifeblood’ of the construction industry as Lord Judge Denning LJ noted in Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd (1973) 71 LGR 162, (Han and Page, 2016) (RICS, 2011 p2,p4). This is the position the construction industry and the legal profession holds in regard to this landmark ruling by Judge Lord Alfred Thomson Denning in 1973**.**

Since Malawi and Kenya are within the Commonwealth, concerned stakeholders in the construction industry in Malawi and Kenya should investigate and create a strategy for attesting that the views of Judge Lord Denning in *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd (1973)* should perhaps have been the precedent in the *Tratsel Supplies Limited vs Attorney General*; civil case Number 1798 of 2001 in the High Court of Malawi, and *the Nahashon Omwoha & 66 others (Petitioners) vs the Attorney (Respondent)* petition No. 29 of 2010 in Kenya.

This approach shall provide the legislation that judges in Malawi and Kenya alluded to when they implied the "existence of a remedy" and suggested "creation of a Fund" to be the basis for a constitutional providing for a remedy by the creation of a fund solely to compensate deserving private entities and compliance to court judgements.

The author also proposes that the stakeholders in the construction industry in Africa, engage with their governments to explore the extent the statement by The Natural Resource Government Institute, (2015) that *"…contracts can be written to explicitly override the laws and regulations"...* with the intention of circumlocution of the "Governments' immunity" which according to David Gaukrodger (OECD 2010) *"…. may make it difficult for private parties to pursue legitimate claims*….," against the government.

International construction legal experts who are accredited by governments such as FIDIC and the International Chamber of Commerce (ICC), who administers arbitration, can help reduce the incidence and severity of payment paralysis, by advocating use of contracts which provide for early detection and mitigation of contractual disagreements before they escalate into disputes.

The FIDIC MDB Harmonised Cinstruction Contract (2010) developed for use on Contracts Financed by the Seven (7No.) Multiratel Development Banks (MDBs) is currently well placed to achieve this important purpose.

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APPENDIX

APPENDIX

Appendix A: Publications by the Author Arising from this Research

Appendix A1 Kaggiah, G.M.B., 2018.

Appendix A2 : George Kaggiah,. Zahra Salimi and. Danny Morton (2022)

Appendix B: Data Collection

Appendix B1a) Application for R1 and Ethical Approval

Appendix B1b) Approval of R1 and Ethical Clearance

Appendix B1c) NCIC Clearance for the Author to collect Data.

Appendix B2 Blank Sample Questionnaire

Appendix B3 Interview Questions

Appendix B3 a) Interview Questions for the 20 SME failure cases

Appendix B3b) Interview Questions for the 5Policy/Opinion Leaders in the Construction Industry

Appendix B4 Procurement Entities Bidding Requirements from Bidders

Appendix B5 Raw Data and Data Analysis

Appendix B5a) Filled Questionnaire

Appendix B5b) SPSS data and output Screen shots

Appendix A

Publications by the Author Arising from this Research

Appendix A1

Kaggiah, G.M.B., 2018. Contract Documents and Procedures which appropriately *secure* the interests of the Procurement Entity (PE), the Financing Agency and the Contractor, Kenya Engineer Journal,(p 26-35) September
https://www.kenyaengineer.co.ke/kenya-engineer-september-october-2018/

Legal Framework for Reversing the Waning Sustainability of SMEs in the Construction Industry Due to Payment Paralysis in Malawi and Kenya, International Journal of Formal Sciences: Current and Future Research Trends (IJFSCFRT, April

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Appendix A1: Publication in the Kenya Engineer Journal, October 2018

Contract Documents and Procedures which appropriately secure the interests of the Procurement Entity (PE), the Financing Agency and the Contractor

George MB Kaggiah BSc., MSc. REng. FIEK, FMIE, CEng. MICE.

1. Introduction

Construction industry is an important economic growth driver (Radelet, 2007 p. 15). This position is supported by a contribution made to House of Representatives US) in 1926 urging the government to provide low interest lending for construction works; "Construction employs more labor, brings in to use more materials. It creates more spending power; and with that start, it will permeate through into the trades and the general price level." (U.S. House of Representatives (1926), pp. 578-79.cited in Wheelock, 1992).

More recently the position was still found to hold true as Cridland (2009) observes that the UK construction industry makes a tremendous contribution to the national economy. Investment in high quality transport infrastructure is vital to ensure that the UK remains competitive.

The construction industry is an important segment of the Malaysian economy that contributes approximately 6% of the Gross Domestic Product. It generates wealth, improves quality of life and creates work opportunities for many. (Azman M.N.A et al., 2014)

When America was under threat of a recession in 2011, as unemployment remained stubbornly high, the President proposed to spend $140 billion in construction works with a view to creating jobs.(The New York Times, Sunday, October 28, 2012) the success of this initiative is corroborated the 2013 US Budget which included a six-year $476 billion reauthorization of the surface transportation program and the creation of a National Infrastructure Bank.

The United States has a history of investing in infrastructure and reaping the long-term economic benefits; this is evident with the space programme and associated infrastructure (David Aschauer,1999).

In Europe, construction is the largest industrial employer with more than 15 million (30%) workers, (FIEC, 2009, p.3), and the construction sector accounted for 10.4 % of the GDP in 2008 and more than 50% of fixed capital formation (Martinuzzi A., etal, 2011). Construction remains primarily a local industry, with a majority of small and medium- sized enterprises and competition with companies outside Europe is negligible (FIEC, 2009). Construction sector is considered to be of strategic importance to the EU as it delivers the buildings and infrastructure needed by the rest of the economy and society. It represents more than 10% of EU GDP and more than 50% of fixed capital formation. It is the largest single economic activity and it is the biggest industrial employer in Europe. (Ecorys Scs Group, 2010)

In India, a national survey on employment (2009-10) showed that between 2004-05 and 2009- 10 sustained employment was created in construction sector. (Government of India Planning Commission, 2011)

Construction Industry is acknowledged as a major economic driver in India, and the vast majority of new jobs created between 2004 and 2010 were in construction and has maintained an average growth rate of 9.8% over the previous 10 years and having a peak of 11.8% (Government of India Planning Commission, 2011)

Achieving sustainable local SMEs is the expectation of all developing nations since it will lead to the following benefits.

a) Generate sustainable employment and contribute in poverty alleviation.
b) Create local capital in human resource, equipment, and technology.
c) Improve the retention level of foreign currency from donor funding within the developing nations.

The World Bank has been a key player in development, support and implementation of policies for poverty alleviation and promotes the efficient use of the poor's most abundant asset: labor. Construction processes throughout Europe are generally still based on manual labour (Girmscheid & Scheublin, 2010) and therefore, promotion of the construction industry is a direct response to the growth of the most developing countries including those in East and Central Africa. (The World Bank,1990). The Bank has also assisted and sponsored development and implementation of several institutional framework to make the procurement processes and project management in the construction industry a success.

However rapidly changing environment has made it increasingly difficult for the SMEs in the construction industry in Kenya to grow and become sustainable as was expected. One will note the numbers have increased but in terms of population growth and volume and value of work carried annually, the percentage taken by the local SMEs has not encouranging.

2. Challenges facing SMEs in Construction Industry in Kenya.

Research carried out in the region indicate that the major challenges to SMEs in the construction Industry are payment paralysis, Access to finance and lack of work opportunities.

1. Delayed payments (Payment paralysis)
2. Limited work opportunities (access to investment and trade opportunities)
3. Access to Credit and Financing
4. High lending rates; (results in uneven playing field in international Bids)
5. Unreliable and costly economic infrastructure
6. Outdated policy, legal and regulatory framework or absence of clear policy;
7. Obstructive Business environments to SMEs' growth
8. Industrial Polarization (more attention to micro-enterprises and Multinationals)
9. Poor Leadership in Management of Construction SMEs
10. Seasonality (stoppage of work and related difficulties during the rains)
11. Corruption

2.1 Payment Paralysis

Payment is considered as the lifeblood of the construction industry because constructions often involve very large capital outlay and take a considerable time to complete. It is beyond the means or capacity of most SMEs to complete the whole of the construction work before they get paid. This is especially so among the medium and small size Contractors (Jud, S.S., et al, 2010) The impact of late payment can be disastrous to SMEs as during the 2008 recession it is estimated that 4,000 businesses failed as a direct result of late payments in the UK (Abrahams, D. , 2013). Late payment or nonpayment leads to "payment paralysis" which is a situations where the Employers delays payments to SMEs in the construction industry for long periods, making the SMEs to suffer acute and prolonged cash flow interruptions and is unable to meet his financial commitments to pay staff, service bank loans or to order materials (MDA Consulting, 2010). The works therefore come to a standstill and plant and labour become idle at the contractor's cost while waiting for payments. In such situations, the contract normally provides for the SME to be paid 'interest on late payment'. The SME is rendered helpless and paralysed; unable to take any action or withdraw from the contract.

2.2 Insertion of Contingent Clauses in the Bid Documents

This situation is made worse by inclusion of Contingent Payment Clauses in the contracts (Prism Economics and analysis, 2013). Contingent payment clauses are provisions in construction contracts that allow for payment to be delayed notwithstanding that the construction work was performed satisfactorily. In some cases, a contractor who is not paid is allowed to suspend work. In other cases, work must be continued at least for a period of time, even though payment is in arrears. Some contingent payment clauses provide for interest on delayed payments.

For instance, the pay-when-paid clause often used in contracts agreement between main contractors and sub-contractors also known as "back to back" method of payment is relevant especially in the case of nominated sub-contractors (Hasmori, M.F., et al, 2012)

Gerald Mabveka (2014) observes that it is common to find Procurement Entities (PEs) include payment terms that are unfair to the SMEs. The SMEs are forced to accept these terms because during the years, with the diminished volume of construction work, SMEs are under pressure and at times engage in risky 'suicide' bids with little or non-existent profit margins just to sustain the flow of work and stay in relevant in business (Lip, 2003 cited in Amoako, K.B., 2011)

FIDIC was inspired from the first edition of the Standard Form of Contracts published by "Institute of Civil Engineers" (ICE) in 1945 (Koksal, J.T.,2011). FIDIC "Conditions of Contract for Works of Civil Engineering Construction"; was in use upto the Fourth Edition 1987 (Red-Book87) when it was replaced by FIDIC "Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer"; First Edition 1999 (Red-Book99) in comparison (Kolonne, T.P., 2011) The difference between the two books is that while the "Engineer" in the Red-Book87 was acting in the interest of the Employer, the "Engineer" in Red-Book99 is more discretionary and should act in a fair manner to Employer and Contractor. Sarwono Hardjomuljadi, (2012) describes FIDIC Red-Book99 as "The answer to the need for a fair and balanced Conditions of Contract.

However, the Bid Document allow the Procurement Entities (PE) to modify, delete and/or add sub clauses to make the documents "project specific" and also to reflect the PE's Project management processes. In majority of cases the donor agency also requires that they are involved at all stages of the procurement process and give a "no objection" at the conclusion of each of the major activities in the process.

The PEs to enter contingent clauses in process of preparing the Contract Documents usually include for the following Documents

- Information to Bidders (ITB)
- Terms of Reference
- Conditions of Contract
- Specifications

The Terms of reference are project specific while the other 3 Sections are generic but each has a "section 2" termed as "Bid Data" in case of ITB, Special Conditions of Contract or "Conditions of Special application" which the PEs use to make the document comprehensive and all inclusive inn respect to activities and management procedures for the particular works.

2.3 Adjustments to suit project specific conditions affecting Eligibility and beyond

Here below are some of the sections where the PEs exercises their discretion in deciding some elements which have far reaching consequences to SMEs as they prepare their bid, and even as the carry out the work upon execution of the contract.

1. The Bidder **MUST** submit his Litigation history together with the Bid.
European Union has, in recent Bids, Clarified that "Previous experience which caused breach of contract and termination by a Contracting Authority shall not be used as reference".

2. ITC 16.2 a). Price Adjustment For assignments with a duration exceeding 18 months, a price adjustment provision for foreign and/or local inflation for remuneration rates applies if so stated in the Data Sheet. YES / N/A

3. **ITB 17.1** The Proposal Validity period shall be ------ days. The PE may request the bidders to extend the validity period. (No compensation or price adjustments are allowed for this period particularly in contracts without the price escalation clause)

4. **SCC 31.1** Payment shall be made by the Procuring Entity within ----**days** of receipt of the request for payment and within ----**days** in the case of the final payment.

5. **SCC 31.4** Interest shall be paid on late payments at the rate of: --- **percent above the base lending rate published by the Central Bank**

6. **SCC 32.1** Prices charged by the Supplier **shall/ not** vary from the prices quoted in the Contract.

The current framework makes it possible for the Procuring Entity (PE) to enter conditions which may obviate appropriate Compensation for SMEs awarded the contract. In some instances "NIL" would have been entered for"interest to be paid on late payments"

In Kenya, other that the contract agreement, there are no laws regulating either the period of delays in payments or the compensation that the SMEs may claim. The situation is made more compromising because the contracts documents are made by consultants hired by the contracting authorities and therefore tend to reduce risks that may affect the Client rather than focusing on fairness to both the Employer and the SMEs.

2.4 Measures to reduce incidence negative contingent clauses

2.4.1 Payments,

The duration from the point of submission of an Interim Payment Certificate and actual payment is usually a minimum 60days because it allows the Engineer, 28 days to verify, and certify the measurements and calculations.

Lip, E.(2006, Cited in (Emenke, F.O., 2010) found that critics blame the construction industry for its outdated and inefficient payment practices resulting late payment and the uncertainty on effective payment date relative to certification of Interim Valuation Certificates.

The author agrees with this view and particularly in respect to the 28 days the

Engineer is allowed to measure and certify an interim Certificate. In the process of supervising the works and enforcing the quality control processes, each element of the works has been measured and approved at the time of construction.

In roads, every layer is measured in length, width and depth with every excavations measured for levels before and after excavation with approval forms signed by all parties. For concrete works we have the formwork measured and inspected in accordance to drawing and the steel fixing checked, and volume and class of concrete measured and sampled at time of placing. It is therefore correct to state that at any date the Engineer can satisfy within a few days the volume of works or material deliveries made on site within the month and since the certificates are monthly 28 days is a long time. The Employer is also allowed a similar amount of time. Further the SME are required to give notice if payment is not received within another 28 days before taking any action.

For comparison, it is noted that in the UK payment term of strictly 60 days are enforced and in Malaysia an Employer must make payment within a period of 2 – 3 months after the invoice

2.4.2 Framework to reduce incident and severity of Payment Paralysis

In Malaysia, based on the conditions of contract, an Employer is considered to have neglected or failed to pay the Contractor if the latter does not receive his payment for a period of 2 – 3 months after the period of honoring his certificate Judi S.S. et al (2010). Based on the research conducted by the construction industry Development Board (CIDB) of Malaysia (2006), (Emenke ,F.O., 2010) both contractors and consultants agreed that they suffered late payments frequently.

On account of these problems, some developed countries like United Kingdom, Singapore, New Zealand and some states in Australia have passed construction specific legal payment security regimes that deliberately enact provisions to address issues on immediate payment in the construction industry, and to eliminate, as much as possible, poor payment practices and smoothen the contractor's cash flow. (Hasmori, M.F, 2012)

The Need for Prompt Payment Legislation in the Construction Industry (2013) records that in a 1994 report on the construction industry, commissioned by the U.K.

government, drew attention to the damage to the industry caused by payment delay. The report recommended that "any attempt by an Employer to include a clause in a bespoke form with the effect of introducing 'pay-when-paid' conditions should be explicitly declared unfair and invalid.

Subsequently the government prohibited 'pay- when-paid' clauses in section 113 of the Housing Grants, Construction and Regeneration Act, 1996 (commonly known as the 'Construction Act'). Section 113 provides that 'pay-when-paid' clauses are void, except in conditions of insolvency. The Latham Report to the Housing Grants, led to the Construction and Regeneration Act (Construction Act) in 1996 which had several aims including improving cash flows in the construction Industry. This came to effect in October, 2011 in England and Wales and November 2011 in Scotland.

2.4.3 Penalty to defaulting Employers

Florini B. and Singh K. (2014) record that in Quebec in a case; 9149-5408 Quebec Inc v Groupe Ortam Inc the Quebec court of appeal ruled that a an annual interest of 15% be paid to compensate the complainant for late payment, statutory additional indemnity of 2% for costs of legal proceedings and collection fees at a time when the legal annual interest rate was 5%. This indicates that the interest rate offered to the claimant was 3 times the ruling commercial interest rate.

The Government of the UK strengthened this position when further steps were taken to address delayed payment or nonpayment by enacting a legislation entitling SMEs to charge interest of 8% above base rate on late payment since 1998 and, following two additional EU directives, there is a legal default maximum payment term of 60 days, unless otherwise agreed (Vince, C., 2013) payments must be made within a maximum of 60 days (Winther,M,2011) In the UK the payment period is being reduced even further and government is encouraging central government departments to aim at paying 80% of undisputed invoices in 5 days. (Cable, V., 2013)

Table 1. Interests on Late Payment payable to SMEs in Kenya

Year	2011	2012	2013	2014	2015
Base Rate (BR) %	10	18	9	9	12
Interest above(BR) payable to SME (Compensation) %	2	2	2	2	2
Compensation as % of base Rate	20	11	22	22	17

Table 2. Interests on Late Payment payable to SMEs in the United Kingdom

Year	2011	2012	2013	2014	2015
Base Rate (BR) %	0.75	0.25	0.25	0.25	0.25
Interest above(BR) payable to SME (Compesation)	8.0	8.0	8.0	8.0	8.0
Compensation as % of base Rate	1067	3200	3200	3200	3200

It is also worth noting that the commercial Banks from which the SMEs borrow offer the facilities at interest rates about 50% higher than the Base lending rate and therefore the base rate has no relevance to the SME.

In the UK, the interest rates charged for late payments are so high that they are indeed an incentive for the Employer not to default

3. The eligibility and evaluation criteria adopted by the Procurement

The eligibility and evaluation criteria adopted by the Procurement entities and the Bank are not favorable to local SMEs and are sometimes not considered reasonable. Some of the Conditions to which attention is drawn is the experience of personnel for Consultants and the turnover and experience for Contractors.

3.1 Personnel for Consultants

It is noted that in Kenya due to the mode of construction adopted, road projects of 30km and above and other civil works take over 2 years to complete, and therefore requiring an Engineer to have carried out 10 such a projects implies that the expert must have been on such a jobs for over 20 years. The experience in Kenya is that most civil engineers get their registration as qualified Engineers after an average of 8 years post graduate experience and as such would be qualified to carry out their first such a job at the age of 33 years while the criteria set out in the table below would only be achieved at age 55.

Table 3 Criteria set for eligibility of Technical Staff

Table 7. Eligibility and Evaluation Criteria considered unreasonable			
No.	Position	years of professional experience	Specific experience
1.	Team Leader / Contract Document Specialist	15 years	The Team Leader / Contract Specialist shall have undertaken a minimum of 10 similar projects as a Team Leader or Contract Specialist but not less than 4 projects in either capacity Estimated total time- input is 8 man-months.
2.	Pavement/ Materials Engineer	10 years	shall have undertaken a minimum of 7 similar projects as a Pavement / Materials Engineer. Estimated total time-input is 3 man-months.
3.	Highway Design Engineer	7 years	Experience in the geometric design of at least seven similar sized road project. Estimated total time- input is 3 man-months.

The Question that also begs to be answered is "If the expert successfully delivered the first and the second such similar assignment, why does she/he have to deliver upto to the tenth such similar task to qualify for this "similar" assignment?" Clearly a review of the basis of such criteria is required to show the grounds of such need. The qualifications recognized by the ERB, IEK, EBK and NCA should be the only legal basis of any eligibility criteria as no one else is legally empowered to conduct such

The process of vetting and examination for professional registration that Engineers go through should be the only criteria to be used by PEs in Kenya. It is also necessary to have the criteria gazetted for a range of works to make it "official" rather than having the criteria set for every assignment. A summary of Personnel in the construction industry suitable for works of particular extent and complexity should be made available and should perhaps be in a similar format as the NCA has adopted for the SMEs in construction as in the table below.

Table 4. Classifying professional personnel by experience in years and value of assignment.

Item	Class	Title	Experience (Yrs)	Experience (Projects)	Upper limit AMOUNT
1		Registered Consultant	15 ++	unclear	Unlimited contract Value
2		Registered Consultant	1, 5,10	unclear	Not Specified
3		Registered Engineer	1, 5,10 , 15	unclear	Not Specified
4		Graduate Engineer	1, 5,10 , 15	unclear	Work under Supervision
5		Engineering Technician	1, 5,10 , 15	unclear	Work under Supervision

Note: Classification MUST not be construed to be in breach of the EBK and/or IEK legal mandate

3.2 SMEs bidding for Works Contract

Table 5. Eligibility and Evaluation Criteria considered unreasonable by local SMEs

Eligibility and Qualification criteria			Compliance Requirements				Documentation
No.	Subject	Requirement	Single Entity	Joint Venture (existing or intended) All Parties Combined	Joint Venture (existing or intended) Each Member	Joint Venture (existing or intended) One Member	Submission Requirements
3. Financial Situation and Performance							
3.1	Financial Capabilities	(i) The Bidder shall demonstrate that it has access to, or has available, Liquid assets, unencumbered real assets, lines of credit, and other financial means (independent of any contractual advance payment) sufficient to meet the construction cash flow requirements estimated as Ksh.----- or equivalent in a freely convertible currency for the subject contract(s) net of the Bidders other commitments	Must meet requirement	Must meet requirement	must meet 25% (Twenty Five Percent) of the Requirement	Must meet 60% (Sixty Percent) of the Requirement	Form FIN – 3.1, with attachments
		(ii) The Bidders shall also demonstrate, to the satisfaction of the Employer, that it has adequate sources of finance to meet the cash flow requirements on works currently in progress and for future contract commitments.	Must meet requirement	Must meet requirement	N/A	N/A	
		(iii) The audited balance sheets or, if not required by the laws of the Bidder's country, other financial statements acceptable to the Employer, for the last Five years shall be submitted and must demonstrate the current soundness of the Bidder's financial position and indicate its prospective long term profitability.	Must meet requirement	N/A	Must meet requirement	N/A	

Construction Cranes infinity

3.2.1 Matching the NCA categories with the international SMEs

The eligibility of an SME for construction works should be as set out by the NCA. The NCA carries out the registration of an SME in a particular category only after satisfying themselves that the SME has the necessary capital and experience to conclude construction works falling within the category for which the SME is registered.

Table 6 below indicates the NCA classification which should be followed. The table includes the top of the range categories and does not include categories NCA4-NCA7

Table 6 NCA classification of the SMEs

CATEGORY NO.	CONTRACTOR WORK	Upper limit AMOUNT
NCA 1	Contractor – Building Specialist Contractors Roads and other Civil Works	Unlimited contract Value Unlimited contract Value Unlimited contract Value
NCA 2	Contractor – Building Specialist Contractors Roads and other Civil Works	500,000,000 250,000,000 750,000,000
NCA 3	Contractor – Building Specialist Contractors Roads and other Civil Works	300,000,000 150,000,000 500,000,000

The NCA have clearly set out the requirements for particular categories of SMEs and they ensure that the said SMEs have the pre-requisite experience and capacity as measured by their human, financial and technological capital together with the available plant and equipment before registering the SME in a particular category.

This classification should be interrogated and adjusted to finality with the involvement of all stake holders to eliminate the need of for PEs and their Financiers resulting to carrying out classifications which might be in breach of the mandate of the EBK and or the IEK. Should such a classification and requirements have no legal basis it could be concluded to be arbitrary and therefore irregular.

3.2.2 Criteria Implying unfair demands

The Financial requirements set out in the criteria in Table 5 above, appear to imply that the Employer MAY require the SME to meet the cost of financing the works. This should not be the case; the SME should be required to have a good financial record and must not be in debt which might cause him to divert finances meant for the works to meet previous debts. The SME should be in a position to obtain the required Performance Bond, 10% Mobilization Advance Guarantee, and the plant and equipment befitting his category and must show that he has enough and

Table 7. Indicative cost of borrowing in the EU and Kenya

Year	2011	2012	2013	2014	2015
Base Rate (BR) % (Kenya)	10	18	9	9	12
Base Rate (BR) % (UK) and EU	0.75	0.25	0.25	0.25	0.25

balanced plant and equipment to maintain production levels required to deliver the works within schedule.

Mobilization which includes for setting up camps stores, and transporting plant and equipment to site usually costs more than the 10% offered as advance mobilization payment and the SME has to carry out works and finance time related costs upto the cost of the first three interim valuation Certificates (90 days) before receipt of the first payment. In the UK, it is recognized that SMEs in most cases do not have capital reserves at their disposal and are highly dependent on cash flow and interruption of anticipated cash flow can result in insolvency, and even when a company remains financially viable, late payment can drain resources, stopping businesses from investing and growing (Conway, J.,2013).This is equally true in Kenya and should be addressed accordingly.

3.2.3 Mismatch in definition of SMEs in Kenya and those in Europe

However, the classification of SMEs in Europe and the ones in Kenya could be significantly different .The most frequent definition is based on the upper limit is 250 employees, as endorsed by the European Union, however, some countries set the limit at 200 employees (OECD,2005), while the United States considers SMEs to include firms with fewer than 500 employees (Hammer A, 2010) and the Government of Uganda uses 5-50 people (UNIDO, 2005). Vedanthachari LN.(2007) defines SMEs as enterprises which employ fewer than 250 people and which have an annual turnover not exceeding 50 million euros (Ksh.5.5 Billion), and/ or an annual balance sheet total not exceeding 43 million euro (European Commission, 2005). There are very few Kenyan SMEs with this turnover but when a joint venture is formed it should perhaps be encouraged by requiring one of the Jv entities having 40% of required resources while the other two between then cone the 60%.

3.2.4 Advantage of international SMEs to those in Kenya

The lending rates in Kenya and those of the countries of origin of some of the international SME are significantly different and gives the international SMEs an advantage over the local SMEs far above the 5% preference offered to local SMEs as may be seen from table 7.

Appendix A 2   Kaggiah, Salimi and Danny, (2022)

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Legal Framework for Reversing the Waning Sustainability of SMEs in the Construction Industry Due to Payment Paralysis in Malawi and Kenya

George M.B. Kaggiah[a*], Dr. Zahra Salimi[b], Prof. Danny Morton[c]

[a]Connex Engineering Ltd P.O. Box 21396-00505 Nairobi, +254721980634
[b]Assistant Teaching Professor University of Bolton Deane Campus, Deane Road, Bolton BL3 5AB, UK
[c]Head of School of Engineering University of Bolton, Deane Campus, Deane Road, Bolton BL3 5AB, UK
[a]Email: GMK1WSS@bolton.ac.uk, kaggiahgmb@gmail.com
[b]Email: D.Morton@bolton.ac.uk, [c]Email: Z.Salimi@bolton.ac.uk

Abstract

Introduction; Structural Adjustment Programs (SAPs) were introduced to the developing countries by the World Bank from 1980 to 2000, following a collective inability to service their loans. SAPs encouraged Governments to privatise non-strategic commercial activities, leading to emergence of Small and Medium Enterprise (SME) sector, taking 95% of trading entities; employing 40% of workforce in Sub-Saharan Africa. Unfortunately, many start-up SMEs in Africa fail within five years, inhibiting growth to compete with International SMEs particularly in the construction industry. This research was to identify the leading factor in causing failure of SMEs in construction Industry in Africa; case of Malawi and Kenya and develop a strategic framework to enhance sustainability of local SMEs. **Methodology;** Literature revealed twelve factors with negative impact on sustainability of SMEs. A questionnaire survey on 800 SMEs analysed with SPSS found that "payment paralysis" was the leading cause of bankruptcy to SMEs. Non structured interviews with 20No. failure cases and 5No. Policy/opinion leaders, to identify the major drivers of payment paralysis. **Results;** Delayed payments triggered "payment paralysis" which led the affected SME to bankruptcy. The study found major drivers of payment paralysis are Corruption, Weak Contract laws, Contract models permitting PEs to skew risks against the SMEs and high bank interest rates. **Conclusion;** A robust legal framework to bring order and fiscal discipline in construction industry involving enactment of laws which enhance sustainability of SMEs is urgently required. The research findings were shared in awareness presentations in Malawi, Zambia and Kenya. Positive results are manifest with 'The Prompt Payment Bill 2020' and others already prepared in Kenya.

Key words: SMEs; Construction; corruption; sustainability; contract; Payment paralysis.

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* Corresponding author.

1. Introduction and Background

The economies of the majority of the countries in the developing countries suffered a severe economic downturn in the 1970s approaching stagnation in the 80s and were generally unable to repay their loans.[1] The World Bank and the IMF with the singular object of reducing expenditure and increasing productivity in these countries initiated The Structural Adjustment Program (SAPs) in 1980 to 2000. SAPs was introduced in the Developing Countries which included those in the 2013 World Bank list of 55 Least Developed Countries (LDCs), among the 193 countries in the world, of which 32 (58%) are in Africa [2, 3].

SAPs encouraged governments of developing countries to privitise non strategic commercial activities and review their management structures with a view to reducing their bloated workforce due to prevalent weak management of the public sector in the developing countries [2].

SAPs would soon be associated with weakening governments and promoting poverty due to the loss of jobs for many heads of families and as it denied the powerful personalities in the Government the power and authority to offer employment at will. This led to the 14th December "Dakar 2000 Declaration which called for the cancellation of Third World debt and cessation of the SAPs [4].

2. Emergence of SMEs as the Economic Driver

SAPs came to an end in 2000 and to many of the subject countries, it was a nightmare as the resultant reduction in government spending in social services had devastating effects on vital services such as health and education [5] and also had disastrous effects on employment as many government employees were laid off in the restructuring process [4].

The author in [6] finds it difficult to state whether SAPs had positive or negative results on the subject countries but, the author in [7] posits that SAPs assisted development and that it had a wider scope beyond economic policy and it caused profitable trends in political stability of some countries and changed the economies from "inefficient highly government regulated" to "diverse, competitive and private markets" and therefore adequately responded to the need as defined by Adebayo Adedeji that "Africa has to Adjust"[7].

Literature reviewed led this author to the conclusion that while SAPs did not progress to its planned conclusion and therefore achieve its goals and objectives as envisioned by its sponsors, the World Bank and the IMF, the initial stages of its application involving privatization of majority of the nonstrategic commercial entities and restructuring of the government had progressed to an irreversible state and as SAPs was abandoned midstream in 2000, the Adebayo Adedeji catchphrase "Africa has to Adjust" came to pass. Africa changed; but in a manner that the SAPs proponents may have not foreseen; the Small and Medium Entrepreneurships emerged and dominated the business space in Africa and other developing countries. .

The author in [7] found that SAPs changed the economic and political terrain to an irreversible state. Many experts trained and experienced in various trades were released into the market environment as lay-offs by governments, and the researcher concurs with the author in [7]because in the process SAPs achieved a hugely positive outcome as the laid-off experts used their knowledge to create entrepreneurship opportunities and thus the private sector emerged to fill the space that the governments ceded as they withdrew from nonstrategic activities such as transport, Construction, manufacturing, Power generation, Agriculture, and allowed private participation in education, health and research. This development created a suitable environment for the emergence of many Micro, Small and Medium Enterprises (MSMEs) which was also the case in the construction industry as confirmed by the authors in [8].

The Contribution of SMEs to the GDP and National Employment was 11.5% and 41.7% respectively in Malawi [9] and 45% and 80% respectively. In Kenya OECD 1996 [10] and the authors in [11] confirm that SMEs created 80% and 85% of the jobs created in Kenya in 1996 and 2018 respectively. The author in[12] found that SMEs constituted 99% of all the businesses in the Developing countries and contributed upto 50% of the GDP.

SMEs in the construction industry are of great importance in developing countries because they generate employment and favour the youth and other untrained individuals who benefit from the "training on the job" opportunities in the sector which are considered more cost effective than employing trained professional workers [13] In a study conducted in Kenya, National Construction Authority (2015) [14] established that 18% of the construction workers were formally trained while 81% acquired their skills by in-house training.

3. Disappointment in High Frequency of SMEs failure

Unfortunately just as there are many SMEs entering the market so are many failing. The author in [15] pessimistically concluded that *"the chance of a newcomer becoming an established member of the business community is sadly slight. The SME owner carries on until his funds are exhausted and then disappears from the scene. His place is taken by another hopeful, certain that he has the abilities which will permit him to succeed where his predecessor has failed. ... Unaware of the odds against them, and largely ignorant of the weapons of trade, prospective proprietors march stolidly to the ambush".*

The author in [15] was found by this researcher to have contributed significantly in clarifying the research question by providing the three definitions of SME failure as viewed from the practical, economic and the legal perspective which are copied here below.

a) Failure is reflected by the exit rate of an SME from the business sector.
b) In economic terms, failure occurs when a firm has a rate of return on investment which is insufficient to cover its opportunity cost.
c) In legal terms, when a small firm is formally liquidated or in the case of an unincorporated enterprise the owner becomes bankrupt for business reasons.

The table 1 below summarises the high incidence of SME failure (un-sustainability) in some countries in Africa.

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The table 1 below summarises the high incidence of SME failure (un-sustainability) in some countries in Africa.

Table 1: Incidence of SME failure (un-sustainability) in Africa.

Item	Country	Proportion (%)				Reference
		Year 2	Year 5	Year 10	total	
1	Kenya	60*	70	-	70	(Kamunge, S.M and his colleagues 2014) [16] Kenya Bureau Statistics 2007[17] Bowen M, Morara, M.and Murithi S(2009)[18], Jacqueline Douglas and his colleagues (2017)[19]
2	Malawi	60	20	10	90	Bowler, Dawood & Page (2006) cited by ML Van Scheers (2011) [20], Bryson B. Majanga (2015) [21],
3	Botswana		52	28	80	OECD (1996) [10] J. Haltiwanger and his colleagues [22]
4	Swaziland	50	30	15	95	Dr .Patricia Joubert
5	S. Africa				75	Adeniran and Johnston, 2011[23]
6	Nigeria	-	70	-	80	(Muhammad M. Ma'aji, 2019) [24] Hashimu, S.N and Bakar, M.S. [25]

Prof. Michael Cant (2012) [26] confirms Dawood and Page (2006) and Phakisa (2009) estimate that 40% of new business ventures fail in their first year, 60% in their second year, and 90% in their first 10 years of existence.

Jacqueline Douglas and his colleagues (2017) [19] found that "70% of Small-to-Medium sized enterprises (SMEs) in Kenya fail within their first three years of existence which is confirmed by the Kenya National Bureau of Statistics (2017) who recorded that approximately 400,000 micro, small and medium enterprises do not celebrate their second birthday

In Malawi it was found that 60% of the SMEs failed within the first year of entry into the business.

4. The Methodology

The Research problem is based on a general observation that local SMEs in the construction industry in Africa were not growing in a sustainable manner and were unable to build capacity in human resource and capital to qualify in the International Competitive Bidding (ICB) which would lead to their engagement in donor funded construction projects. Africa would then be less dependence on international contractors which would improve retention of the donor funding inflows within the borrowing country. The research design included exploratory literature review and archival research which offered the available information and revealed a number of possibilities of the main cause of the problem as published by other scholars and providing the variables for the research. The second phase of the study was a survey. A Questionnaire was developed to include all the important aspects of SME particularly in regard to the management, market environment, performance, profitability and sustainability of SMEs. The mixed method provided quantitative data to highlight the population of SMEs involved and therefore the significance of the industry and the net effect of the negative factors impacting the SMEs in the construction industry, and qualitative data to establish the factors affecting the sustainability of SMEs in the construction industry. A Survey was then carried out to establish the single most devastating of the negative factors in the market environment. The survey was conducted in Malawi where the questionnaire was administered to a representative sample picked at random in accordance to recommended sampling procedures and possesses [27]. The population of SMEs in the construction industry in Malawi in the year 2015 was obtained from the records of the subscriptions and registrations with the NCIC as 5,000 and a random sample of 800 was taken spread over the three administrative regions of Malawi, Northern, Central and the Southern Regions. There were 750 respondents and their results were data coded into the IBM 20 Statistical Package for the Social Sciences (SPSS) for analysis. Payment Paralysis was found to be the leading factor in waning sustainability of SMEs in the construction industry in Malawi.

The research then reached out to 20No. SMEs that had failed and had unstructured interviews to record their individual experiences particularly in reference to Payment Paralysis and suggestions for incorporation in a strategic framework to reduce the incidence and the effects of payment paralysis.

Non-structured interviews were then conducted with five senior managers in the Ministry of Transport, Roads Authority, MABCATA and NCIC who play a major role in the employment, registration and regulation of SMEs in the Construction Industry in Malawi.

5. Results of Literature Review

Literature reviewed revealed 13 negative factors listed in table2 here below, which had been identified by other

Table 2: Challenges facing the SMEs in the Construction Industry

No	**Factor affecting sustainability**	No.	**Factor affecting sustainability**
1	Industrial Polarization	2	Obstructive Business Environment to SMEs
3	Delayed Payment	4	Limited Access To Investment
5	Poor Leadership In Management	6	Access To Credit And Financing
7	High Lending Rates	8	Outdated Policy, Legal and Regulatory Framework
9	Unreliable and Costly Economic Infrastructure	10	Seasonality
11	Limited Work Opportunity	12	Corruption
13	Limited work opportunity	14	

researchers as causes of negative impact to SMEs generally.

These factors were used in the preparation of the survey questionnaire and the respondents asked to measure each in terms of frequency and severity and rank the three most damaging factors in their experience,

The Results based on the SPSS analysis of the 750 questionnaires were as in table 3 below

The ranking of the three most frequent challenges can be recognized from Tables 2 shows the SMEs views and experiences in regard to the severity of the negative effects of each of the factors identified. In Table 3, 307 respondents, 40.9% of the sample, indicated that delayed payments is the leading factor that has had the most devastating negative impact on SMEs in the construction industry.

Table 3: The first most devastating Challenges to SMEs in construction Industry

Description of negative factor	Frequency	Percent	Valid %	Cumulative %
Obstructive business environment to SMEs	0	0	0	0
Industrial polarization	6	.8	.8	7.1
Poor leadership in management	61	7.9	8.1	15.2
Delayed payment	307	39.6	40.9	56.1
Limited access to investment	39	5.0	5.2	61.3
Access to credit and financing	88	11.3	11.7	73.1
High lending rates	10	1.3	1.3	74.4
Outdated policy, legal and regulatory framework	3	.4	.4	74.8
Unreliable and costly economic infrastructure	47	6.1	6.3	81.1
Seasonality	20	2.6	2.7	83.7
Corruption	12	1.5	1.6	85.3
Limited work opportunity	110	14.2	14.7	100.0
Total	750	96.6	100.0	

6. The Research Findings

The leading cause of waning sustainability of SMEs in the construction Industry in Africa; case of Malawi and Kenya is payment paralysis which is triggered by delayed payments.

The five leading drivers of delayed payments are:

a) Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs)
b) Incorrect Interpretation and Application of World Bank Procurement Model
c) Corruption and Political Rivalry

d) Bank Lending Interest Rate in Africa is generally higher than those in the Countries of Origin of the competing Foreign Contractors

e) Influence of market environment on bidding

f) Influence of market environment on bidding

6.1 *Discussion of Findings*

6.1.1 *Arbitrary Transfer of Risks by the Procuring Entities (PEs)*

In Malawi and Kenya, there is no law regulating either the limiting period of such delays in payments or the compensation that the affected SMEs may claim. The situation is made worse because the contract documents are prepared by consultants hired by the contracting authorities and therefore tend to reduce risks that may affect the Client rather than focusing on fairness to both the Employer and the SMEs who will be contracted to carry out the works contract.

Gerald Mabveka (2014) [28]observes that it is common to find Procurement Entities (PEs) include payment terms that are unfair to the SMEs. The SMEs are forced to accept these terms because during the years, with the diminished volume of construction work, SMEs are under pressure and at times engage in risky 'suicide' bids with little or non-existent profit margins just to sustain the flow of work and stay in business [29, 30].

The Conditions of Contract allow the Procuring Entity (PE) to make insertions in the Special Conditions with a view to transferring some risks to the SMEs and the SMEs are not given an opportunity to challenge the transfer of risks and are left with no option but to accept.

SCC 31.1 Payment shall be made by the Procuring Entity within ----days of receipt of the request for payment and within ----days in the case of the final payment.

SCC 31.4 Interest shall be paid on late payments at the rate of: --- percent above the base lending rate of the Reserve Bank of Malawi

SCC 32.1 Prices charged by the Supplier shall/ not vary from the prices quoted in the Contract. (Extract from Office of Director of Public Procurement of Malawi).

6.1.2 *Incorrect Interpretation and Application of World Bank Procurement Model*

Kenya, Malawi and other countries benefitted from the joint World Bank/OECD Development Assistance Committee (DAC) Procurement Round Table Initiative established in 2002 where developing countries and donors worked together from 2003 – 2004 to develop tools and standards comparable to the International Standards for improvement of procurement systems which resulted in the adoption of the Quality- and Cost-Based Selection ("QCBS"). This method requires the Works and Services SMEs in the construction industry to submit bids which demonstrate their competence and capacity to carry out the bidder offering the "Least Cost evaluated" is awarded the contract. The Term "Least Cost evaluated" means when the evaluation committee compares the sum of the "Cost of the product" of the Quality likely to be delivered by applying the experience and capacity described in the bid and the "Cost of production" as in the Bid (BoQ or Financial Proposal)

The World Bank Procurement Model has been widely adopted and is being used with minor project specific alterations for both locally financed and donor funded Projects. However, the "Q" in ("QCBS") has increasingly diminished as has the use of the "Confidential Engineers Cost Estimate". This has led to a situation where the "Production cost" has increasingly become the ruling evaluation criterion and at times contracts have been awarded at prices below the Engineers estimate to Bidders with uncertain experience and capacity thus abusing the recommended Quality and Cost Based Selection ("QCBS").

6.1.3 Corruption and Political Rivalry

The corruption levels in Malawi were underlined by the Nyasa Times Newspaper on July 13, 2013 when it attributed a statement to the then Director of Malawi Anti-corruption Bureau(ACB), Justice Rezine Mzikamanda as having said that 30% of the Government budget disappears in the corruption abyss [31]. In the Amnesty International Corruption Perceptions Index 2020 [32] Malawi was Ranked 129 out of 180.

Malawi is not alone; in Kenya where the findings of this research were also disseminated and practically applied. On 23rd Nov, 2015, the President of the Republic of Kenya declared corruption a national security threat and he presented a raft of measures to fight the graft that is endemic in East Africa's largest economy [33]. Reuters reported that Kenya was losing a third of its state budget, the equivalent of about $6 billion, to corruption every year. On 18th January 2021 the President of the Republic of Kenya reiterated that the country was losing Sh2 billion a day to corruption (USD 7.30 Billion p.a.) [34].

The EU Special Report 14/2020, recognized the perception of widespread corruption in Kenya (p5) and underlines that Kenya is in the bottom 21 % of countries ranked in the Transparency (p16) and that the EU's support for the fight against corruption was limited. The Report recommended that the EU prioritise sectors in Kenya with the potential to fight against corruption (p5).

6.1.4 Lending Rates in Africa higher than those levied to Foreign Contractors

The opinion leaders interviewed, and literature reviewed confirmed that there exists an astronomical disparity in the prevailing bank lending interest rate in Africa and particularly in Malawi, compared to those of the home countries of the competing foreign SMEs. This disparity gives the foreign SMEs an advantage over the local SMEs in Malawi since their cost of resources is much lower than those incurred by the local SMEs. Data collected on interest rates over the last 16 years (2000 to 2015) in the tables here below indicate the local the average lending interest rate is 2.79% in the United Kingdom, 2.14 in the European Union, 2.61 in the United States of America and 33.85% in Malawi. This single factor leads to the loss of competitive advantage of local SMEs by a margin of over 30% on the financial aspects of the bids.

Table 4: Bank lending interest rate Malawi (% p.a)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
53.1	**56.2**	**50.5**	**48.9**	**36.8**	**33.1**	**28.3**	**21.7**	**19.3**	**19.3**	**18.6**	**17.8**	**25.7**	**38.5**	**36.8**	**37.1**

Source: Reserve Bank of Malawi. Kaggiah, G.M.B., (2018)

Table 5: Bank lending interest rate in the European Union (EU) (% p.a.)

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
4.3	3.8	2.8	2.5	2.0	2.3	3.3	4.0	3.8	2.0	1.0	1.3	0.8	0.2	0.1	0.05

Data Source: European Central Bank Link to ECB: www.ecb.int No responsibility is taken for them correctness of this information. Kaggiah, G.M.B., (2018)

6.1.5 Influence of market environment on bidding

In this research it was found that in each financial year, more that 75% of the licensed construction SMEs in Malawi were not awarded any contract. These observations lead to the conclusion that the market environment is very competitive, and a high number of SMEs missed an opportunity to work for a whole year and had to wait until the following year for new bids to be floated for them to make another attempt. The environment is therefore so harsh for start-ups that it creates desperation, at the lower end of the construction services supply chain, which has driven several SMEs both in the both in the services and the Construction sector of the construction industry in Malawi to progressively lower their rates to such levels that their profit margins too low for them to invest in human, technical or financial capital development.

Bidding in such environment leads to SMEs offering such low rates that such a bids are referred to as "suicidal bidding" as it renders the SMEs vulnerable to risks and therefore compliments the negative effects of payment paralysis when it occurs and completely eliminates the possibility of survival of such SMEs in current market environment in Malawi.

7. Constraints \limitations of the study.

Start-up Small and Medium Entrepreneurships (SMEs) in Africa and indeed all Developing Countries are deeds of the brave and resolute individuals with strong personalities to repel dissenting opinion and with such a commitment as to sacrifice and accrue some savings in an environment of scarcity to facilitate investment in business in the face of perilous risks. The character of such individuals does not easily accept failure and they are in most cases devastated when the business collapses.

Discussion of the subject matter is therefore emotional as it touches on the personality of the individuals and discussion or sharing their experiences is very difficult and only a few are prepared to share their painful and humiliating experiences. It is also very difficult to trace and make contact with owners of entrepreneurships which failed.

SMEs facing difficulties are also hesitant to speak out for fear of being "black listed".

Governments in Africa have committed to support SMEs in policy with some like South Africa enacting the Affirmative action to support SMEs. Despite all this apparent goodwill in support of SMEs, it appears like the governments' efforts did not achieve the intended results. The authors in [35] emphasizes that the Broad Based Black Economic Empowerment (BBBEE) did not only fail to deliver the intended objective of spurring growth of the targeted SMEs but contributed towards economic strain and generally corruption in the tendering processes. These reasons make most senior officials within Government and government entities involved with SMEs reluctant to discuss and disclose information relating research studies such as this one.

8. Previous studies

Previous studies reviewed discuss SMEs in general with vey scanty coverage of the construction industry. The most frequent subjects studied are lack of financing for start-up SMEs, proportion of SMEs as a percentage of registered trading entities and frequency of failure of SMEs. Also studied is the Ease of Doing Business for SMEs in various countries. Previous studies provide enough data on the challenges that an SME in the various sectors of the economy are likely to encounter in different countries..

Majority of the Literature available has not focused on the actual cause of the challenges (or factors) recorded and none of the literature reviewed demonstrated an intention of finding out the most severe of the challenges discovered and therefore determine the most threatening and frequent cause of failure for SMEs with an objective of reducing or mitigating the effects of the factor causing failure. In fact only the author in [15] provides a clear definition of failure SME.

However, Sir Michael Latham (1994) report "Constructing The Team; Joint Review of Procurement and Contractual Arrangements in the United Kingdom Construction Industry" [36], which was conducted with one of the objectives being increasing cash flow to SMEs in the construction industry has heavily influenced the study which informed this paper.

9. Sharing Research findings with Stakeholders and solicit support

Sustainability of the SMEs in the construction Industry in Malawi and Kenya can be improved by eradication or reduction of payment paralysis by stopping the five major drivers identified in this research, with a strategic legal framework with appropriate legislation(s) enacted in parliament. This paper focuses on the gains made in creating awareness in the five drivers of payment paralysis and achievements recorded towards reducing the incidence and the severity of Arbitrary Transfer of Risks to SMEs by the Procuring Entities (PEs) by an effective legal framework.

The author, engaged with stakeholders in the construction industry and created awareness of payment paralysis as the leading challenge affecting competitiveness and sustainability of local SMEs to solicit support, expertise and political goodwill to have appropriate Bills drafted and tabled in Parliament for enactment into legislation as part of the actionable strategic legal framework to protect and improve the market environment for the local SMEs. The author had been the team leader on several high profile projects in Kenya and Malawi and his passion in promotion of the Engineering profession, particularly by mentoring and training Graduate Engineers in 1998 to 2012 led to his election as Fellow No. F005,in the first lot of six Fellows of the Malawi Institution of Engineers in 2012.

The findings and recommendations of this research were shared with other engineers and particularly MABCATA, NCIC and senior Engineers at the Roads Authority and other organizations who were involved in the construction policy implementation. Consequently, policy changes are being made to improve sustainability of local SMEs in the construction industry in Malawi.

In Kenya, the author had a breakthrough when he received an invitation from the Roads and Civil Engineering Contractors Association, (RACECA) on October 30, 2015, to make a presentation of the research findings and the recommended proposals of improving sustainability of local SMEs in their meeting held on November 24, 2015. The invitation was circulated to all stakeholders in the construction industry in Kenya including all leading newspapers and the presentation was also circulated to all on the mailing list.

10. Finding Support and Sponsors for Legal Framework

This presentation provided the best possible forum for creating awareness and passing the findings and recommendations of the research to the entire construction industry in Kenya,(and beyond) as it was disseminated to over one hundred (150No.) recipients including, all members of RACECA, the National Government, The 47 Country Governments, the Council of Governors of the 47 counties in Kenya, the Parliament, all public procuring Entities, the promoters and the regulatory authorities of SMEs in the construction industry, the law Society of Kenya and the public at large as can be seen from the abridged mailing list below.

1. H.E. The Deputy President of the Republic of Kenya dp@deputypresident.go.ke
2. The Parliament of the Republic of Kenya csenate@parliament.go.ke
3. The Council of Governors of the 47 Counties of Kenya "info@cog.go.ke"
4. The Governor of Machakos County" governor@machakosgovernment.com
5. Public Procurement Regulatory Authority "info@ppoa.go.ke"
6. The Kenya Anti Corruption Commission (KACC) kacc@integrity.go.ke
7. National Construction Authority of Kenya (NCA) "info@nca.go.ke"
8. Roads and Civil Engineering Contractors Association raceca@swiftkenya.com
9. The Architectural Association of Kenya "aak@aak.or.ke"
10. Athi Water Works Development Agency info@awsboard.go.ke
11. The Permanent Secretary, Ministry of Water ps@water.go.ke

12. The Engineers Registration Board of Kenya (EBK) registrar@ebk.or.ke
13. The Institution of Engineers of Kenya (IEK) secretariat@iekenya.org
14. The Law Society of Kenya (LSK) lsk@lsk.or.ke
15. The Nation Newspapers editor@nation.co.ke>;
16. The Standard Newspapers "online@standardmedia.co.ke"
17. Public Procurement Oversight Authority "info@ppoa.go.ke"
18. Over 100 other important Stakeholders in the Construction Industry

After a successful presentation, on November 24, 2015 RACECA nominated the author on November 27, 2015 to a Three-Member RACECA Committee *"to propose an approach to the National Construction Authority, the Law Society of Kenya and the Public Procurement Oversight Authority to improve competitiveness of the local SMEs."*

This committee and individual members of RACECA reached out to opinion leaders and legislators to initiate draft Bills to be tabled in Parliament to form the foundation of a legal framework favouring and supporting improved sustainability of local SMEs in the construction industry.

To inform more stakeholders and get comments and the desired actions from a wider audience in the construction industry and peer review feedback, the 10-pages paper presented and circulated to RACECA in November 2015 and was published in The Kenya Engineer; Journal of the Institution of Engineers of Kenya Volume 39,No.5 : September/October 2018 Edition [37].

The active involvement of RACECA and the goodwill of the members of the groups mentioned above initiated and led to positive outcomes and Bills aimed at improving the sustainability of SMEs have been published and several significant Acts of Parliament are being processed, as in Table 5 below, and the vital inclusion of "the Prompt Payment Bill, 2020" as Bill No.1 of the 12No. Bills underpinning "The Constitution of Kenya (Amendment) Bill, 2020" proposed to amend the Constitution of Kenya, 2010, have been circulated to the public and shall be enacted into law by Parliament soon.

The measure and mark of success in the development of a strategic Legal Framework for Reversing the waning sustainability of SMEs in the construction industry is the inclusion of the "Prompt Payment Bill, 2020" in the "The Constitution of Kenya (Amendment) Bill, 2020".

The Prompt Payment is a product of Sir Latham's Report of 1996 which had several aims including improving cash flows in the construction Industry. In agreement with the famous pronouncement of Judge Lord Denning, who said *"Cash flow is the life blood of the building industry"*[38] in his Court of Appeal decision in 1971, *Sir Latham's Report* prohibited 'pay-when-paid' *Clauses and initiated the "Prompt Payment Act".*

The Prompt Payment Legislation in the Construction Industry came to effect in October 2011 in England and Wales and November 2011 in Scotland' [39]and is in force in Europe, Australia, Canada and Malaysia.

12. The Engineers Registration Board of Kenya (EBK) registrar@ebk.or.ke
13. The Institution of Engineers of Kenya (IEK) secretariat@iekenya.org
14. The Law Society of Kenya (LSK) lsk@lsk.or.ke
15. The Nation Newspapers editor@nation.co.ke>,
16. The Standard Newspapers "online@standardmedia.co.ke"
17. Public Procurement Oversight Authority "info@ppoa.go.ke"
18. Over 100 other important Stakeholders in the Construction Industry

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The Prompt Payment Legislation in the Construction Industry came *to effect in October 2011 in England and Wales and November 2011 in Scotland'* [39]and is in force in Europe, Australia, Canada and Malaysia.

The Prompt Payment Act outlaws delays in payments and The Government of the UK strengthened this position when further steps were taken to by enacting a legislation entitling suppliers of goods and services to charge interest of at least 8% above base rate on late payment as provided for in the Late Payment of Commercial Debts (Interest) Act 1998. In the UK, the maximum payment term is 60 days [40]

If a similar legal framework were put in place in Kenya and Malawi, the following would be the benefits to the SMEs which would, conversely, be punitive to defaulting PEs.

Table No.4: Calculating interest chargeable on Late payments based on the UK Act

Country	Current interest Base Rate (BR) (%)	Multiplier applied to BR to yield (M)	Compensatory Interest Rate (CIR) (%)	Total Interest Charged (I) (%)
UK	0.25	16	8.00	8.25
Malawi	12.00	16	192.00	204.00
Kenya	7.00	16	112.00	119.00

10.1 Emergence of Sponsors of Legislation to reduce Payment Paralysis.

Upon creating awareness of the effects of delayed payments, the resultant payment paralysis and the consequent failure of upcoming and even established SMEs, the Members of Parliament and the Senate in Kenya took up the challenge and five Bills were introduced in Parliament targeting the menace of Delayed payments as in Table 5 here below.

Table 5: Bills to improve SMEs sustainability Drafted and Presented to Parliament

No.	**Name and Sponsor Legislator(s)**	**Proposal**
1.	Hon. Moses Kuria Bill (May 2, 2019) The Public Procurement and Asset Disposal (Amendment) Act 2019	Payment within 90 (ninety) days from the date of receipt of invoices and certificates and that in the event payment is not made, the SME be issued with equivalent value of promissory note which shall be valid for a period not exceeding forty-eight months from the date of issue. The promissory notes are to protect the SMEs from lenders and auctioneers.
2.	Hon. Rigathi Gachagua Bill (May 13, 2019) The Public Procurement and Asset Disposal (Amendment) Act 2019;	Protect the interests and include local SMEs in International Competitive Bidding (ICB) processes have the minimum (ICB) raised to USD10.0Million, and the local SMEs to take 30% share of works awarded to international SMEs.
3.	The Prompt Payment Bill 2020 Senators Farhiya Haji and Johnson Sakaja	Payment within 90days of receipt of Invoice. This Bill seeks to improve sustainability of SMEs by reducing the incidence of Payment Paralysis by introducing the Prompt Payment Bill 2020

	(February 2020)	
4.	Hon Richard Tongi Bill; October 13, 2020 Public Procurement and Disposal (Amendment Act 2020)	This Bill focuses on transfer of expertise from foreign SMEs offering specialized expertise and skills which are not available in Kenya and to ensure that the period of such a transfer is defined and adhered to.
5.	The Prompt Payment Bill, 2021 March 12, 2021 A Bill for an Act of Parliament to provide for prompt payment for the supply of goods, works or services; and for connected purposes. The Steering Committee on the Implementation of the Building Bridges to a United Kenya Taskforce Report 2020	This Act shall apply to payment due for all goods, works, and services procured by the national government, county governments and private entities. (1) A procuring entity shall pay a supplier by the prescribed payment date. (2) A procuring entity who fails to pay a supplier by the prescribed date shall, pay an interest to the supplier in accordance with this section on the amount due for the supply of goods, works, or services. (3) A procuring entity shall pay an interest under this Act for the period beginning on the day after the prescribed payment date and ending on payment.

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Appendix B

Data Collection

Appendix B: Data Collection

Appendix B1a) Application for R1 and Ethical Approval
Appendix B1b) Approval of R1 and Ethical Clearance
Appendix B1c) NCIC Clearance for the Author to collect Data.
Appendix B2 Blank Sample Questionnaire
Appendix B3 Interview Questions
Appendix B3 a) Interview Questions for the 20 SME failure cases
Appendix B3b) Interview Questions for the 5Policy/Opinion Leaders in the Construction Industry
Appendix B4- Preliminary Questionnaire by PEs in Bidding, Perceived as Intimidating
Appendix B5 Raw Data and Data Analysis
Appendix B5a) Filled Questionnaire
Appendix B5b) SPSS data and output Screen shots

Appendix B1a) Application for R1 and Ethical Approval

Research Ethics Checklist **Form RE1**

This checklist should be completed for every research project which involves human participants. It is used to identify whether a full application for ethics approval needs to be submitted.

Before completing this form, please refer to the University Code of Practice on Ethical Standards for Research Involving Human Participants. The principal investigator and, where the principal investigator is a student, the supervisor, is responsible for exercising appropriate professional judgment in this review.

This checklist must be completed before potential participants are approached to take part in any research.

Section I: Applicant Details

1.	Name of Researcher (applicant):	George M.B. Kaggiah
2.	Status (please click to select):	Full Time PhD Research
3.	Email Address:	gmk1wss@bolton.ac.uk, kaggiah1@yahoo.com
4a.	Contact Address:	P.O. Box 31061, Lilongwe 3, Malawi
4b.	Telephone Number:	+265 888 842 458, +265 999 942 458.

Section II: Project Details

5.Project Title:	Strategies of improving sustainability of Small and Medium Entrepreneurs (SMEs) in Construction Industry in Africa; Case of Malawi.

Section III: For Students Only:

6. Course title and module name and number where appropriate School/Centre:	Full Time PhD Research Faculty: Well-being and Social Sciences Bolton Business School
7.Supervisor's or module leader's name:	Bolton Supervisor : Professor Danny Morton
8. Email address:	D.Morton@bolton.ac.uk
9. Telephone extension::	

Declaration by Researcher (Please tick the appropriate boxes)

☐Y	I have read the University's Code of Practice
☐Y	The topic merits further research
☐Y	I have the skills to carry out the research
☐Y	The participant information sheet, if needed, is appropriate

Comments from Researcher, and/or from Supervisor if Researcher is Undergraduate or Taught Postgraduate student:	
☐Y	The procedures for recruitment and obtaining informed consent, if needed, are appropriate
☐Y	The research is exempt from further ethics review according to current University guidelines

Section IV: Research Checklist

Please answer each question by ticking the appropriate box:

		YES	NO
1.	Will the study involve participants who are particularly vulnerable or who may be unable to give informed consent (e.g. children, people with learning disabilities, emotional difficulties, problems with understanding and/or communication, your own students)?		✓
2.	Will the study require the co-operation of a gatekeeper for initial access to the groups or individuals to be recruited (e.g. students at school, members of self-help group, residents of nursing home)?		✓
3.	Will deception be necessary, i.e. will participants take part without knowing the true purpose of the study or without their knowledge/consent at the time (e.g. covert observation of people in non-public places)?		✓
4.	Will the study involve discussion of topics which the participants may find sensitive (e.g. sexual activity, own drug use)?		✓
5.	Will drugs, placebos or other substances (e.g. food substances, alcohol, nicotine, vitamins) be administered to or ingested by participants or will the study involve invasive, intrusive or potentially harmful procedures of any kind?		✓
6.	Will blood or tissues samples be obtained from participants?		✓
7.	Will pain or more than mild discomfort be likely to result from the study?		✓
8.	Could the study induce psychological stress or anxiety or cause harm or negative consequences beyond the risks encountered in normal life?		✓
9.	Will the study involve prolonged or repetitive testing?		✓
10.	Will financial inducements (other than reasonable expenses and compensation for time) be offered to participants?		✓
11.	Will participants' right to withdraw from the study at any time be withheld or not made explicit?		✓
12.	Will participants' anonymity be compromised or their right to anonymity be withheld or information they give be identifiable as theirs?		✓
13.	Might permission for the study need to be sought from the researcher's or from participants' employer?		✓
14.	Will the study involve recruitment of patients or staff through the NHS?		✓

If ALL items in the Declaration are ticked AND if you have answered NO to ALL questions in Section IV, **send the completed and signed Form RE1 to your School/Centre Research Ethics Officer** for information. You may proceed with the research but should follow any subsequent guidance or requests from the School/Centre Research Ethics Officer or your supervisor/module leader where appropriate. Undergraduate and taught postgraduate students should retain a copy of this form and submit it with their research report or dissertation (bound in at the beginning). MPhil/PhD students should submit a copy to the Board of Studies for Research Degrees with their application for Registration (R1). **Work which is submitted without the appropriate ethics form will be returned unassessed.**

If ANY of the items in the Declaration are not ticked AND / OR if you have answered YES to ANY of the questions in Section IV, you will need to describe more fully in Section V of the form below how you plan to deal with the ethical issues raised by your research. This does not mean that you cannot do the research, only that your proposal will need to be approved by the School/Centre Research Ethics Officer or School/Centre Research Ethics Committee or Sub-committee. When submitting the form as described in the above paragraph you should substitute the original Section V with the version authorized by the School/Centre Research Ethics officer.

If you answered YES to *question 14*, you will also have to submit an application to the appropriate external health authority ethics committee, after you have received approval from the School/Centre Research Ethics Officer/Committee and, where appropriate, the University Research Ethics Committee.

University of Bolton

Section V: Addressing Ethical Problems

If you have answered YES to any of questions 1-12 please complete below and submit the form to your School/Centre Research Ethics Officer.

Project Title

Principal Investigator/Researcher/Student

Supervisor

Summary of issues and action to be taken to address the ethics problem(s)

Please note that it is your responsibility to follow the University's Code of Practice on Ethical Standards and any relevant academic or professional guidelines in the conduct of your study. **This includes providing appropriate information sheets and consent forms, and ensuring confidentiality in the storage and use of data**. Any significant change to the design or conduct of the research should be notified to the School/Centre Research Ethics Officer and may require a new application for ethics approval.

Signed: ____________________ Principal Investigator/Researcher

Approved: ____________________ Supervisor or module leader
(where appropriate)

Date: ____________________

For use by School/Centre Research Ethics Officer:

- No ethical problems are raised by this proposed study - Retain this form on record
- Appropriate action taken to maintain ethical standards
- The research protocol should be revised to eliminate the ethical concerns or reduce them to an acceptable level, using the attached suggestions
- Please submit School/Centre Application for Ethics Approval (Form RE2(D))
- Please submit University Application for Ethics Approval (Form RE2(U))

Retain this form on record and return a copy of section V to Researcher

Signed: ____________________

Date: ____________________

LM Lakhwani, Meenakshi <M.Lakhwani@bolton.ac.uk>
To: Kaggiah, George
Cc: Morton, Danny

Fri 27/03/2015 13:53

Dear George

At its meeting on 18/3/15, the Board of Studies for Research Degrees agreed to approve your application to register for a Research Degree (R1).

The approval has been granted on the basis of a 3/6 year period of registration (dependant on your mode of study) as defined in the Research Degree Regulations, section 4.1. Your period of registration takes effect from the date of your original enrolment.

Please note, under the Research Degree Regulations (Section 6), you will be required to undergo a mid-term assessment by submitting an R2 form and evidence of progress to your Director of Studies. This mid-term assessment is normally carried out after 12-18 months of full-time study or the part-time equivalent. The R2 Guidance Notes can be found at:

http://www.bolton.ac.uk/Research/Staff-Students-Examiners/ResearchDegreesAndStudents/Documents/PDF/transferguidelinesMarch2012.pdf

Please do not hesitate to contact me if you require any further clarification or assistance.

Kind regards
Meenakshi Lakhwani
Research & Graduate School
The University of Bolton
Tel: 01204 903615

Reply Reply all Forward

Appendix B1c): NCIC Clearance for the Author to collect Data.

National Construction Industry Council
Private Bag A 146
Lilongwe, Malawi
Phone: 01 725 569/564/523/529
Fax : 01 725 535

Our Ref.: NCIC/15(A)
Your Ref.: ....

5 January, 2015

TO WHOM IT MAY CONCERN

DATA COLLECTION ON FACTORS AFFECTING SUSTAINABILITY OF SMALL AND MEDIUM ENTREPRENEURS IN MALAWI

We write to confirm that Mr. George Kaggiah is undertaking a survey on the factors affecting the sustainability of Small and Medium Entrepreneurs (SMEs) in the Construction Industry in Malawi. You are therefore requested to provide the information required through filling in questionnaires and interviews as the case may be.

The information apart from fulfilling the requirement for the award of PHD will be useful for the Construction Industry in general.

Your assistance will be appreciated.

Yours faithfully

L.M Phiri (Ms)
CHIEF EXECUTIVE OFFICER

Appendix B2 Blank Sample Questionnaire

FACTORS AFFECTING SUSTAINABILITY OF SMALL AND MEDIUM ENTREPRENEOURS (SMEs)IN THE CONSTRUCTION INDUSTRY IN AFRICA CASE OF MALAWI.

George M.B. Kaggiah,
University of Bolton and MIM

QUESTIONAIRE
(44 QUESTIONS)

The purpose of this questionnaire is to find out from your experience the factors which affect the sustainability of Small and Medium Entrepreneurs (SMEs) in the construction Industry such as your company in Malawi. Your participation is voluntary and the information you give shall be treated with confidentiality. Your participation in this research is appreciated.

1. INFORMATION ABOUT THE ORGANISATION

1.1 Name of Organization (optional)……………………………………..
1.2 Position in the Organisation…………………………………………………….
1.3 Year started………………………………………………………………………..
1.4 Year Registered with the NCIC…………………………………………………….

1.5 What type(as classified by NCIC) is your company(if applicable tick more than one)
Civil Contractor[ ] Building Contractors[ ]Special Contractor[],Electrical contractors[ ] Consultants[ ]

1.6 What category is your firm currently

K0- K5.0 Million[ ]K5.0M -K10M [ ]10-100Million [ ]K100-500Million [ ]500-1.0Billion[ ] Unlimited[ ] Other (please specify)…….

1.7 Previous category registered but now upgraded.

K 0- K5.0 Million [ ]K5.0M -K10M [ ] 10-100Million [ ] Unlimited [ ] Other (please specify)…….
100-500Million, 500-1,000Million

1.8 For how many years has your organization been in operation?.
1-5 [ ] 6 – 10 [ ]11-15 [ ] 16-20 [ ] more than 20 [ ]

1.9 How many contracts have you concluded satisfactorily
0 [ ] 1-2 [ ] 2-5 [ ] 5-10 [ ] over 10 [ ]

1.10 During this period what has been the longest period of inactivity (yrs)
0[ ] 1-2[ ] 2–4[ ] 4-6[ ]more than 6[ ]

MANAGEMENT OF THE ORGANISATION

1.11 How many partners own the organization [ ]

1.12 What motivated you (and your Partners) to start a Company in Construction industry?
Self employment [ ], opportunity to use own knowledge [ ] Investment [ ] Other [ ]

1.13 If you filled other in 1,12 above please specify …………….. ………… ……… …………………………………………………………

1.14 What is the qualification of the Managing Partner
Junior [ ], MSCE [ ], Diploma [ ] Degree [ ]

1.15 What is the qualification of the other Partners numbered Partner1-3 below
Partner1----- Junior [ ], MSCE [ ], Diploma [ ] Degree [ ]

Partner2----- Junior [ ], MSCE [ ], Diploma [ ] Degree [ ]
Partner3----- Junior [ ], MSCE [ ], Diploma [ ] Degree [ ]

1.16 Does at least one of the partners have knowledge in accounting
Yes [ ], No [ ]

1.17 How did the company manage its accounts and annual income returns ?
Employed in house accountant [ ], short term contract accountant [ ]

2. INFORMATION ON SIZE OF ORGANISATION

2.1 Please indicate the highest number of employees reached in your company (at any time)
1-50[ ] 51-100[ ]101-150 [ ]151-200[ ]201-250 [ ]>250[ ]

2.2 Please indicate your annual turnover in Million Kwacha
0-4Million[ ] 4-40[ ]40-400[ ]over 400[ ]

2.3 Does your organization have a PIN No. with the Malawi Revenue Authority?
Yes [ ] No [ ]

2.4 How many computers are there in your organisation?
1-5 [ ]6 – 10[ ]11-15 [ ]16-20[ ]More than 20

3. THE MARKET

3.1 Which sector (niche') of the market does your organization target for contracts (can tick more than one)

The public sector (Government) [ ] Parastatals [ ] NGOs[ ] private sector[ ]

3.2 In a scale of 1to 5 please indicate your major sources of work
The public sector (Government) [ ] Parastatols [ ] NGOs[ ] private sector[ ]

4. THE COMPETITION

4.1 In the tenders you participated in, what was the average number of competitors for one contract?
1-5[ ] 5-10[ ] 10-15[ ] 15-20[ ] over 20[ ]

4.1.1 Please indicate the ratio of the tenders won to the tenders submitted
1in every 20[ ] 1 in 10[ ] 1in 5 [ ] 1in 2 [ ]

4.2 Please indicate if you considered the competitors to have equal strength and capacity.
Yes [ ] No[ ]

4.3 If yes please indicate which of the attributes listed here below was more prevalent and influential to capability of an organization

Better resourced [ ] highly trained staff [ ]computer use[ ] Other(s) [ ]

4.4 If your answer to 4.4 above is Other(s), please specify the most significant attribute…………………………………………………………………………………………………..

5. EXPETATIONS AND OUTCOME ANALYSIS

5.1 What % profit do you normally work on when tendering?
5% to 10% [ ]10%to 20% [ ] 20% to40%[ ]over 40% [ ]

5.2 Do you provide for the effects of a possible increase in your costs due to increase of cost of materials, labour and transport when submitting a tender?
Yes [ ] No [ ]

5.3 Please indicate if your organization monitors the changes in foreign exchange rates and their effects costs of imported construction materials and provides for the risk in your rates.
Yes [ ] No [ ]

5.4 In what ratio of the contracts carried out. Did you make a profit?
1out of 5 [ ] 2 out of 5 [ ] 3 out of 5 [ ] more than 3 out of 5 [ ]

5.5 In what ratio of the contracts carried out. Did you make losses?
1out of 5 [ ] 2 out of 5 [ ] 3 out of 5 [ ] more than 3 out of 5 [ ]

5.6 On average what was the level of profits you made.
below 10% [ ] about 20% [ ] about 40% [ ] over 40% [ ]

5.7 What was the highest level of profits you made on a Contract?
below 10% [ ] about 20% [ ] about 40% [ ] over 40% [ ]

6. DIFFICULTIES EXPERIENCED BY THE COMPANY DUE TO DELAYED PAYMENTS

6.1 Did you experience delays in payment of your Invoices
Yes [ ] No [ ]

6.2 Which of the statements below best represent your experience in prevalence of delayed payments?
No delays in payment were recorded [ ] some of the payments were delayed[ ]
Payments were always delayed [ ]

6.3 On average what was the duration of delay in payment to your invoices ?
1-2months[ ]2-4months [ ] 4-8months[ ]8-12 months[ ] 1-2yrs [ ]++2yrs [ ]

6.4 On one of the project you consider to have had the most frequent and longest delays in payment of your invoices, what was the average duration of the delays.
1-2months [ ]2-4months [ ] 4-8months [ ] 8-12 months [ ] 1-2yrs [ ]++2yrs [ ]

6.5 What is the longest period have you recorded for delayed payment on a particular invoice
1-2months [ ]2-4months [ ] 4-8months [ ] 8-12 months [ ] 1-2yrs [ ]++2yrs [ ]

6.6 Did the contracts you were involved in, provide for compensation for the delayed payments (as in claims for interest on delayed payments)?
Yes [ ] No [ ] some did [ ]

6.7 In your opinion do you consider the compensation provided for as adequate?
Yes [ ] No [ ]

6.8 Did the contracts you were involved in, provide for compensation for escalation of prices?
Yes [ ] No [ ]

6.9 In your opinion do you consider the compensation provided for as adequate?
Yes [ ] No [ ]

6.10 Do you know of a Contractor who has stopped operations due financial problems resulting from delayed payments and nonpayment**?**
Yes [ ] No [ ]

7. POSSIBLE INTERVENTIONS

7.1 Do you Consider that the provisions in the contract documents adequately address the losses suffered by contractors in the event of delayed payments

Yes [ ] No [ ]

7.2 Which of the proposals suggested below would be the best solution to this problem

Do nothing [ ] Revise the contract documents [ ] Other (s) [ ]

7.3 If your answer to 7.2 above is "Other(s)" please state here below what you consider the most practical and appropriate intervention?

7.4 In this research, ten (10No.) challenges for SMEs in the construction industry have been identified and listed here below. In your own experience, please rank them in scale of 1-10 with 1 as the most frequent and 10 the least frequent.

[ ] Obstructive business environment to SMEs growth
[ ] Industrial Polarization (more attention to micro-enterprises and Multinationals)
[ ] Poor Leadership in Management of Construction SMEs
[ ] Delayed Payment (Payment Paralysis)
[ ] Limited access to investment and trade opportunities
[ ] Access to Credit and Financing
[ ] High lending rates
[ ] Outdated policy, legal and regulatory framework or absence of a clear policy
[ ] Unreliable and costly economic infrastructure
[ ] Seasonality (stoppage of work and related difficulties during thr rains
[ ] Corruption
[ ] Limited work opportunity
[ ] Other………………………………..

7.5 In your own experience, please rank the identified challenges as the most devastating irrespective of its frequency in scale of 1-10 with 1 as the most damaging to the SME and 10 the least significant.

[ ] Obstructive business environment to SMEs growth
[ ] Industrial Polarization (more attention to micro-enterprises and Multinationals)
[ ] Poor Leadership in Management of Construction SMEs
[ ] Delayed Payment (Payment Paralysis)
[ ] Limited access to investment and trade opportunities
[ ] Access to Credit and Financing
[ ] High lending rates
[ ] Outdated policy, legal and regulatory framework or absence of a clear policy
[ ] Unreliable and costly economic infrastructure
[ ] Seasonality (stoppage of work and related difficulties during thr rains
[ ] Corruption
[ ] Limited work opportunity
[ ] Other………………………………..

Thank You for participating in this survey, your co-operation is highly appreciated.

Appendix B3 Interview Questions

Appendix B3 a)
Interview Questions for the 20 SME failure cases

1. Why were you attracted in working in construction works?
2. What were your qualifications of your management team?
3. Please describe briefly when you started your construction company and the main works you successfully completed.
4. How would you rate your firm in comparison with other local construction firms in the field at the time that you were at peak of your operation?
5. What did you find to be your firms main operational challenges?
6. Which contract(s) led to closure of your firm?
7. Was the contract awarded by your usual employers or a new entity?
8. Did you conduct monthly joint measurements with the supervising team before preparation of your Interim Payment Certificates?
9. Were your certificates returned for corrections?
10. Did your Employer give approval of your IPCs promptly?
11. Did you require monitoring the approval process of your Interim Payment Certificates (IPC)?
12. After approval how long did it take to receive your payment?
13. How many IPCs were unpaid at the time you started experiencing difficulties paying your staff and suppliers?
14. What proportion of the contract value did they all amount to?
15. Did you follow the provisions of the contract to pursue your payment?
16. Did the employer declare any dispute with your firm?
17. Did you approach MABCATA and NCIC for assistance?
18. Did your staff or suppliers go to court?
19. Please describe your experience with labour, your suppliers, your bank, and the Income tax.
20. Does the firm still owe anyone or you have been cleared?
21. Do you hope to revive the firm?
22. What areas in the management of contract do you consider as requiring improvement (s)

Thank you very much.

Appendix B3b)

Interview Questions for the 5Policy/Opinion Leaders in the Construction Industry

I am grateful that you have found time to have this interview to share your experiences and your thoughts on sustainability of SMEs in the construction industry in Africa and Malawi in particular. I will be asking you some main questions and I will ask you follow-up questions after your answer.

1. You are known for your leadership, service and interests in the well being of the construction industry in Malawi; please give me an overview of the industry in Malawi and how we compare with our counterparts in Africa and the region.
2. Concern have been raised by a number of observers and researchers at the high rate of failure of start-up SMEs in the construction Industry in Africa. Malawi is no exception having been recorded as experiencing a failure rate of 60% of start-up SMEs within their second year of entry into business despite the efforts the government making to support local SMEs. What do you consider are the main causes of this outcome?
3. A number of SMEs in the Industry have cited delayed payments or non-payment as the main course of failure. Do you agree ordo you have an alternative view?
4. Would you please discuss broadly the environment in which these SMEs operate in Malawi and touch on the Procuring Entities (PEs) who employ them, the contact Agreements in use, National Fiscal management and our social values. Please point out the aspects which you consider to be the main drivers of delayed payment or no-payment by the government who are also the main employer as well as the sponsor of SMEs. Please give your recommendation on how you would propose to deal with each if the aspects
5. There has been some high profile cases of corruption in Malawi such as the "Cash Gate" which the Government supported by DFID are investigating. How would you rate corruption in the construction sector as compared with other sectors in Malawi?
6. In South Africa, the government engaged in Affirmative action commonly referred to as BBBE to support growth of the SMEs owned and managed by indigenous South Africans. What do you think of the policy and what is its future?

Thank you very much. Zikomo.

Appendix B4- Preliminary Questionnaire by PEs in Bidding, Perceived as Intimidating

Appendix B4- Questionnaire administered by PEs and Perceived Intimidating

SAMPLE OF QUESTIONNAIRE PEs DEMAND BIDDERS TO RESPOND TO.

A. The following are preliminary requirements that **must** be submitted with Proposal

a) Copy of certificate of incorporation.

b) Copy of recent certificate indicating the directors of the firm and the shares each director holds. (Issued within the last 6 Months from Tender Opening Date)

c) Copy of valid Tax Compliance Certificate

d) Copy of Proof of Registration with Registration with the NCIC

e) Duly filled Confidential Business Questionnaire.

f) Duly filled and signed Declaration Form for Bankrupt or Insolvent and Debarment.

g) Duly filled and signed **f**orm on Anti-Corruption Declaration, Commitment and Pledge Form

h) Copies of certificates and testimonial of the proposed key staff.

i) Curriculum vitae (CVs) of the proposed key staff duly signed by the proposed individual.

j) Letters of availability for the assignment signed by the proposed key staff.

k) Details of Current work load.

l) Current Sworn Affidavit on Litigation History.

m) Client satisfaction on previous and current assignments. Evidence of having successfully carried out similar woks as a firm.

n) The tender has been duly signed by the person lawfully authorised to do so through the power of attorney.

o) The required number of copies of the tender have been submitted.

p) The tender is valid for the period required.

q) All pages of the bid document must be **sequentially serialized.**

Appendix B5 Raw Data

Appendix B5a) Filled Questionnaire
Appendix B5b) Screen shot SPSS data

Appendix B5 Raw Data

Appendix B5a) Filled Questionnaire

pare 302

FACTORS AFFECTING SUSTAINABILITY OF SMALL AND MEDIUM ENTREPRENEOURS (SMEs)IN THE CONSTRUCTION INDUSTRY IN AFRICA CASE OF MALAWI.

George M.B. Kagglah,
University of Bolton and MIM

QUESTIONAIRE

The purpose of this questionnaire is to find out from your experience the factors affected the sustainability of Small and Medium Entrepreneurs (SMEs) in the construction Industry such as your company in Malawi. Your participation is voluntary and the information you give shall be treated with confidentiality. Your participation in this research is appreciated.

1. INFORMATION ABOUT THE ORGANISATION

1.1 Name of Organization (optional)...Ramds contractors
1.2 Position in the Organisation....managing Director
1.3 Year started...........2005...
1.4 Year Registered with the NCIC........2005...................................

1.5 What type (as classified by NCIC) is your company (If applicable tick more than one)
Civil Contractor [ ]Building Contractors [✓]Special Contractor [ ], Electrical contractors[ ]
Consultants[ ]

1.6 What category is your firm currently

K0- K5.0 Million[ ]K5.0M -K10M [ ]10-100Million [✓]K100-500Million [ ]500-1.0Billion[ ]
Unlimited[ ]Other (please specify).......

1.7 Previous category registered but now upgraded.

K 0- K5.0 Million [ ]K5.0M -K10M [ ] 10-100Million [ ] Unlimited [ ]Other (please specify)...... 250 m
100-500Million, 500-1,000Million

1.8 For how many years has your organization been in operation?.
1-5 [ ] 6 – 10 [✓]11-15 [ ] 16-20 [ ] more than 20 [ ]

1.9 How many contracts have you concluded satisfactorily
0 [ ] 1-2 [ ] 2-5 [ ] 5-10 [✓] over 10 [ ]

1.10 During this period what has been the longest period of inactivity (yrs)

0[ ] 1-2[✓]2--4[ ] 4-6[ ]more than 6[ ]

MANAGEMENT OF THE ORGANISATION

1.11 How many partners own the organization [1]

1.12 What motivated you (and your Partners) to start a Company in Construction Industry?
Self employment [✓], opportunity to use own knowledge [ ] Investment [ ] Other [ ]

1.13 If you filled other in 1,12 above please specify....Business.......................................

1.14 What is the qualification of the Managing Partner
Junior [ ], MSCE [ ], Diploma [ ] Degree [✓]

1.15 What is the qualification of the other Partners numbered Partner1-3 below
Partner1----- Junior [ ], MSCE [ ], Diploma [ ] Degree [ ]
Partner2----- Junior [ ], MSCE [ ], Diploma [ ] Degree [ ]
Partner3----- Junior [ ], MSCE [ ], Diploma [ ] Degree [ ]

1.16 Does at least one of the partners have knowledge in accounting
Yes [✓], No [ ]

1.17 How did the company manage its accounts and annual income returns ?
Employed in house accountant [✓], short term contract accountant [ ]

2. INFORMATION ON SIZE OF ORGANISATION

2.1 Please indicate the highest number of employees reached in your company (at any time)
1-50[ ] 51-100[✓]101-150 [ ]151-200[ ]201-250 [ ]>250[ ]

2.2 Please indicate your annual turnover in Million Kwacha
0-4Million[ ] 4-40[✓]40-400[ ]over 400[ ]

2.3 Does your organization have a PIN No. with the Malawi Revenue Authority?
Yes [✓] No [ ]

2.4 How many computers are there in your organisation?
1-5 [ ]6 – 10[✓]11-15 [ ]16-20[ ]More than 20

3. THE MARKET

3.1 Which sector (niche') of the market does your organization target for contracts (can tick more than one)
The public sector (Government) [✓] Parastatals [ ] NGOs[ ] private sector[ ]

3.2 In a scale of 1to 5 please indicate your major sources of work
The public sector (Government) [ ] Parastatols [ ] NGOs[ ] private sector[✓]

4. THE COMPETITION

4.1 In the tenders you participated in, what was the average number of competitors for one contract?
1-5[ ] 5-10[ ] 10-15[ ] 15-20[ ] over 20[✓]

4.2 Please indicate the ratio of the tenders won to the tenders submitted
1in every 20[ ] 1 in 10[✓] 1in 5 [ ] 1in 2 [ ]

4.3 Please indicate if you considered the competitors to have equal strength and capacity.
Yes [✓] No[ ]

attribute..
....

5. EXPETATIONS AND OUTCOME ANALYSIS

5.1 What % profit do you normally work on when tendering?
5% to 10% [ ]10%to 20% [✓] 20% to40%[ ]over 40% [ ]

5.2 Do you provide for the effects of a possible increase in your costs due to increase of cost of materials, labour and transport when submitting a tender?
Yes [ ] No[✓]

5.3 Please indicate if your organization monitors the changes in foreign exchange rates and their effects costs of imported construction materials and provides for the risk in your rates.
Yes [ ] No[✓]

5.4 In what ratio of the contracts carried out. Did you make a profit?
1out of 5 [ ] 2 out of 5 [ ] 3 out of 5 [✓]more than 3 out of 5 [ ]

5.5 In what ratio of the contracts carried out. Did you make losses?
1out of 5 [ ] 2 out of 5 [✓] 3 out of 5 [ ] more than 3 out of 5 [ ]

5.6 On average what was the level of profits you made.
below 10% [ ] about 20% [✓] about 40% [ ] over 40% [ ]

5.7 What was the highest level of profits you made on a Contract?
below 10% [✓] about 20% [ ] about 40% [ ] over 40% [ ]

6. DIFFICULTIES EXPERIENCED BY THE COMPANY DUE TO DELAYED PAYMENTS

6.1 Did you experience delays in payment of your Invoices
Yes [✓] No [ ]

6.2 Which of the statements below best represent your experience in prevalence of delayed payments?
No delays in payment were recorded [ ] some of the payments were delayed[ ]
Payments were always delayed [✓]

6.3 On average what was the duration of delay in payment to your invoices ?
1-2months[ ]2-4months [✓]4-8months[ ]8-12 months[ ] 1-2yrs [ ]++2yrs [ ]

6.4 On one of the project you consider to have had the most frequent and longest delays in payment of your invoices, what was the average duration of the delays.
1-2months [ ]2-4months [✓]4-8months [ ] 8-12 months [ ] 1-2yrs [ ]++2yrs [ ]

What is the longest period have you recorded for delayed payment on a particular invoice
1-2months [ ]2-4months [✓] 4-8months [ ] 8-12 months [ ] 1-2yrs [ ]++2yrs [ ]

6.6 Did the contracts you were involved in, provide for compensation for the delayed payments (as in claims for interest on delayed payments)?
Yes [ ] No [✓] some did [ ]

6.7 In your opinion do you consider the compensation provided for as adequate?
Yes [ ] No [✓]

6.8 Did the contracts you were involved in, provide for compensation for escalation of prices?
Yes [ ] No [✓]

6.9 In your opinion do you consider the compensation provided for as adequate?
Yes [ ] No [✓]

6.10 Do you know of a Contractor who has stopped operations due financial problems resulting from delayed payments and nonpayment?
Yes [ ] No [✓]

7. POSSIBLE INTERVENTIONS

7.1 Do you Consider that the provisions in the contract documents adequately address the losses suffered by contractors in the event of delayed payments

Yes [ ] No [✓]

7.2 Which of the proposals suggested below would be the best solution to this problem

Do nothing [ ] Revise the contract documents [✓] Other (s) [ ]

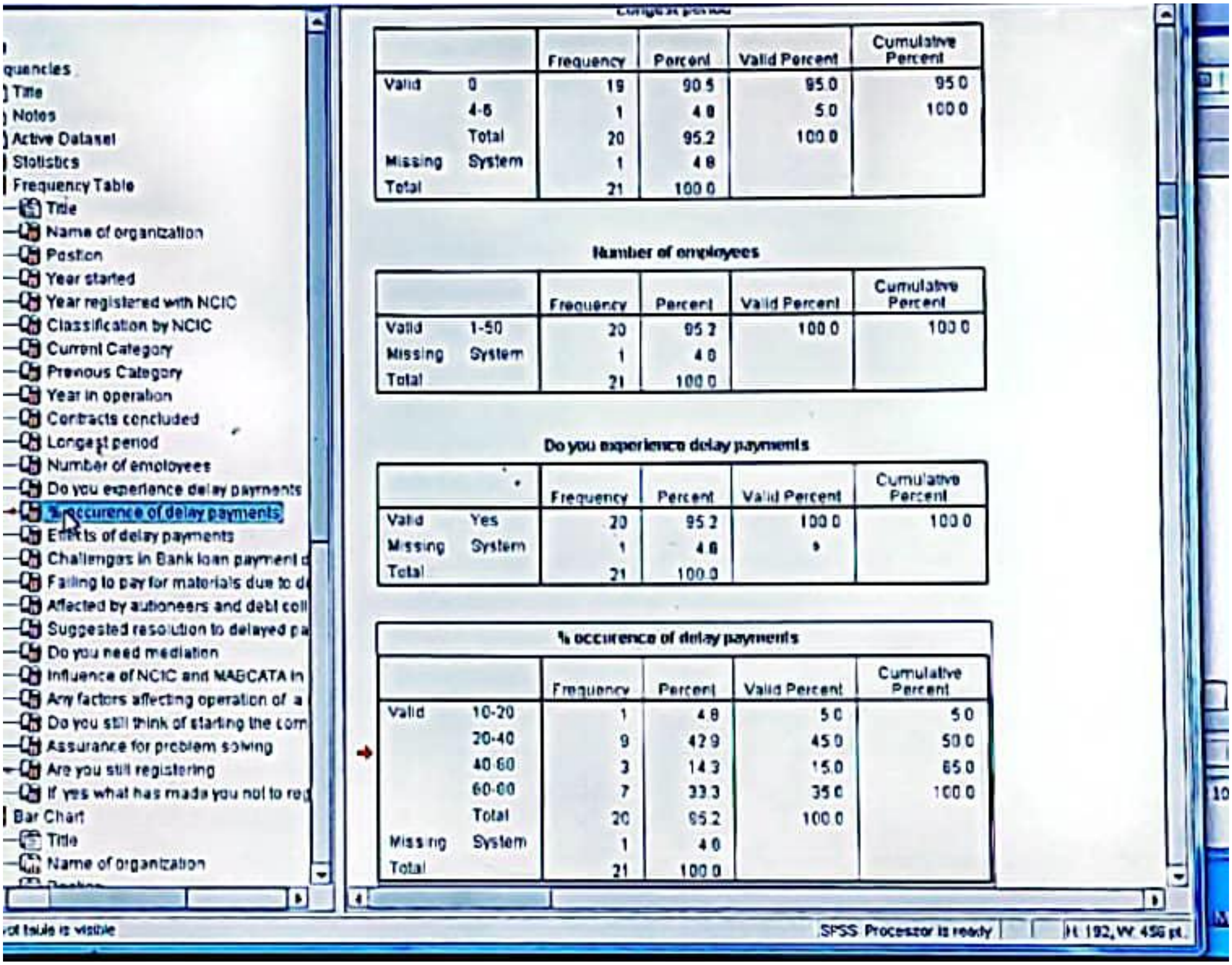
7.3 If your answer to 7.2 above is "Other (s)" please state here below what you consider the most practical and appropriate intervention?

....

Thank You for participating in this survey, your co-operation is highly appreciated.

Appendix B5 Raw Data

Appendix B5b) Screen shot SPSS data



Longest period

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	19	90.5	95.0	95.0
	4-6	1	4.8	5.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Number of employees

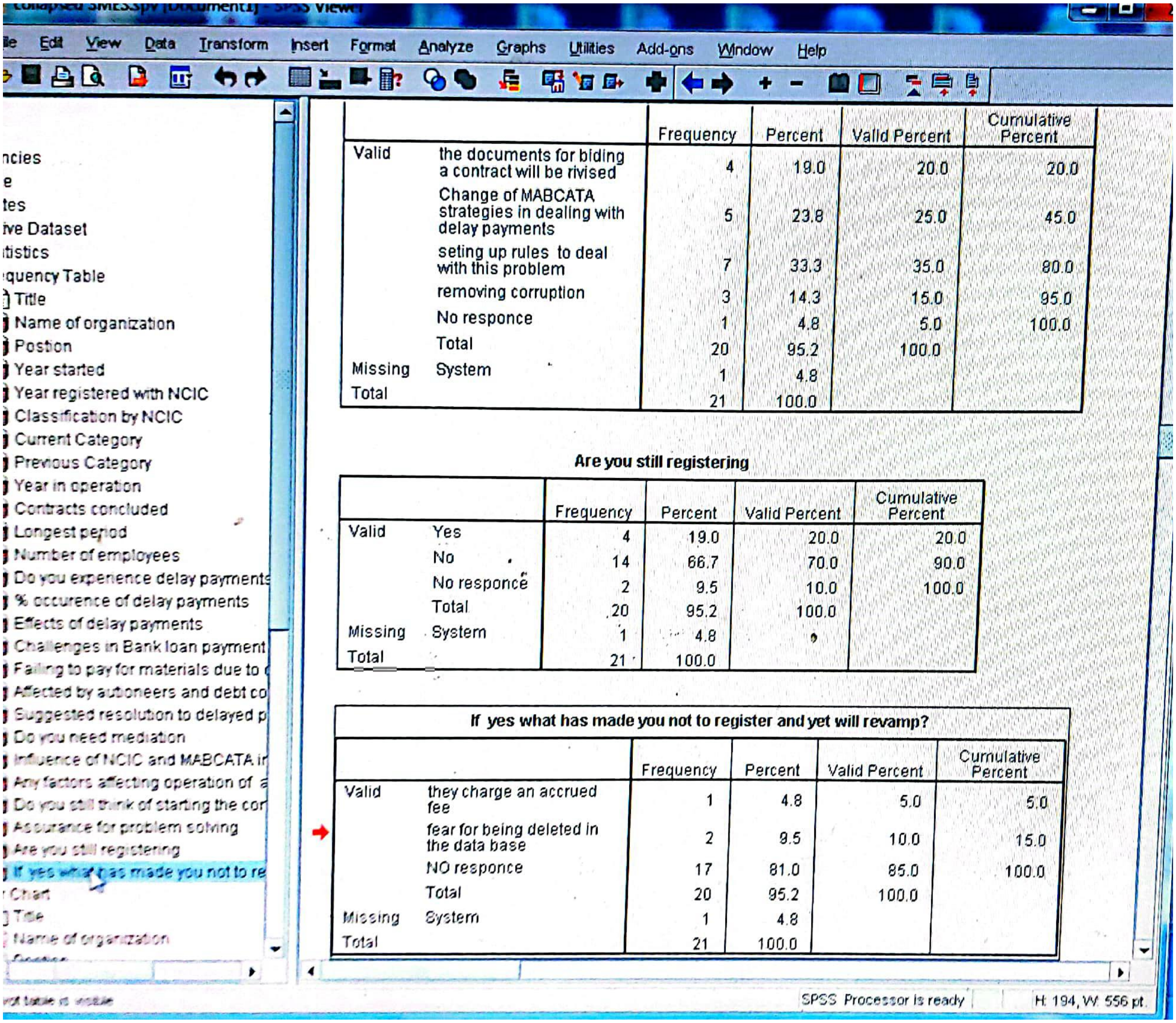
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1-50	20	95.2	100.0	100.0
Missing	System	1	4.8		
Total		21	100.0		

Do you experience delay payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	20	95.2	100.0	100.0
Missing	System	1	4.8		
Total		21	100.0		

% occurence of delay payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	10-20	1	4.8	5.0	5.0
	20-40	9	42.9	45.0	50.0
	40-60	3	14.3	15.0	65.0
	60-80	7	33.3	35.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		



		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	the documents for biding a contract will be rivised	4	19.0	20.0	20.0
	Change of MABCATA strategies in dealing with delay payments	5	23.8	25.0	45.0
	seting up rules to deal with this problem	7	33.3	35.0	80.0
	removing corruption	3	14.3	15.0	95.0
	No responce	1	4.8	5.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Are you still registering

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	4	19.0	20.0	20.0
	No	14	66.7	70.0	90.0
	No responce	2	9.5	10.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

If yes what has made you not to register and yet will revamp?

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	they charge an accrued fee	1	4.8	5.0	5.0
	fear for being deleted in the data base	2	9.5	10.0	15.0
	NO responce	17	81.0	85.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

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requencies
Title
Notes
Active Dataset
Statistics
Frequency Table
- Title
- Name of organization
- Postion
- Year started
- Year registered with NCIC
- Classification by NCIC
- Current Category
- Previous Category
- Year in operation
- Contracts concluded
- Longest period
- Number of employees
- Do you experience delay payments
- % occurence of delay payments
- Effects of delay payments
- Challenges in Bank loan payment d
- Failing to pay for materials due to de
- Affected by autioneers and debt coll
- Suggested resolution to delayed pa
- Do you need mediation
- Influence of NCIC and MABCATA in
- Any factors affecting operation of a
- Do you still think of starting the com
- Assurance for problem solving
- Are you still registering
- If yes what has made you not to reg

Bar Chart
- Title
- Name of organization

Longest period

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	19	90.5	95.0	95.0
	4-6	1	4.8	5.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Number of employees

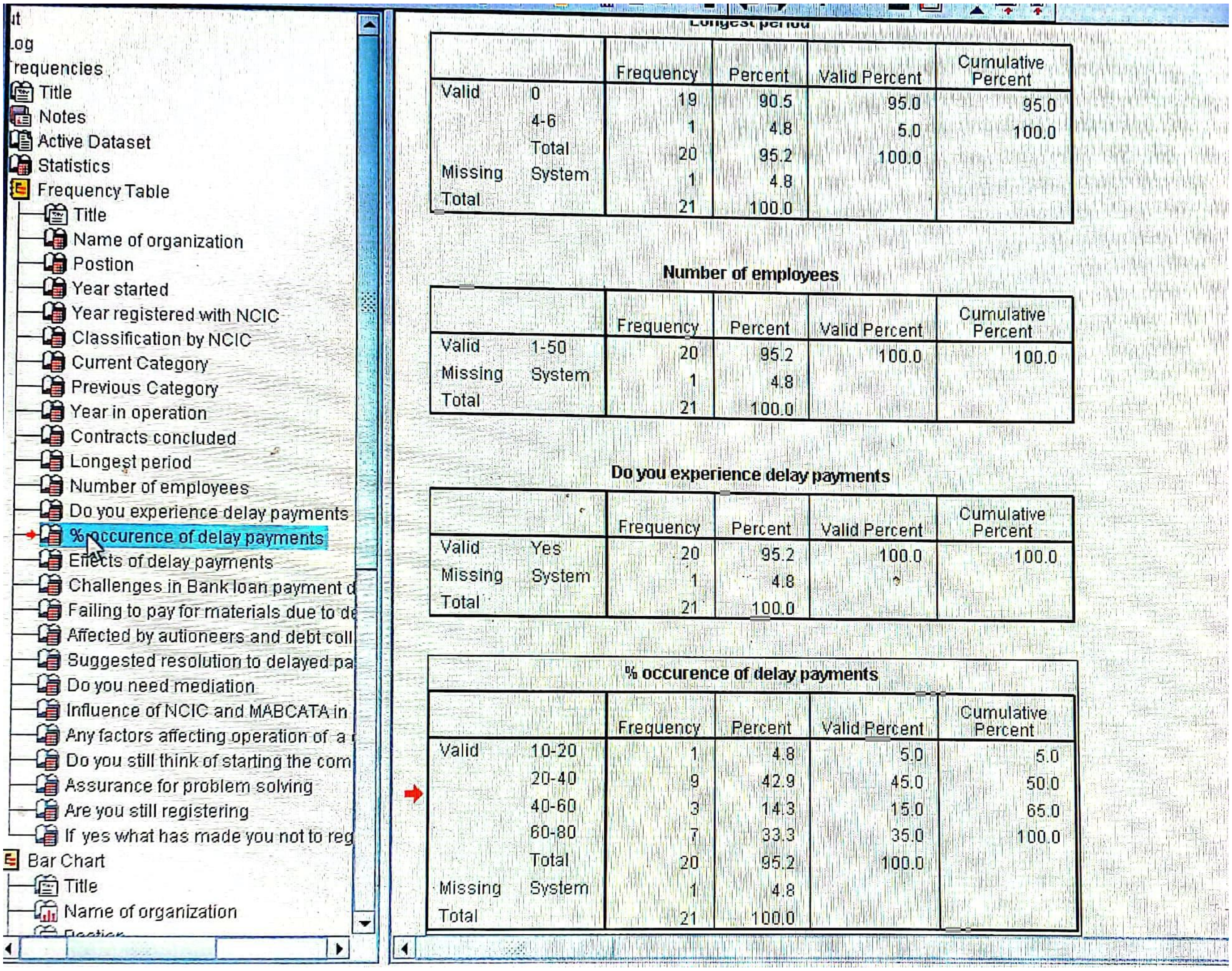
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1-50	20	95.2	100.0	100.0
Missing	System	1	4.8		
Total		21	100.0		

Do you experience delay payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	20	95.2	100.0	100.0
Missing	System	1	4.8		
Total		21	100.0		

% occurence of delay payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	10-20	1	4.8	5.0	5.0
	20-40	9	42.9	45.0	50.0
	40-60	3	14.3	15.0	65.0
	60-80	7	33.3	35.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		



Longest period

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	0	19	90.5	95.0	95.0
	4-6	1	4.8	5.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Number of employees

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	1-50	20	95.2	100.0	100.0
Missing	System	1	4.8		
Total		21	100.0		

Do you experience delay payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Yes	20	95.2	100.0	100.0
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Total		21	100.0		

% occurence of delay payments

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	10-20	1	4.8	5.0	5.0
	20-40	9	42.9	45.0	50.0
	40-60	3	14.3	15.0	65.0
	60-80	7	33.3	35.0	100.0
	Total	20	95.2	100.0	
Missing	System	1	4.8		
Total		21	100.0		

Analyze Graphs Utilities Add-ons Window Help

Visible: 54 of 54 Variables

Q1.2	Q1.3	Q1.4	Q1.5	Q1.6	Q1.7	Q1.8	Q1.9	Q1.10	Q1.1'
MD	2005	2005	Building co...	100-500 mi...	10-100 MIL...	OVER 10	No responce	1-2	
MD	2013	2013	Building co...	No Respon...	K5-10 Milion	1-5	1-2	1-2	
MD	2005	2012	Building co...	No Respon...	K5-10 Milion	No responce	2-5	2-4	
MD	2000	2000	Building co...	10-100 milion	K0-5 Million	11-15	2-5	4-6	
Director	No response	No response	Building co...	10-100 milion	K5-10 Milion	More than 20	over 10	4-6	
MD	No response	No response	Building co...	No Respon...	10-100 MIL...	11-15	2-5	2-4	
MD	2013	2013	Consultants	K 5-K10 mi...	K5-10 Milion	1-5	2-5	2-4	
MD	2005	2005	Building co...	K 5-K10 mi...	K5-10 Milion	No responce	over 10	No response	
MD	2004	2004	Building co...	10-100 milion	Unlimited	11-15	5-10	0	
MD	2005	2005	Building co...	10-100 milion	Unlimited	6-10	1-2	2-4	
MD	2014	2014	Civil Engin...	K 5-K10 mi...	K5-10 Milion	1-5	5-10	2-4	
MD	No response	No response	No responce	No Respon...	K5-10 Milion	No responce	2-5	2-5	
MD	No response	No response	Building co...	No Respon...	10-100 MIL...	1-5	1-2	No response	
MD	2013	2013	Building co...	No Respon...	10-100 MIL...	1-5	1-2	2-4	
MD	2004	2004	Building co...	K 5-K10 mi...	K5-10 Milion	11-15	over 10	2-4	
MD	No response	No response	Building co...	100-500 mi...	10-100 MIL...	1-5	No responce	2-4	
MD	2013	2013	Building co...	No Respon...	K5-10 Milion	1-2	1-2	2-4	
6	1998	2000	Building co...	No Respon...	K5-10 Milion	No responce	over 10	2-4	
MD	2012	2012	Building co...	No Respon...	K5-10 Milion	1-5	1-2	2-4	
6	2009	2010	Building co...	No Respon...	K5-10 Milion	11-15	5-10	2-4	
MD	2003	2003	Building co...	No Respon...	K5-10 Milion	11-15	1-2	2-4	
MD	2010	2010	Building co...	No Respon...	K5-10 Milion	1-5	1-2	2-4	
MD	2002	2002	Building co...	No Respon...	K5-10 Milion	More than 20	1-2	2-4	
6	2005	2005	Building co...	No Respon...	K5-10 Milion	1-5	0	2-4	
6	2012	2012	Building co...	No Respon...	K5-10 Milion	1-5	2-5	2-4	
6	2005	2005	Building co...	No Respon...	K5-10 Milion	6-10	2-5	1-2	