

RESEARCH PROPOSAL

**THE ROLE OF PUBLIC-PRIVATE PARTNERSHIPS IN OVERCOMING
INFRASTRUCTURE CHALLENGES IN SOUTH AFRICA**

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ABSTRACT

The study gives background and importance of PPPs for a thriving economy that is afforded adequate support. It further provides key components of the legal PPP framework in South Africa and the role of clear Agreements in the successful completion of projects. It interrogates the question regarding what can be done differently to improve the outcomes of PPP projects. It specifies problem areas that impede on projects being completed with success and outline common PPP problems. The research also deals with specific projects that have been successfully completed at different levels of government. This is a direct indication that, although there may have been challenges that led to failures in the past, there is still good stories to tell about PPPs in South Africa. Focus is then turned to best practices, locally and internationally to improve the efficiency of PPP projects and their prospects of success. The study also observes that a well structured legal PPP framework has the potential to boost the economy and inspire other frameworks in developing and underdeveloped countries. Recommendations made require the National Treasury to play a more meaningful and active role in ensuring a higher success rate of PPP projects. Two key structures are recommended for the achievement of this objective.

Key words: PPP projects, successful completion, legal framework, private partner, government, Regulation 16, Agreements, Transparency, regulatory, capital investment

LIST OF ABBREVIATIONS

APRM	African Peer Review Mechanism
BBBEE	Broad-Based Black Economic Empowerment
BEE	Black Economic Empowerment
BOT	Build Operate Transfer
BPCC	Bakwena Platinum Corridor Consortium
BRICS	Brazil Russia India China South Africa
COI	Conflict of Interest
CPD	Chapman's Peak Drive
DBSA	Development Bank of Southern Africa
DFBOT	Design Finance Build Operate Transfer
DPLG	Department of Provincial and Local Government
EIA	Environmental Impact Assessment
EPI	Extended Programme for Immunisation
ETC	Electronic Toll Collection
EU	European Union
GPG	Gauteng Provincial Government
GTAC	Government Technical Advisory Centre
ICT	Information and Communication Technology
ICU	Intensive Care Unit
MFMA	Municipal Finance Management Act
MSA	Municipal Systems Act
N3TC	N3 Toll Concession
NGO	Non-governmental Organisation
NPA	National Prosecuting Authority
OECD	Organisation for Economic Cooperation and Development
PAJA	Promotion of Administrative Justice Act
PFMA	Public Finance Management Act
PGOWC	Provincial Government of the Western Cape
PPI	Private Participation in Infrastructure
PPIAF	Public-Private Infrastructure Advisory Facility
PPP	Public-Private Partnership
SADC	Southern African Development Community
SAIIA	South African Institute of International Affairs
SANRAL	South African National Roads Agency Limited
SDG	Sustainable Development Goals
SPV	Special Purpose Vehicle
USP	Unsolicited Proposal
VAT	Value Added Tax

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CHAPTER 1

INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

Under the current South African law, no legislation directly regulates Public-Private Partnerships (PPP). The Department of Finance has, however, issued a National Treasury Manual on PPPs.¹ In the absence of direct legislation on PPPs, the work of Public-Private Partnerships still has legal relevance due to several contracts signed by and binding on parties involved.

Public-Private Partnership agreements can be used in making success of the work of PPPs and in overcoming challenges with infrastructure development. According to the Organisation for Economic Cooperation and Development (OECD), PPPs are “long term contractual arrangements between the government and a private partner whereby the latter delivered and funds public services using capital asset, sharing the associated risks”.²

In South Africa, a PPP is defined as “a contract between a government institution and private party where the private party performs an institutional function and/or use state property in terms of output specifications; substantial project risk (financial, technical and operational) is transferred to the private party who benefits through unitary payments from government budgets and/or user fees³ and other socio-economic structures such as universities and hospitals”.⁴

PPP management is a complex and intricate process that requires thorough knowledge and understanding of the technical, financial and legal aspects to any PPP project. Every PPP has a ‘Project Cycle’ which entails the different stages and phases that have to be implemented throughout the Project Preparation Period to the end of the Project Term.

Over time, governments of developing countries have realised that their initiatives alone cannot address their economic and social challenges. Other contributing factors include the shortage of public funds in a lot of developing countries, the most viable solution being to invite and encourage the private sector to participate.⁵

¹ National Treasury PPP Practice Note number 02 of 2004.

² R Matey ‘A Comparison of Public-Private Partnerships in Nigeria and South Africa’, Washington University, Global Studies Law Review, Vol 18, Issue 3 (2019) pp 691 to 722.

³ This comprises all modes of transport being the contraction of roads, railways, ports and airports.

⁴ Regulation 16.1 to the Public Finance Management Act 1 of 1999, Definitions.

⁵ Public-Private Partnerships; Experiences of Developing Countries in Africa, Asia and South America; 5 EUR.PUBLIC PRIVATE PARTNERSHIP L.REV. 125 (2010).

This research strives to find what can be done differently, from a legal and contractual perspective, to guarantee successful outcomes of PPP projects.

1.2 BACKGROUND

Not all Public-Private Partnerships are completed successfully. Some PPPs fail for a number of reasons, from lack of skill to political interference. Most of the wrongdoing emanates from the public partner who appoints officials that do not have the necessary expertise. As a result, there's poor management and funds are often misappropriated. At times the terms of contracts signed are deviated from, which leads to projects not being completed. This is worsened by the fact that no consequences follow non-compliance.

There is a dedicated PPP Unit within the National Treasury that provides support and advice, whereas the Budget Office of National Treasury assists in the drafting of contracts and assessing prospective bidders.

This research is of the view that there is a need for regulatory authority, a form of Ombudsman. It would be composed of experts in relevant fields, especially legal aspects that encourage compliance with set standards and terms. These experts would investigate alleged deviations and delays that are reported by any aggrieved party to the contract and make recommendations that binding.

The primary focus of this institution would be to protect the interests of taxpayers from abuse by officials, both public and private, on all levels of government and at different stages of the project cycle. It could be empowered to make recommendations to other institutions such as the National Prosecution Authority (NPA) to investigate any *prima facie* indication of criminality like corruption⁶ or theft.

Further, holding the parties accountable until the completion of the project is a good investment that benefits everyone.

1.3 STATEMENT OF THE PROBLEM

⁶ Corruption as a criminal offence is discussed in para 3.6.1 of Chapter 3 below.

Given the fact that PPPs do not always yield successful outcomes, the question is why are there PPPs that do not succeed?⁷ What changes can be made to correct the current legal framework to make PPPs more effective and efficient? What structural changes and institutions can be put in place to improve their work? Most importantly, how can PPPs be leveraged to better expedite the development of infrastructure?

The meaningful use of PPPs also brings the aspirations of Agenda 2063⁸ within reach. PPPs present the most viable options in overcoming infrastructure development challenges. Ultimately, it will be an ordinary man and/or woman on the street who benefits.

The fact that South Africa does not have any direct legislation regulating PPPs is not a problem. There are, nonetheless, numerous successfully completed PPP projects in South Africa.⁹ Adversely, there has also been bad performance of PPP projects due to poor planning. Other contributing issues include inadequacy, like the lack of adequate skill and improper political involvement.¹⁰

PPPs provide the best alternative for governments to provide quality infrastructure and services to its people as this ultimately benefits the economy. It is important that PPP projects whose feasibility study has been approved as making financial sense and bringing good value for money reach successful completion. The challenge is that there is no authority that is vested with sufficient powers to oversee and ensure their completion without fruitless expenditure. In other words, taxpayers' money is not protected.

The PPP Unit and National Treasury's Budget Office are not effective in this regard. One may not expect them to assist with the drafting of a contract and later on enforce it. An independent body that exercises authority and is impartial would ideally ensure that all parties keep to their end of the contract, and that there is no interference from external factors.

The legal problem is that the South African PPP framework does not have a specialised body that investigates or presides over legal issues with the aim of resolving differences between parties and with the purpose of ensuring successful completion of projects while keeping to agreed terms and standards.

⁷ According to SM Seeletse, 'Performance of South African Public-Private Partnerships; Problems and Perspectives in Management,' Volume 14, Issue 2, 2016, many PPP projects do not reach finalisation due to negligence and wrong deployment as the main cause of the failures in which the government side is a grave wrongdoer.

⁸ Agenda 2063; The Africa we want. <https://au.int/en/agenda2063/overview> Accessed 20 August 2021.

⁹ The success of the public-private partnership. <https://mg.co.za/article/2019-07-26-00-the-success-of-the-public-private-partnership/> Accessed 20 August 2021.

¹⁰ Discussed in detail on para 3.4.2 of Chapter 3 below.

1.4 OBJECTIVES OF THE STUDY

The purpose of this research is to interrogate the legal and institutional framework of Public-Private Partnerships in South Africa. This study will make reference to sections of the Public Finance Management Act¹¹ (PFMA) as well as its regulations to the extent that they are relevant to the institution of PPPs. The National Treasury Manual on PPPs will also be taken into account, especially the stages and phases that are followed by every PPP project.

The focus of this research involves the optimal use of the current legal framework to effect change and overcome issues and factors that lead to the failure of some PPPs. Success factors¹² and challenges¹³ of PPPs in South Africa will be taken into account to achieve a thorough comprehension of the impact of PPPs on infrastructure development.

Factors that lead to successful completion of PPP projects in South Africa involve effective structures¹⁴, transparency¹⁵ and accountability¹⁶, an enabling environment¹⁷ and cooperation between parties involved. All these factors work well together.

The above factors can be better understood and used to optimise the PPP outcomes thereby providing a 'win-win' situation between the parties to the partnership.

Work done by other regulatory institutions in different fields will also be taken into consideration.

1.5 RESEARCH QUESTIONS

¹¹ Act 1 of 1999.

¹² Maseko M 'Analysis of Critical Success factors in public-private partnerships in infrastructure development in South Africa' <https://www.platinum.org.za/Pt2014/Papers/129-Maseko.pdf> Accessed 20 August 2021.

¹³ <https://open.uct.ac.za/handle/11427/23412> Accessed 20 August 2021.

¹⁴ According to I Marques de Sa, 'Technology, demographics, environment, and politics can all change, so contracts needs to be flexible to adjust to the project's life cycle', <https://insights.som.yale.edu/insights/how-do-you-build-effective-public-private-partnerships> Accessed 21 August 2021.

¹⁵ This transparency is contemplated in section 217 of the Constitution of the Republic of South Africa, which provides that "When an organ of state contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective".

¹⁶ Fabregas A *Et al* 'Public Private Partnerships Transparency and Accountability: Where is my data' <https://blogs.worldbank.org/governance/public-private-partnerships-transparency-and-accountability-where-my-data> Accessed 21 August 2021.

¹⁷ Enabling Environment for PPP <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-43.pdf> Accessed 21 August 2021.

This study will answer the following key questions regarding PPPs in South Africa;

- a. What legal role can be played by a regulatory authority to ensure that PPP projects are completed with success?
- b. How is the current legal framework of PPPs in South Africa and where can it be improved to increase efficiency?
- c. Which PPP challenges can be better resolved through a regulatory authority?
- d. Which PPP projects have been successfully completed in South Africa and what lessons can be learned from them?
- e. What international best practices can be used to improve the South African legal framework on PPPs?
- f. Can the decisions a PPP regulatory authority be taken on judicial review, and what happens while awaiting the outcome?

1.6 LITERATURE REVIEW

M. Maseko,¹⁸ indicates that some of the infrastructure in South Africa is old and this creates serious challenges to the growth of the economy. Economic growth and the population growth are not aligned. The population is growing faster than the economy and this puts pressure on social development, access to electricity, water and a better quality of life. This view is supported especially in light of the fact that society generally holds government accountable for service delivery. A leading role played by government in Public-Private Partnerships is important for development.

S. Gqoli¹⁹ attributes words of the former Minister of Finance in South Africa, Mr Trevor Manuel²⁰ that “This is what PPPs are about. The public gets better, more cost-effective services. The private sector gets new business opportunities. Both are in the interest of the nation”. It is submitted that this is especially true in a situation where the private partner is a South African company. Gqoli further correctly states that the test for a successful PPP project includes affordability, value for money and appropriate risk transfer.

Axel Marx²¹ is of the view that Public-Private Partnerships have become more prominent with the adoption of the 2030 Agenda for Sustainable Development Goals

¹⁸ ‘Analysis of critical success factors for public-private partnerships in infrastructure development in South Africa’ at page 129.

¹⁹ <https://www.oecd.org/investment/investmentfordevelopment/35624345.pdf> Accessed 21 August 2021.

²⁰ In August 2004.

²¹ PPPs for Sustainable Development; Exploring their Design and its Impact on Effectiveness https://www.researchgate.net/publication/331227974_Public-Private_Partnerships_for_Sustainable_Development_Exploring_Their_Design_and_Its_Impact_on_Effectiveness Accessed 21 August 2021.

(SDGs). Private partners have an opportunity to contribute meaningfully towards the achievement of SDGs by providing available resources, skill and expertise, implementation and legitimacy and enforcement capacity. Accordingly the United Nations, the achievement of sustainable development cannot happen without the participation of Public-Private Partnerships and the involvement of the private sector.²²

According to SAIIA,²³ the challenges from private sector perspective, and based on a few case studies are about; the lack of clear policy on PPP projects in different countries, lack of adequate capacity and the absence of institutions that are responsible for implementing PPPs. Other challenges concern the private sector's lack of understanding of local customs and laws, bureaucratic procedures, age of infrastructure, and local citizens not affording of the services provided.

It is hereby submitted that the lack of understanding of local laws and customs is caused by the non-involvement of sufficiently qualified legal personnel who are conversant with those laws, regulations and customs.

Augustine Arimoro,²⁴ writes that other countries in Sub-Saharan Africa have the opportunity to draw from and apply the PPP model in South Africa. Arimoro further states that; it is imperative that a successful PPP framework has to have "a clear, well understood and documented policies. The PPP policy must provide clarity to stakeholders (public and private) on how the government wants to undertake PPPs".²⁵ It is the researcher's contention that the same is in line with and achieved by the National Treasury Manual on PPPs.

Joshua Loots²⁶ contends that despite the flow of foreign capital and investment from private sources in the development of African infrastructure, there has not been any human development improvement and coordination among cities, states and countries that are neighbours. This study seeks to make recommendations to better deal with this particular challenge.

E.R. Yescombe²⁷ says that South Africa has developed a unique PPP programme that mirrors how developing countries that have enhanced investment and financial sector can achieve milestones with a PPP programme. It is believed that with the necessary

²² Marx also emphasizes that the institutional design of these partnerships are a determining factor for effective PPPs.

²³ SADC PPP Case Studies <https://saiia.org.za/toolkits/sadc-business-barriers/sadc-ppp-case-studies/> Accessed 21 August 2021.

²⁴ A Arimoro, 'An Appraisal of the Framework for Public-Private Partnerships in South Africa, Framework for PPPs in South Africa', EPPPL (2018) at 214.

²⁵ Ibid.

²⁶ Public—Private Partnerships for infrastructure Development in Africa; The Need for Human-Focused Regulation, HEINRICH BULL STIFTUNG (June14, 2017).

²⁷ Butterworth – Hainemann, 'Public-Private Partnerships: Principles of Policy and Finance', (2007) 47.

adjustments to the current PPP framework, the South African model may be exemplary to other developing African nations.

According to the PFMA, persons that are responsible for implementation are the various heads of departments at national and provincial levels and the CEOs or boards of public entities. They are accountable to Parliament or the Provincial Legislature for their budgets and the efficient management thereof.²⁸ This provision is equally applicable to institutions, both public and private, who are party to the PPP agreement.

There is a great need for intra-continental trade that will allow Africa to compete at the global level and have a strong economy. This, however, can be better achieved through proper infrastructure development.²⁹

This has been the case for a number of decades and can be overcome through a meaningful use of Public-Private Partnerships that are supported by effective regulatory authorities.

It is always important for parties to identify and choose a correct form of contract as failure to do so may lead to unfavourable or incomplete PPP projects. One common consideration for the private partner is about the end-user's willingness and ability to make payments towards the investment.³⁰ Prior to undertaking a PPP project, a feasibility study has to be conducted to measure and work out the cost of a project by way of traditional procurement methods and then compare it to a Public-Private Partnership approach.³¹

Another factor that will be taken into account within the South African legal framework is the BEE³² policy whose purpose was to redress the stifling economic effects of apartheid.³³

Philippe Burger³⁴ addresses the meaning of transparency³⁵ with PPP projects in that it is "the promotion of information disclosure throughout the whole life cycle of PPP projects, i.e. disclosing the business case, value for money evaluation report, fiscal affordability assessment report, contract and relevant information asymmetry and the

²⁸ Public Finance Management Act 1 of 1999, sections 38 to 42.

²⁹ www.nepad.org/programme/programme-infrastructure-development-africa-pdf Accessed 22 August 2021

³⁰ ECONOMIST INTELLIGENCE UNIT, at 31.

³¹ Principles for Public Governance of Public Private Partnerships. <https://www.oecd.org/gov/budgeting/oecd-principles-for-public-governance-of-public-private-partnerships.htm> Accessed 22 August 2021.

³² Black Economic Empowerment, discussed in more detail in Chapter 3, para 3.8.1 below.

³³ This is in line with the preamble to the Code of Good Practice for Black Economic Empowerment in Public-Private Partnerships. <https://www.bbbeeommission.co.za/b-bbee-codes-of-good-practice/> Accessed 22 August 2021.

³⁴ "The Dedicated PPP Unit of the South African National Treasury". www.oecd.org/mena/governance/37146964.pdf Accessed 22 August 2021.

³⁵ Transparency, or the lack thereof, is discussed in detail in Chapter 5 para 5.5 below.

public sector, the private sector and the public, to facilitate all stakeholders to access PPP project information”.

Further, transparency in PPP projects has the potential to increase the development of projects as well as their implementation. In this manner, the public will be informed of the progress of different projects given that the PPP market would be open and credible.³⁶

The PPP Unit³⁷ is the leading government agency for PPPs in South Africa. It is made up of a group of professional staff drawn from the public and private sectors. Its main function is to ensure that feasibility study is conducted, complied with and in line with international best practices.

1.7 METHODOLOGY

This research is conducted based on primary and secondary sources which include sections of the Constitution, local legislation, previously written material, articles, policy statements, modules of the manual by National Treasury as well as internet sources.

The research conducted herein is qualitative in nature. It does not make reference to any statistical data and no interviews were conducted.

1.8 LIMITATIONS AND DELINEATION OF THE STUDY

PPPs have numerous facets. These include project cycles, a consortium of companies involved, various funding mechanisms, to mention a few. This study is focused on the importance and effective PPP legal framework and agreements, their flexibility and other factors that contribute to the use of contracts in overcoming any challenges that may impede on a successful completion of the projects.

The work of a Public-Private Partnership is multidisciplinary; however, this study focuses fundamentally on legal aspects and not the financial and/or technical aspects of PPPs.

1.9 CHAPTER OUTLINE

The layout of the chapters will be as follows:

³⁶ BRICS Good Practices of Public-Private Partnership, at 7.

³⁷ Discussed in detail in Chapter 2 para 2.4.1.4.

Chapter 1: Introduction and Background. This part of the research will introduce all relevant concepts and provide a brief background of the subject matter.

Chapter 2: Structure of PPPs and its Agreements. This chapter is about how PPPs are structured (based on the National Treasury Manual) and the different stages and phases of PPP projects.

Chapter 3: Analysis of PPP problems. Here, an in-depth look will be had to challenges faced by PPPs and how they can be overcome to avoid failure.

Chapter 4: PPP case studies in South Africa. Here the research will focus on case studies of successfully completed PPP projects and lessons that can be learned from them.

Chapter 5: Best PPP practices. In this chapter, regard will be had to the best international PPP practices, guidelines and principles of OECD, compliance with National Treasury Manual, and the BRICS Good Governance on Public-Private Partnership Framework.

Chapter 6: Recommendations and Conclusion.

CHAPTER 2

LEGAL STRUCTURE OF PUBLIC-PRIVATE PARTNERSHIPS AND ITS AGREEMENTS

2.1 INTRODUCTION

The previous Chapter provides a backdrop for this study. This current Chapter seeks to present key parts of the South African legal framework on PPPs, how they are structured and significance of their Agreements.

According to Mariam Saleh, “In 2020, the population of Africa grew by 2.49 percent compared to the previous year. The population growth rate in the continent has been constantly over 2.45 percent from the year 2000 onwards, and it peaked at 2.62 percent between 2012 and 2014. In 2021 Africa had over 1.36 billion inhabitants. Despite the slowdown in the growth rate, the continent’s population will continue to increase significantly in the coming years, reaching nearly 2.5 billion people by the year 2050.”³⁸

World Population Review projects that the population of South Africa will grow continuously until about the year 2082 where it will reach about 80 million people prior to flattening and decreasing for the rest of the century. The rate of population growth for South Africans is currently 1.28 percent per year.³⁹

South Africa, similar to other developing and underdeveloped countries, is in need of a full scale infrastructure program which will be useful in supporting its economy and improving lives and livelihoods of all who live in it. It is hereby submitted that the currently available infrastructure is not sufficient to accommodate the country’s growing population. This also extends to the country’s role in supporting and assisting its neighbouring nations, especially landlocked countries such as Lesotho, Eswatini and Zimbabwe.

There are different types of infrastructures such as water, energy, transport and social services. The word ‘infrastructure’ as will be used in this research ought to be understood to refer to any or some or all types that are contemplated herein.

As indicated above, Public-Private Partnerships make it possible for governments of different jurisdictions to provide services to the masses. For these required services to

³⁸Population Growth Rate in Africa from 2000 to 2020. <https://www.statista.com/statistics/1224179/population-growth-in-africa/> Accessed on 27 August 2021.

³⁹World Population Review; South Africa Population 2021(Live) <https://www.worldpopulationreview.com/countries/south-africa-population> Accessed on 27 August 2021.

be provided, it makes legal sense for a government to have a legal framework within which the above-mentioned services can be provided. This particular chapter pays attention to the structure and form of PPPs in South Africa.

2.2 AN OVERVIEW OF HOW PUBLIC-PRIVATE PARTNERSHIPS WORK⁴⁰

Governments generally have two options of delivering services to their populations. The first option is by way of Traditional Procurement and the second but not least option is by way of Public-Private Partnerships. The differences between the two will be briefly discussed in paragraph 2.3 below. At this point, this research submits that PPPs are especially ideal where a government (the public partner) requires sufficient finance and capital to provide for the many and large needs of its citizens. At any given time, citizens of any particular jurisdiction require services such as hospitals, schools and universities, roads, water, electricity or energy, waste management and other services. It is the responsibility of the government to find the most effective and efficient means to provide the same. To resolve this challenge, the public partner may enter into a PPP agreement with a consortium of companies comprising the private partner⁴¹ who will design, build, finance, operate and maintain the infrastructure required and for people to benefit from the use thereof.

Public-Private Partnerships are not privatisation of resources or structures. In a PPP the government remains accountable for the provision of services. The government decides which infrastructure is needed more urgently, where and when. It then invites private parties to a tender process to determine which among the bidders is best able to expedite the establishment of the required infrastructure project. Once an appropriate private partner has been earmarked, they recover their initial investment through service fees paid for by the public partner or by the users directly. The role of the public partner is fundamentally to supervise and oversee the public service provision in the best interest of citizens.

The PPP also offers an opportunity for parties to plan the project over the entire cycle. The benefit to this advantage is that it increases the use of available resources thereby enabling efficiency. It is reasonably expected that the private partner knows how to attract and invest capital, how to avoid cost overruns and the best way to operate.

⁴⁰ Guidebook on Promoting Good Governance in PPPs www.unece.org. Accessed 27 August 2021.

⁴¹ The regulation defines a private party to a PPP agreement in the negative, explicitly excluding public institutions. PPPs in South Africa are thus specifically defined to exclude public-public partnerships. Not-for-profit entities are not excluded from the definition of a private party but their capacity to carry substantial financial, technical and operational risk in a project will determine the role they are able to play in a PPP.

PPPs allocate specific risks to the partner that is better placed to manage them. The risk allocation process is unique to every individual project. On the one hand, the public partner is suited to undertake issues such as permits that may be required, legal framework, jurisdictional matters and overall regulation. The private partner, on the other hand, mitigates risks related to design, cost efficient investment, operation and technology. Other risks have to be shared between the partners, for instance damages caused by natural disasters as they are not caused or created by either party.

PPPs present a complex arrangement of finance and legal requirements. This can be best achieved by the public partner setting good governance principles which start by taking the needs of the user into account and are known in South Africa as '*Batho-pele*'⁴² Principles.

The success of a PPP is dependant, *inter alia*, on a competent and capable government to build administrative capacity to effectively negotiate and manage long term collaborations with the private partner. This is done by putting in place, adequate legal framework and regulations. Transparent procurement policies are also essential and environmental risks have to be mitigated as far as possible.

A PPP concludes at the end of the project cycle when the relevant infrastructure project is handed to the government.

2.3 DIFFERENCES BETWEEN TRADITIONAL PROCUREMENT AND PPPs

Governments make use of PPPs to increase their value for money, which is a major consideration in traditional infrastructure procurement processes. It is only if a project represents good value for money that it is undertaken.⁴³

"Value for Money can be defined as the optimum combination of whole-life cost and quality (or fitness for purpose) to meet the user's requirement and incorporates the relationship between economy, efficiency and effectiveness."⁴⁴ It is important for any government institution to take this definition into account when deciding whether to make use of traditional procurement or PPP.

⁴² *Batho-pele* is a Sotho word which literally means 'people first'. Sesotho is one of the eleven official South African languages. Batho-pele principles are eight in total and they are; Consultation, Service Standards, Access, Courtesy, Information, Openness and transparency, Redress and Value for Money.

⁴³ Philippe Burger and Ian Hawksworth, 'How to attain Value for Money: Comparing PPP and Traditional Infrastructure Public Procurement', <https://www.oecd.org/gov/budgeting/49070709.pdf>. Accessed 27 August 2021.

⁴⁴ 'Guide to Purchasing' https://www.sheffield.ac.uk/finance/staff-information/help/procurement/how/purchasing_guide Accessed 27 August 2021.

A PPP project term is generally longer than traditional procurement. Challenges are expected to ensue over the long duration of the contract. The success of the PPP project is dependent on a good management of the contractual relationship between the parties concerned.⁴⁵ In South Africa, the project cycle of a PPP is at least twenty years, although there may be exceptions as will be shown in Chapter 4 below.

2.4.1 PPPs AT NATIONAL AND PROVINCIAL LEVELS OF GOVERNMENT

Within the South African context, Public-Private Partnerships are developed through stages and phases of the project cycle and in terms of the National Treasury's PPP Manual (hereinafter referred to as 'the Manual'). The Manual is subdivided into PPP Practice Notes which are also Modules and their stages and phases will be dealt with in greater detail below.

Further, the said Manual is supported by and cross-referenced with Standardised PPP Provisions.⁴⁶ This Standardisation makes provision for common issues encountered by Public-Private Partnership projects and informed by Regulation 16. Typical risks such as financial, technical and operational risks are outlined in the Standardisation.

Developing every infrastructure takes the form of a 'project'. This research understands the word project to mean an organised unit of work, therefore if it is not organised, it is not a project but something else.

Every PPP has a 'Project Cycle' which details the duration and activities involved. There are two stages to the project cycle, namely; Project Preparation Period and Project Term.

Project preparation period has three phases, and they are; Phase I (Inception), Phase II (Feasibility Study) and Phase III (Procurement). Project term has additional three phases which are; Phase IV: Development, Phase V: Delivery and Phase VI: Exit. The Nation Treasury is required to make four different types of approvals in the course of Phase III.

Accordingly, Module 1 deals with South African Regulations for PPPs, Module 2: Code of Good Practice for BEE in PPPs, Module 3: PPP Inception, Module 4: PPP Feasibility Study, Module 5: PPP Procurement, Module 6: Managing the PPP Agreement, Module 7: Auditing PPPs; and Module 8: Accounting Treatment for PPPs. This information is reflected on Table 1* below.

⁴⁵A Primer to Public-Private Partnerships in Infrastructure Development
https://www.unescap.org/ttdw/ppp/ppp_primer/04_differences_between_ppp_and_conventional_projects.html
Accessed 28 August 2021.

⁴⁶<https://www.gtac.gov.za/Publications/1280-Standardised%20Public-Private%20Partnership%20Provisions.pdf> .
Accessed 28 August 2021

The PFMA and Treasury Regulation 16 are also applicable to constitutional institutions that support democracy, namely;

- a. The Public Protector,
- b. The South African Human Rights Commission,
- c. The Commission for the Promotion and Protection of Cultural, Religious and Linguistic Communities,
- d. The Commission for Gender Equality,
- e. The Auditor General and
- f. The Independent Electoral Commission,⁴⁷
- g. The Financial and Fiscal Commission,
- h. The Independent Communications Authority of South Africa, and
- i. The Municipal Demarcation Board.

Other national and provincial institutions of government that are subject to Treasury Regulation 16 are public entities listed in schedules 3A, 3B, 3C and 3D to the PFMA and any subsidiary of any such public entity.

Schedule 3B and 3D entities are known to be government business enterprises. The reason for this is because they generate income. They have less autonomy than the schedule 2 public entities and may be self-funded or government funded to some extent. The borrowing powers of these state owned entities are limited. Other public entities are schedule 3A and 3C entities. They fulfil a specific economic or social responsibility of government.

These entities have a legal requirement to file annual reports and financial statements to the Auditor General⁴⁸ to the Executive Authority and to Parliament/Provincial Legislature.⁴⁹ It is worth pointing out that fraud and corruption still occur even with these reporting channels available, however, this will be discussed in detail in Chapter 3 below.

2.4.1.1 **TREASURY REGULATION 16 TO THE PFMA**

According to Regulation 16, each PPP project's financial structure as well as its funding mechanism are determined based on the three regulatory tests of the feasibility study, which is affordability, value-for-money and the project's risk profile.

⁴⁷ Constitution of the Republic of South Africa, Act 108 of 1996, Chapter 9, section 181 provides for (a) to (f).

⁴⁸ Annual Report Guide for Schedule 3A and 3C Public Entities, at page 5.

https://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/public_entity_ar_guide.pdf Accessed 28 August 2021.

⁴⁹ Section 55 of the PFMA and chapter 28 of the Treasury Regulations (28.2).

There are various officials or institutions that take part in the development of a PPP and they are; private party,⁵⁰ accounting officer,⁵¹ project officer,⁵² transaction advisor,⁵³ lender,⁵⁴ responsible authority,⁵⁵ and shareholders.⁵⁶ The presence of these contributors and role players is an indication that a PPP project cycle is a complex process with competing interests.

The three regulatory tests referred to above are applicable at every stage of preparing, procuring and managing a PPP agreement. The phases of the project cycle are briefly discussed below and as follows;

PHASE I: PROJECT INCEPTION

It is the duty of the accounting officer or accounting authority (the two concepts will be used interchangeably) to register the PPP with the relevant treasury as soon as the public partner or institution identifies a project that that will be implemented. What follows then is the appointment of a project officer and a transaction advisor. The appointments and registration have to be in writing and within or outside the institution if the relevant treasury so requires.⁵⁷

PHASE II: FEASIBILITY STUDY – TREASURY APPROVAL I

This assessment determines whether a proposed project is in the institution's best interest, a feasibility study has to be conducted by the accounting officer of that institution to explain the operational and strategic benefits of the proposed project in line with government policy.

In the case of a PPP project that involves the performance of a function that is institutional, this must be described in detail by the accounting officer. This description

⁵⁰ Which refers to “a party to a PPP agreement, other than an institution to which the Act applies, a municipality or a municipal entity under the ownership control of one or more municipalities; or the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality or municipal entity referred to the above.”

⁵¹ In terms of section 36(2)(a) and (b) “an accounting officer is the head of a department and/or the chief executive officer on a constitutional institution.”

⁵² Means “a person identified by the accounting officer or accounting authority of an institution, who is capable of managing and is appropriately qualified to manage a PPP to which that institution is party from its inception to its expiry or termination.”

⁵³ A person or persons appointed in writing by an accounting officer or accounting authority of an institution, who has or have appropriate skills and experience to assist and advise the institution in connection with a PPP, including the preparation and conclusion of a PPP agreement.

⁵⁴ Any person providing financing to the Private Party under the Financing Agreements;

⁵⁵ “Any ministry, any minister, any organ of state, any official in the public administration or any other governmental or regulatory department, commission, institution, entity, service utility, board, agency, instrumentality or authority (in each case, whether national, provincial or municipal) or any court, each having jurisdiction over the matter in question, but excluding for all purposes the Institution.”

⁵⁶ Refers to holders of the Equity.

⁵⁷ Regulation 16.3.1 in Module 3.

has to explain the extent of the institutional function in legal terms including how the same can be better performed by a private party. The use of state property also has to be outlined by the accounting officer providing information regarding which property, what type it is and how it has been used prior to the registration. An accounting officer also has the responsibility to demonstrate how affordable the process will be for the institution. An anticipated value for money has to be explained, particularly how financial risks will be mitigated.⁵⁸

It is only after the feasibility study has been approved in writing that a particular institution can move on to the procurement phase of the project. This approval is done by the relevant treasury at national or provincial level. Where there is a need to revise the feasibility study for the purpose of clarifying any of its aspects, this must be done through the approval of the relevant treasury.⁵⁹

PHASE III: PROCUREMENT – TREASURY APPROVAL IIA & IIB

The institution must get clearance from the relevant treasury for the procurement documentation, including the draft PPP agreement, before distributing any PPP procurement documentation to any prospective bidders. The procurement method has to follow a fair, transparent, and cost-effective system, with a preference for the protection or advancement of people, or groups of people, who have been disadvantaged by unfair discrimination, in accordance with applicable laws.⁶⁰

The institution must submit a report to the relevant treasury after evaluating the bids but before appointing the preferred bidder, demonstrating how the criteria of affordability, value for money and transfer of substantial risk were applied in the evaluation of the bids and how these criteria were satisfied by the preferred bidder.⁶¹

The Promotion of Administrative Justice Act⁶² imposes a number of responsibilities emanating from section 33(1) of the Constitution of the Republic of South Africa⁶³ in order to put people' rights to fair administrative action into practice. These are the values of legality, sound reason, and procedural fairness. Each administrative action in a PPP procurement process must be in accordance with the law and prescribed procedures; the institution's decision-making must be accountable, responsive, and

⁵⁸ Regulation 16, Module 4 of the Manual.

⁵⁹ Regulation 16.4.2 – 4.

⁶⁰ Regulation 16.5.1 – 3.

⁶¹ Regulation 16.5.4 – 5.

⁶² Act 3 of 2000.

⁶³ Act 108 of 1996.

open; all bidders must have an equal chance of competing for the contract at each stage of the procurement process.

Treasury Approval III is not a separate phase of the project cycle. It applies after a procurement procedure has been completed but before a PPP agreement is signed by the institution's accounting officer or accounting authority. The accounting officer is required to obtain approval from the relevant treasury for a management plan that defines the institution's capacity to implement procedures and mechanisms to report, monitor, manage and enforce the PPP agreement. Further, an indication has to be made that a legal due diligence has been complied with in respect of the accounting officer or accounting authority.⁶⁴

2.4.1.2 **MANAGEMENT OF PPP AGREEMENTS**

It is important for PPP agreements to be managed. The accounting authority of a party to a PPP agreement is responsible for ensuring that the PPP agreement is properly implemented, managed, enforced, monitored, and reported on, and must maintain the mechanisms and procedures approved in Treasury Approval: III for measuring the PPP agreement's outputs, monitoring the implementation of the PPP agreement, and reporting on the PPP agreement.⁶⁵

A PPP agreement involving the private party's use of state property does not absolve the institution's accounting authority of the responsibility for ensuring that such state property is adequately protected against misuse, forfeiture and loss. An agreement that involves the performance of an institutional function in this regard also does not absolve the institution's accounting officer of the responsibility for ensuring that the institutional function is carried out effectively and in the interest of the public. It submitted that failures and non-completion occur due to non-compliance with proper standards of PPP agreements.⁶⁶ Appropriate recommendations in this regard will be made in Chapter 6 below.

2.4.1.3 **VARIATION AND AMMENDMENT OF PPP AGREEMENTS**

Any substantial revision of a PPP agreement, including any material variations to the outputs therein, or any waivers intended or provided for in the PPP agreement, require the prior written permission of the appropriate treasury. Only if the appropriate treasury

⁶⁴ Regulation 16.6.1.

⁶⁵ Regulation 16.7.1.

⁶⁶ Regulation 16.7.2 – 3.

is satisfied that the PPP agreement, as amended, will continue to deliver value for money, affordability, and considerable technical, operational, and financial risk transfer to the private party will a material revision be approved. For getting such treasury approval, the accounting authority must generally follow the method established by regulations 16.4⁶⁷ and 16.6.⁶⁸ It is this research's contention that there has to be consequence management for deviations from the agreed terms of a PPP agreement since failure to do so and/or compromises lead to projects not being completed with success. This research seeks to correct that.

It is further submitted that variation clauses in contracts have to be given meaning so as not encourage unnecessary compromises that ultimately leads to failed projects.

A PPP agreement or any amendment thereof is binding on the State to the extent that it was entered into on behalf of the institution by an accounting officer of that institution, and if the relevant treasury has granted all treasury approvals required in terms of regulation 16 in respect of the PPP. Put simply, not any official can amend an agreement in this regard.

On written request from the institution, the competent treasury may exempt that institution from complying with any or all of the provisions of regulation 16, subject to any terms and circumstances it deems suitable.⁶⁹ The expectation is that this should not be done in a manner that defeats the purpose of the agreement and/or undermine the success of the project concerned. Consequence management has to also extend to officials that comprise the PPP Unit as they are not immune from making decisions or taking action that may harm prospects of a successful project.

2.4.1.4 DEDICATED PPP UNIT

A dedicated PPP Unit is established in line with the Public Finance Management Act, 1999. Its primary function is to ensure affordability, value for money and sufficient risk transfer in Public-Private Partnerships. This is done in consideration of international best practices. It also plays an important role in Treasury Approval during the pre-contract phases. It is an agency of the National Treasury and is assisted by the Government Technical Advisory Centre (GTAC).

The function the GTAC is to provide public finance management through professional advisory services, project management and transaction support.⁷⁰

⁶⁷ Feasibility study – Treasury Approval I.

⁶⁸ Contracting PPP agreements – Treasury Approval III.

⁶⁹ Regulation 16.10.1.

⁷⁰ GTAC; Strategic and Technical Advisory <https://www.gtac.gov.za/> Accessed 30 August 2021.

A PPP Unit's other responsibilities include defining PPP processes and policies, as well as strengthening the capacity of implementing agencies to follow those processes and policies. This frequently entails producing PPP guidance materials and standard documents. They also supervise the management of PPP projects for efficiency and cost-effectiveness, as well as approving or advising on the approval process.⁷¹

South Africa has a lot of PPP experience. Between 2000 and 2014, the country invested about \$8.35 billion in 24 national and provincial PPP projects.⁷² The PPP Unit played a vital role in these projects as they came into operation in the year 2000. PPP Units are staffed with professionals in the fields of private finance, consultancy and accountancy. This can be deemed useful for the success of the Unit as thorough knowledge of complex financial arrangements is required.

In 2007 the World Bank defined a PPP Unit as an organisation that “promotes or improves PPPs. It may manage the number and quality of PPPs by trying to attract more PPPs or trying to ensure that the PPPs meet specific quality criteria such as affordability, value for money and appropriate risk transfer.”

PPP Units, according to the OECD (2010), are organizations that have been established with full or partial government assistance with the goal of guaranteeing that the public good is protected and has the “necessary capacity to create, support and evaluate multiple PPP agreements are made available and reside in government”.

According to Farrugia et al. (2008), PPP Units are broadly divided into three main categories:

- Review bodies that are in charge of reviewing project business plans and offering recommendations to decision-making organizations based on their findings.
- Full-service agencies that, in addition to review operations, offer consultancy services to help build PPP markets in their jurisdiction and may also supply other services such as finance.
- Centres of Excellence that aggregate and distribute research, knowledge, and best practices as a build up to the establishment of a full PPP Unit.

According to Alberto Lemma, there is limited quantitative evidence of the usefulness of centralised PPP coordination units in comparison to ministries or government agencies contracting PPP projects on their own.⁷³

⁷¹Dedicated PPP Units <https://pppknowledgelab.org/guide/sections/32-dedicated-ppp-units> Accessed 30 August 2021.

⁷² Establishing the PPP Framework <https://pppknowledgelab.org/guide/sections/5-establishing-the-ppp-framework> Accessed 30 August 2021.

⁷³ Alberto Lemma, ‘Literature Review: Evaluating the Costs and Benefits of Centralised PPP Units, Overseas Development Institute’, 2013.

It is submitted that this PPP Unit is useful and continue to contribute meaningfully to the PPP framework of South Africa. This is demonstrated by their past successes. However, this research will make recommendations that may mitigate future failures, given that PPP projects are not always completed successfully.

2.4.2 PPPs AT MUNICIPAL LEVEL OF GOVERNMENT

The Municipal Systems Act 32 of 2000⁷⁴ (MSA) and the Municipal Finance Management Act 56 of 2003⁷⁵ (MFMA) govern Public-Private Partnerships in municipal government. The PFMA and/or Treasury Regulation 16 do not apply to local governments. The government's experience with PPPs has resulted in a set of guidelines that outline the procedures to be followed when dealing with PPPs at the local level.

The National Treasury/Department of Provincial and Local Government (DPLG) *Municipal Service Delivery and PPP Guidelines* of 2007 are issued by the Minister of Finance and the Minister for Provincial and Local Government, and apply to the municipalities described in section 2 of the MSA. Municipal Finance Management Act provides that the “Minister of Finance may, with the concurrence of the Minister for Provincial and Local Government, issue regulations and guidelines regulating the financial commitments of municipalities and municipal entities in terms of PPPs”.⁷⁶

According to section 86A of the Municipal Systems Act, read together with section 120 (1) and (2) of that Act, “the Minister for Provincial and Local Government may issue guidelines for municipalities when assessing options for the provision of a municipal service, the different categories of municipal services and the different categories of service providers.”

A municipality may supply municipal services either internally or outside, according to the MSA. A municipal entity, another municipality, a state organ, a community-based organization or other non-governmental organization (NGO), or “any other institution, entity, or people legally competent to operate a business activity,” which include a Public-Private Partnership (PPP), are examples of external mechanisms. A municipality shall assess and choose a mechanism to supply a municipal service, according to section 77 MSA.⁷⁷

This research observes that the MFMA strives to improve budgetary and financial management methods in local government, enhancing municipalities' ability to provide services to all users, citizens, customers and investors. It also strives to provide a good

⁷⁴ https://www.gov.za/sites/default/files/gcis_document/201409/a32-000.pdf Accessed 30 August 2021.

⁷⁵ https://www.gov.za/sites/default/files/gcis_document/201409/a56-03.pdf Accessed 30 August 2021.

⁷⁶ Section 168(1)(d) MFMA.

⁷⁷ Section 76 MSA.

financial governance structure by defining and distinguishing the mayor's, whether executive, and non-executive councillors' and officials' duties and responsibilities. The mayor or executive committee is in charge of policy and outcomes, while the municipal manager and other top managers are in charge of implementation and outputs, according to the Act.

PPPs are governed by the Municipal Public-Private Partnership Regulations, which are very specific and detailed. The rules outline the components of a municipal PPP as well as the steps and approvals that must be completed.⁷⁸ As can be seen, the existing PPP legal framework in South Africa has procedures in place to assure the successful completion of PPP projects. The reasons that contribute to failures while there are legal rules, regulations, recommendations, and reports will be discussed in the following chapter.

The PPP project cycle at Municipal level differs from the one at National and Provincial levels. Its structure is illustrated by Figure 2* below. Similar to its counterpart, it also has two stages, being Project Preparation Period and Project Term. It, as well, has modules in which Module 1 – 3 deal with the project inception, Module 4 makes provision for a feasibility study, Module 5 deals with procurement, and Module 6 is about contract management.

Practically, PPP projects in all levels of government are similar in many regards such as the definition of concepts, functions to be carried out, officials that represent partners to an agreement and most of the agreement terms.

2.5 TYPES OF PUBLIC-PRIVATE PARTNERSHIPS

There are various types of PPPs, however, the PPP definition in Treasury Regulation 16⁷⁹ distinguishes between two basic kinds of PPPs, one involving the performance by

⁷⁸ http://www.saflii.org/za/legis/consol_reg/mppr493/ Accessed 30 August 2021.

⁷⁹ “Public private partnership” or “PPP” means “a commercial transaction between an institution and a private party in terms of which the private party – (a) performs an institutional function on behalf of the institution; and/or (b) acquires the use of state property for its own commercial purposes; and (c) assumes substantial financial, technical and operational risks in connection with the performance of the institutional function and/or use of state property; and
(d) receives a benefit for performing the institutional function or from utilizing the state property, either by way of:
(i) consideration to be paid by the institution which derives from a revenue fund or, where the institution is a national government business enterprise or a provincial government business enterprise, from the revenues of such institution; or (ii) charges or fees to be collected by the private party from users or customers of a service provided to them; or
(iii) a combination of such consideration and such charges or fees.”

a Private Party⁸⁰ of an “institutional function”⁸¹ and the other involving some form of “use of state property”⁸² by a Private Party for its own commercial purposes.

The various types of PPP projects based on the contractual arrangements include;

- a. Design, finance, build, operate and transfer (DFBOT),
- b. Design, finance and operate (DFO),
- c. Design, build, operate and transfer (DBOT),
- d. Equity partnerships and
- e. Facilities management projects.

Hospitals, transportation and roadways, tourism, and head office accommodation projects are among the projects under consideration. They were financed with a mix of stock, debt, and government capital injections in some cases.⁸³ The above-mentioned types of PPP projects do not represent an exhaustive list and may include Concessions.

Legal advice should be sought on the form of legal arrangement that best fits the nature of the user rights that the Institution seeks to contract out to a Private Party in a PPP Agreement. This should be determined at the feasibility study phase, and it should be done project by project. Hence, no two PPPs are the same.

Parties to a PPP contract should keep in mind that their partnership does not relieve their institutions of their responsibility to ensure that State property is not misused or ignored, since any losses would be ultimately paid for by the taxpayer.

2.6 MISCELLANEOUS

The Auditor-General's duties and functions, as well as the scope of financial, performance, and forensic audits, are all described in Module 7 of Regulation 16. It illustrates how this pertains to PPPs, notably in terms of contract management. It also explains how the institution's internal audit team contributes to PPP projects. National

⁸⁰ “Private party” means a party to a PPP agreement, other than – (a) an institution to which the Act applies; (b) a municipality or a municipal entity under the ownership control of one or more municipalities; or (c) the accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality or municipal entity referred to in paragraph (a) or (b).

⁸¹ “Institutional function” means – (a) a service, task, assignment or other function that an institution is entitled or obliged to perform – (i) in the public interest; or (ii) on behalf of the public service generally; or (b) any part or component of or any service, task, assignment or other function performed or to be performed in support of such a service, task, assignment or other function.

⁸² “State property” includes all movable and immovable property belonging to the state as well as intellectual property rights vested in the state.

⁸³ Public Private Partnerships

<http://www.treasury.gov.za/documents/national%20budget/2018/review/Annexure%20E.pdf> Accessed 31 August 2021.

Treasury collaborated with the Office of the Auditor-General to develop the Module. Office of the Auditor-General is a Chapter 9 institution as contemplated above and is regulated in terms the Auditor-General Act.⁸⁴

2.7 CONCLUSION

The South African government has placed sufficient safeguards on all its three levels in order to encourage the success of at least most of the PPP projects. One reasonably expects that failure thereof should only occur under exceptional circumstances. That unfortunately is not the case. Chapter 3 takes a closer look at the said failures and their causes.

⁸⁴ Act 12 of 1995.

CHAPTER 3

ANALYSIS OF PUBLIC PRIVATE PARTNERSHIP LEGAL PROBLEMS

3.1 INTRODUCTION

With an understanding of key features of the legal framework of PPPs in South Africa, as outlined by the previous Chapter, the current Chapter focuses on problem areas that adversely impact on the success of projects that fail.

This research understands the word ‘problem’ to refer to an unpleasant or harmful matter or event that must be dealt with and resolved. In the same breath, a ‘legal problem’ is best resolved or overcome by making use of legal means and applying correct legal principles, interpretation of laws, rules and/or regulations to accomplish desired lawful outcomes. The wide meaning of ‘legal means’, as contemplated above, may be read to include a legal framework.

It is the writer’s contention that the South African PPP legal framework has legal problems that will be brought to the fore and analysed in this chapter. Recommendations will then be made on how these legal problems could be overcome by legal means to positively impact the successful completion of bankable PPP projects.

3.2 PRIVATE PARTNER

The term private partner and private party are used interchangeably in this research and have been given meaning to in Chapter 2 paragraph 2.4.1.1 above.

A private party to a PPP agreement is defined in the negative in the rule, specifically excluding governmental organizations. Non-profit organizations are not excluded from the concept of a private party; nonetheless, their ability to bear significant financial, technical, and operational risk in a project will define the role they can play in a PPP.

To design, build, manage, and operate the asset for the stipulated duration, a private-sector consortium develops a special-purpose vehicle (SPV). A construction business, a maintenance company, and one or more equity investors are normally part of the consortium. The first two are often project equity investors who make decisions but are only compensated when the obligations are paid, whereas the second is the project’s creditor (debt holder).⁸⁵

⁸⁵ Whiteside, Heather ‘Public-private partnerships in Canada’, Halifax: Fernwood Publishing, 2016.

According to Corporate Finance Institute, “an SPV is a separate legal entity created by an organisation. It is a distinct company with its own assets and liabilities, as well as its own legal status. Usually, they are created for a specific objective, often to isolate financial risk. As it is a separate legal entity, if the parent company goes bankrupt, the special purpose vehicle can carry on”.⁸⁶

3.2.1 SELECTION OF A PRIVATE PARTNER

The procurement procedure must implement a balanced, impartial, clear, robust, and cost-effective system, with a preference for the preservation or advancement of people, or groups of people, who have been deprived by unfair discrimination, in line with applicable laws.⁸⁷

The selection of a private partner is an administrative process and according to section 33(1) of the Constitution of the Republic of South Africa, “everyone has a right to administrative action that is lawful, reasonable and procedurally fair”. The Promotion of Administrative Justice Act (PAJA),⁸⁸ defines an administrative action as “any decision taken, or failure to take a decision, by an organ of state when exercising power in terms of the Constitution or provincial constitution or exercising public power or performing a public function in terms of any legislation, or a natural or juristic person other than an organ of state when exercising public power or performing a public function in terms of any empowering provision which adversely affects the rights of any other person and which has a direct, external legal effect.”⁸⁹

It is submitted that the process of selecting a private partner is delicate as one of the driving factors of PPPs and requires a private partner with the requisite skills, experience, and resources to manage risks and provide high-quality, low-cost facilities and services. A compromise in this regard could mean that the project is predestined for failure.

Each administrative action taken in a PPP procurement process must be in line with the requirements and prescribed procedures; the institution's decision-making must be accountable, responsive, and transparent; all bidders at each stage of the procurement process must have an equivalent capacity to compete for the contract; and no activity taken by the government may prejudice their economic viability.⁹⁰

⁸⁶ Special Purpose Vehicle <https://corporatefinanceinstitute.com/resources/knowledge/strategy/special-purpose-vehicle-spv/> Accessed 10 Sept 2021

⁸⁷ Regulation 16.5.3

⁸⁸ Act 3 of 2000.

⁸⁹ Section 1 of PAJA.

⁹⁰ Module 1 of the National Treasury's PPP Manual.

Noncompliance with a private partner's due selection processes causes a legal problem that requires a legal solution. This solution will form part of recommendations below.

3.2.2 OBLIGATIONS AND RESPONSIBILITIES OF A PRIVATE PARTNER

Any business or operations not covered in the project deliverables should be avoided by the private party and/or SPV. If a private party is allowed to conduct non-project activities on the project site or use Project Assets for non-project purposes in a particular project, the PPP Agreement's provisions governing the private party's general obligations and responsibilities must be amended to reflect this, in order to ensure that the project is not jeopardised. Subcontracting the Project Deliverables to the Subcontractor is expected from the private party.⁹¹

To safe-guard the success of the project against abuse and misuse of Project Assets, the following Standard Clause may be inserted into the PPP Agreement;

“General Obligations

(a) The Private Party shall not engage in any business or activity other than the business or activity included in, or otherwise required to enable the Private Party to provide, the Project Deliverables.

(b) The Private Party shall not be relieved of any obligation, responsibility or liability under this PPP Agreement by the appointment of any Subcontractor to carry out any part of the Project Deliverables. As between the Private Party and the Institution, the Private Party shall be responsible for the payment, performance, acts, defaults, omissions, breaches and negligence of all Subcontractors. All references in this PPP Agreement to any performance, payment, act, default, omission, breach or negligence of the Private Party shall be deemed to include any of the same by a Subcontractor.”⁹²

Non-compliance with agreement terms is discussed in paragraph 3.10 below.

Any risks connected with any subcontractor's execution of any component of the Project Deliverables will be passed down to the relevant subcontractor by the private party. For example, indemnities or some form of security such as construction guarantees or cessions in security of the earnings of any insurance to be taken out by the Subcontractors can be obtained in the case of any design risks or completion risks to the Construction Subcontractor and other “first-tier” construction Subcontractors (if any), such as the quantity surveyor. Despite this, the institution shall ensure that the

⁹¹ Standardised PPP Provisions, Part C, paragraph 7.1 – 2.

⁹² Standardised PPP Provisions, Part C, paragraph 7.3.

subcontractor risks are correctly divided between the private party and the subcontractors prior to the signature date by reviewing the subcontracts.⁹³

The success of any PPP project is dependent on all parties, including the private partner, to carry out their contractual obligations and comply with all guidelines and legal provisions.

3.2.3 INDEMNITIES AND CLAIMS FOR DAMAGES

The institution should make absolutely sure that the PPP Agreement mandates the private party to indemnify the institution from specific losses incurred in the course of the private party's performance or nonperformance of the Project Deliverables. This to the extent that such contingent liability is not insured, the private party will typically include a provision in its bid price for it.

In general, the institution shall seek indemnification from the Private Party for the following five types of liabilities that may occur as a result of the Private Party's performance or non-performance of the Project Deliverables. "These are:

- i. property damage;
- ii. breach of statutory duty;
- iii. death and personal injury;
- iv. other third party claims; and
- v. breach of a Private Party warranty."⁹⁴

Delays may interfere with the timely completion of a project in the event that the above indemnities are not clearly articulated in the PPP Agreement.

3.3 THE ROLE OF PUBLIC OFFICIALS IN PPPs

Public officials in Public-Private Partnerships represent the government. As contemplated in paragraph 2.2 above, the government's role is to supervise and oversee the public service provision carried out by the private partner in the best interest of citizens. National Treasury is the relevant government office that is responsible for this function. Further support is provided by a dedicated PPP Unit and the Budget Office. As previously mentioned, the public partner is responsible for regulation, permits and jurisdictional issues.

⁹³ Standardised PPP Provisions, Part B: Project Documents and Deliverables.

⁹⁴ Standardised PPP Provisions, Part C, paragraph 9.1.1 – 2.

Private parties frequently recover damages from the repercussions of the government/Responsible Authorities' actions or omissions that will not change the law but influence the return on equity, debt payments, or otherwise lead to an increase in expenses to the private party. Private parties claim that they present bids on the assumption that such unforeseen discriminatory behavior on the part of the government, sometimes as a result of a change in law or any act or omission by any Responsible Authority, will not adversely affect them. This assumption, however, is frequently incorrect. "Unforeseeable Conduct" refers to both changes in law, such as statutes, rules, and bylaws, as well as any act or omission by any Responsible Authority or Institution that is not covered by the PPP Agreement's other clauses.⁹⁵

The private party shall bear the risk of Unforeseeable Conduct that is of a general nature and does not discriminate against the private party. Unpredictable behavior that results in unfair discrimination against the private party, either as an individual entity or, more commonly, as a member of a specified group of entities (for instance, all private parties under PPP Agreements), should be the institution's risk.⁹⁶

When the institution carries some of the risk of Unforeseeable Conduct, the private party is required to use all reasonable efforts to reduce such increased costs. This obligation to offset should also require the private party to prepare for and foresee the impacts of any Unforeseeable Conduct, notably in the case of budget allocation in the normal course of business.⁹⁷

The interests of the employees must be considered, particularly in light of section 197 of the Labour Relations Act,⁹⁸ which is applicable when a business, trade, or undertaking is transferred or sold as a going concern. This is applicable where a PPP involves the transfer or partial transfer of an institution's existing operations.⁹⁹

Government buy-in is one of the factors that allow PPP projects to thrive and succeed and should be done without the public partner interfering with the work of the private partner.

⁹⁵ Standardised PPP Provisions, Part K; Unforeseeable Discriminatory Government Conduct, para 49.1.2 – 3.

⁹⁶ Part K, paragraph 49.3.2.

⁹⁷ Part K, paragraph 49.4.1.

⁹⁸ Section 197 of the Labour Relations Act 66 of 1995 provides for the "automatic transfer of the contractual rights and obligations of employees employed in a going concern from the transferor to the transferee. The transferee then becomes the employer and inherits the transferor's employment liabilities in respect of the transferring employees, including its liability for all unpaid salaries, wages and benefits that have accrued in the period up to the transfer of the going concern."

⁹⁹ Part L, Employment, paragraph 51.1.1.

3.4.1 POLITICAL INTERFERENCE IN GENERAL

This research understands the word ‘interfere’ to have two meanings, the first is to intervene in a situation without invitation or necessity, and the second is to prevent a process or activity from continuing or being carried out properly.

According to Mfuru, 2018,¹⁰⁰ the key findings of his research are that due to political meddling, public administrators face difficulty in carrying out their obligations. Maladministration, misuse of power, inappropriate conduct, unacceptable delays, poor governance, and a lack of dedication among public employees are the result of these factors. His research stated that political involvement was caused by an insufficient separation of power and responsibility between politics (policy) and public management (execution).

According to Sengiwakhile Mngomezulu, 2020,¹⁰¹ in many municipalities in South Africa, politics in delivering services is a severe concern, with municipalities grappling with how to cope with the interaction between politicians and officials. Political meddling in administrative problems, as well as poor relations between major political and administrative authorities in towns, appears to be the norm.

3.4.2 POLITICAL INTERFERENCE ON PPP PROJECTS IN SOUTH AFRICA

Solly Matshonisa Seeletse, (2016),¹⁰² under a discussion on PPP hurdles, held that all the respondents [to his research] claimed that political interference was the most significant impediment to the success of PPP projects. Furthermore, the use of inexperienced personnel has been demonstrated to be a government shortcoming, which is seen as political influence. He goes on to say that PPPs involve significant financial and asset investments. Any unproductive outcome is a setback for progress. This research concurs with his submission, especially from the investment point of view. The same can be said about PPP projects on all levels of government.

¹⁰⁰ The Impact of Political Interference in Public Administration in Kihaba Town Council, <https://www.eajournals.org/wp-content/uploads/The-Impact-of-Political-Interference-in-Public-Administration-in-Kibaha-Town-Council.pdf> Accessed 11 September 2021.

¹⁰¹ Mngomezulu S, ‘Political Interference in the Administration of Service Delivery in UMLALAZI Local Municipality of KwaZulu-Natal, South Africa,’ <https://ideas.repec.org/a/rnd/arjeb/v12y2020i1p38-45.html> Accessed 11 September 2021.

¹⁰² Seeletse SM, ‘Performance of South African public-private partnerships’ https://www.businessperspectives.org/images/pdf/applications/publishing/templates/article/assets/7254/PPM_2016_02_Seeletse.pdf Previously cited in Chapter 1 above.

Afeez Olalekan Sanni, 2014,¹⁰³ is of the view that in the delivery of PPP projects in South Africa, there is a lack of policy direction among government authorities, as well as a lack of certainty in the minds of implementing partners and the private sector. The author went on to say that governments in Sub-Saharan African countries should always be dedicated to the procedures, and therefore that political leaders should encourage and create a positive climate for the implementation of PPP infrastructure projects.

According to Peter Farlam,¹⁰⁴ a strong political support without similarly open and transparent systems frequently leads to suspicions of corruption. Following an investigation into allegations that he welcomed rewards and transactions totalling more than R500 000 from former ANC fundraiser Schabir Shaik, whose business was part of the dominant N3 toll road consortium, South Africa's former transport minister, Mac Maharaj, stepped down as a director of a banking group FirstRand in 2003.

More references might be cited, but the point of this section of the research is that political involvement is real in South Africa, and it undermines the purpose and substance of Public-Private Partnerships in service delivery and infrastructure development. Without good infrastructure, there can be no robust economy or investment.

3.5 CONFLICTS OF INTEREST

Conflicts of interest (COIs) have been defined as involving a "set of conditions in which professional judgments concerning a primary interest (such as a patient's welfare or validity of research) tends to be unduly influenced by a secondary interest (such as financial gain)".¹⁰⁵ COIs can be financial or non-financial, and they can apply to people or entire organisations. In disciplines like medical, business, politics, public service, and education, there has been a lot written about COIs. However, there has been little, if any, guidance on how to manage COIs inside the Public-Private-Partnerships (PPPs) that operate in global health and agriculture. Since collaborations between public (non-profit) and private (for-profit) organizations usually produce concerns of COI, recognising and managing these COIs is crucial to the continued survival of these partnerships.¹⁰⁶

¹⁰³ Sanni AO 'Building infrastructure through Public Private Partnerships in subSaharan Africa: Lessons from South Africa', <https://pdf.sciencedirectassets.com/277811/1-s2.0-S1877042814X00364/1-s2.0-S187704281404302X/main.pdf> Accessed 11 September 2021.

¹⁰⁴ Farlam P 'South African Institute of International Affairs; Assessing Public-Private Partnerships in Africa', page 35, <https://www.oecd.org/investment/investmentfordevelopment/34867724.pdf> Accessed 11 September 2021.

¹⁰⁵ Thompson DF, "Understanding Financial Conflicts of Interests", 1993.

¹⁰⁶ Omobowale EO, 'Addressing Conflicts of Interest in Public Private Partnerships'. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2914055/> Accessed 12 September 2021.

The EU tries to strike the right balance by blending broad definitions of conflicts of interest with a variety of legal mechanisms designed to identify, manage, and resolve specific conflicts. In this regard, the legal tools used in order to avert conflicts of interest can be split into two types. Provisions in hard-law tools ensure that public authorities carry out their obligations in a fair and neutral manner. These rules apply throughout the whole PPP decision-making processes. A wide range of soft-law tools, including requirements to mentor public actors' decisions on support for companies or financial institutions, assistance from internationally recognized guidelines and principles, and participation in initiatives to ramp up financial stability, are in place to supplement such rules.¹⁰⁷

There are two distinct processes to managing a conflict of interest, both the insider or discloser and the organization have significant responsibilities at each stage (in particular, the organisation cannot leave the obligations to the discloser, as often seems to happen). The first stage is to reveal one's concerns, and the second is to make decisions on how to improve those concerns.¹⁰⁸ This is especially practical in a setting where both the individual and/or organisation have mutual benefits of openness, honesty and integrity. This approach is supported and encouraged as non-disclosure of conflicts of interest could have adverse effects on the success of the project.

3.6 CORRUPTION AND FRAUD

Corruption and Fraud are criminal offences under South African legislation and common law and may be committed in the course of carrying out a PPP project.

3.6.1 CORRUPTION

According to C.R. Snyman,¹⁰⁹ “even if a country has the best possible statutes and legal rules, any attempts by its government to construct a fair and prosperous dispensation for its citizens would fail if corruption within its society were rife. Corruption erodes moral values as well as the credibility of public authorities and its organs, undermines legal certainty and faith in the rule of law, leads to a dysfunctional public and private sector, endangers the free market economy, creates a breeding ground for organised crime, results in some people becoming rich at the expense of others, increases levels of

¹⁰⁷ European Parliament, Think Tank; Addressing conflicts of interest in PPPs [https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI\(2015\)545722](https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2015)545722) Accessed 12 September 2021.

¹⁰⁸ PPPs: Handling conflicts of interest. <http://wigleylaw.com/assets/pdfs/2010/handling-conflicts-of-interest.pdf> Accessed 12 September 2021.

¹⁰⁹ Criminal Law, 6th Edition, page 401.

poverty, impedes economic development, destroys the pillars of democracy, creates a culture of dishonesty and leads to lack of faith in a country's leaders.”

Corruption is presently punishable in terms of the Prevention and Combating of Corrupt Activities Act¹¹⁰ and is defined in section 3¹¹¹ of the said Act. In Common law the crime presently known as corruption was previously known as bribery and could be committed by or in respect of state official(s) only.

This criminal offence is committed by two parties being the corruptor (giver of a benefit (which can be in cash or in kind)) and the corruptee (receiver of the benefit or gratification). For corruption to be committed, there has to be a meeting of minds or an agreement for an offering of gratification and a corresponding acceptance in return for a favour. It is submitted that corruption has the potential to remove all prospects of a successful PPP project. The conduct involves, *inter alia*, the abuse of a position of authority, breach of trust and a violation of a legal duty or a set of rules.

3.6.2 FRAUD

By definition in common law, fraud “is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another”.

Misrepresentation may take the form of spoken or written words, or a nod of the head to signify consent. Further, there must be real or potential prejudice or harm to another person or institution.¹¹² Fraud as a criminal offence ought to be reported, thoroughly investigated and prosecuted. South Africa has various institutions that conduct

¹¹⁰ Act 12 of 2004.

¹¹¹ “Any person who, directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –

(i) that amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to –

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corruption.”

¹¹² C.R. Snyman, Criminal Law, 6th Edition, pages 523 to 532.

investigations on complex financial transactions depending on the alleged offence. The roles and functions of these institutions will be discussed in detail below.

Fraud and corruption are not only criminal offences but are a problem and a real threat to the success of PPP projects and the economy.

3.7 NEGLIGENCE

Negligence fundamentally means failure to take proper care in doing something. Seeletse¹¹³ is of the view that negligence is one of the factors that contribute to the failures of PPP projects, particularly by government or public party officials. Negligence also refers to instances where the conduct of an individual or institution does not comply with a certain standard of care required by the law. This requirement can be best understood by considering what a reasonable person would have foreseen in the circumstances and the care that such a reasonable person would have taken in those circumstances.

Both natural persons and juristic or corporate institutions are capable of conducting themselves in a negligent manner. Their actions can lead to criminal and/or civil liability. The same is applicable where there has been wrongdoing due to negligence in their participation in PPP projects. In terms of section 332 of the Criminal Procedure Act,¹¹⁴ a corporate body can be criminally prosecuted. Sub-section (2) of the same provides that “in any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as a representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he or she were the person accused of having committed the offence in question”. For the sake of clarity, to be negligent is not a criminal offence, but it is an element that may be used to define the culpability (blameworthiness) aspect of an offence.

With the above in mind, PPP projects involve large amounts of money, money that is ultimately paid by the end user and/or tax payer for the delivery of services they are entitled to. It is thus submitted that all parties taking part in the complete execution of the project, and at all levels of government, exercise their utmost duty of care in doing so. Failure to do so presents a problem which, depending on the merits, may be punishable by law.

¹¹³ As stated elsewhere above.

¹¹⁴ Act 51 of 1977.

3.8.1 BROAD-BASED BLACK ECONOMIC EMPOWERMENT

The Broad-Based Black Economic Empowerment policy was promulgated into law¹¹⁵ and commenced on 21st April 2004. The foundation and/or justification for this legislation were that race was utilized to regulate access to South Africa's productive resources and abilities during apartheid. The majority of South Africans remain unable to own productive assets or acquire sophisticated skills due to the country's economy. Furthermore, South Africa's economy continues to perform less than its potential due to a low level of income generated by the majority of its people, and unless additional measures are taken to obtain a greater involvement of the majority of South Africans in the economic ecosystem, the economy's strength and wealth in the future may be jeopardised, irreversibly harming the livelihoods of all South Africans.¹¹⁶

The above-mentioned Act aims to create a legislative framework for the development of black economic empowerment, to embolden the Ministers of Finance and Trade and Industry to issue codes of good practice and transformation charters, to set up the Black Economic Empowerment Advisory Council, and provide for matters related to it.

Module 2 of the National Treasury's PPP Manual deals with the Code of Good Practice for BEE in PPPs.

3.8.2 CODE OF GOOD PRACTICE FOR BEE IN PPPs¹¹⁷

Departments, constitutional institutions, public bodies, and all phases of the project cycle are covered by this Code. PPP BEE policy is designed to create a broad-based and lasting BEE impact in every PPP project implemented in lines of Treasury Regulation 16 to the PFMA, in conjunction with the principles and policy objectives of the BBBEE Strategy.

Job creation and meaningful and beneficial direct ownership of substantial equity interests in the private party to a PPP Agreement by Black People, Black Women, and Black Businesses are among the policy goals of BEE in PPPs. PPPs' lengthy nature makes them an excellent tool for increasing Black Equity and Black Management over time. PPPs clearly identify risk, cost it, and transfer it accordingly, so black participants know exactly what they're getting themselves into.

A BEE balanced scorecard¹¹⁸ for the project, having a clear and acceptable set of BEE elements, targets, minimum thresholds, and weightings, officially agreed as part of the

¹¹⁵ Act 53 of 2003.

¹¹⁶ Preamble of the Act.

¹¹⁷ Module 2 of National Treasury's PPP Manual

feasibility study, is required before any PPP may be released to the market by the institution.

Obtaining the capital required to purchase shares in private parties to PPP Agreements is sometimes difficult and costly for Black people and Black businesses. As a result, loans are a common source of funding for Black Equity. These can be in the form of shareholder loans based on the project's cash flow or loans to Black enterprises based on their financial statements. As their financial base grows, expanding Black businesses will have more opportunities to invest their own money.

3.8.3 CHALLENGES WITH BEE IN PPPs

There are a number of challenges encountered by Black enterprises in PPPs. There is a limited pool of Black equity in South Africa, for example. Costs of expert financial and legal counsel to Black enterprises are a deterrent in the preparing of bids, contract negotiations, and setup, leaving black consortia participants exposed to entering into unfavourable agreements. In addition, there is a paucity of black experience and expertise in PPPs, resulting in an uneven playing field as compared to experienced partners. Furthermore, there are few black PPP Transaction Advisors in South Africa.¹¹⁹

Black people's economic ownership in the country increased marginally from 29% in 2018/19 to 31% in 2019/20. Other areas, such as preferred procurement arrangements for black enterprises and enterprise development, saw some advances as well. While the figures indicate progress, the impact had not been felt on the ground, and concerns were raised about how reliable these figures were since B-BBEE fronting was "so engrained" in SA's corporate. On paper, the enterprises are still black-owned, but the decisions are still made by the people who previously owned them.¹²⁰ Nothing precludes fronting operations under the guise of Black Economic Empowerment from extending to private parties that form consortia of Special Purpose Vehicles in Public Private Partnerships, according to this study.

3.9 NON-COMPLIANCE WITH AGREEMENT TERMS

As with any well written agreement, a procedure for resolving disputes under the terms of the PPP Agreement must be specified in the same agreement.

¹¹⁸ A minimum threshold of 50% of the total possible 100 BEE points must be achieved for the bid to be evaluated further.

¹¹⁹ Part I, Module 2.

¹²⁰ BEE fronting so widespread, its time to remove licences. <https://www.news24.com/fin24/companies/bee-fronting-so-widespread-its-time-to-remove-licences-commissioner-20210603> Accessed 12 September 2021.

The private party, notably its financiers, has a tendency to resolve contract disputes through traditional civil lawsuit processes, which is slow, expensive, and even "unreliable" because the courts may lack the expertise required to resolve disputes of technical nature and financial complexities to PPP Agreements. The optimum dispute resolution regime for PPP Agreements is arbitration by specific arbitrators.¹²¹ This research disagrees with this approach based on the fact that in practice, parties to a contract may agree on the jurisdiction of the court and not a particular or specific court. For instance, they may agree that a Magistrates' Court will have jurisdiction, but may not specifically say Pretoria Magistrates' Court. Further, specifying an arbitrator before a dispute occurs has the potential to compromise the impartiality of that arbitrator.

Arbitration has no fundamental or automatic advantages because it is not always faster or less expensive than litigation in the courts. The rules of court allow judges to appoint technical and financial experts to assist them with situations that require expert opinion.¹²² The private negotiated selection of arbitrators does not guarantee the appointment of the most qualified individuals and, because it is not an open procedure or otherwise subject to the framework of methods and techniques inherent in the judicial selection process,¹²³ it may be tainted by allegations of cronyism.

However, the most valid argument for preferring court adjudication over arbitration is the need to establish a significant legal precedent base for the interpretation and enforcement of PPP Agreements, to allow courts to develop the knowledge needed to understand the complexities of PPP Agreements, and to focus on promoting a measure of transparency regarding the interpretation and enforcement of PPP Agreements.¹²⁴ This research is intent of recommending a legal process that is quicker, cheaper, cost effective, specialized and alive to the complexities of PPP projects in general and PPP Agreements in particular.

PPP related disputes may be resolved amicably between affected parties by way of a clause in the agreement enabling parties to give notice and consent to reach a compromise without adversely impacting on the successful and timely completion of the project. Non-compliance with PPP Agreement terms may hamper the progress of the project and should be avoided by any possible means.

3.10 TERMINATION

For any of the following reasons, a Project may be discontinued prior to the expiry date:

¹²¹ Standardised PPP Provisions, paragraph 86.1.2.

¹²² Rule 36(9) of the Uniform Rules of Court, under the Supreme Court Act 59 of 1959.

¹²³ Such as processes by the Judicial Services Commission or the Magistrates Commission.

¹²⁴ Standardised PPP Provisions, paragraph 86.1.3.

1. Institution Default; the PPP Agreement shall state clearly the circumstances that would comprise an Institution Default and would therefore enable the private party to terminate the PPP Agreement. Certain violations by the Institution, such as Force Majeure, are Compensation Events that allow the private party to compensation. The Institution Default shall be restricted to those institutional failures that make the contractual relationship between the parties unworkable or entirely frustrate the private party's competence to implement its duties under the agreement,
2. Private Party Default; the events of Private Party Default that may result in termination should be specified in the PPP Agreement. These need to be objective, precise, and allow for appropriate limitations, taking into account the negative effects of a termination. Penalty Deductions, for example, accumulate and only trigger termination when a certain amount is achieved.
3. *Force Majeure*; any Party should be permitted to terminate the PPP Agreement if an incident of Force Majeure occurs and the Parties have been unable to settle on a negotiated solution for dealing with the repercussions of the occurrence of Force Majeure. By this time, the incident of Force Majeure will have lasted for a significant amount of time, preventing the completion of all or a considerable portion of the Project Deliverables, or
4. Corrupt Acts; These are intended at any and all sorts of corruption, and fraud committed against the Institution in relation to the PPP Agreement's procurement and continuing operation. It encompasses all forms of corruption, including gifts, cash, and other forms of bribery. The ramifications of corrupt acts must be addressed in detail in the PPP Agreement. In some cases, it must provide for the institution to cancel the PPP Agreement due to corrupt acts.¹²⁵

Termination of any PPP Agreement works against public investment, it will be the people on the ground that are most affected as jobs would be lost and this would lead to poverty, crime and a lower standard of living. While it is understandable that some instances are beyond the control of parties involved, such as *force majeure*, the same unwelcome event can be mitigated by taking an insurance cover. It is hereby recommended that corrupt acts be thoroughly investigated and prosecuted as contemplated by paragraph 3.6 above.

3.11 CONCLUSION

This Chapter has paid attention to common legal problems that pose a threat to the successful completion of PPPs at different levels of government in the South Africa.

¹²⁵ Standardised PPP Provisions, paragraphs 60.1 – 5.

Although the list is not exhaustive, it does provide a clearer view to reasons why not all projects are completed. These challenges will be revisited in Chapters below as recommendations will be made regarding how they may be resolved through legal means. Against the backdrop of challenges mentioned above, the next chapter pays attention to specific PPP case studies, and discusses their successes.

CHAPTER 4

PPP CASE STUDIES IN SOUTH AFRICA

4.1 INTRODUCTION

Having observed some of the problem areas with PPP projects and their impediments, Chapter 4 looks at specific case studies of successfully completed projects at different spheres of the South African government.

Every PPP project has to be bankable. Bankability is defined as the ability of a project to raise finance and the required amount of debt. Lenders must have confidence in the project company's¹²⁶ ability to service the loan in order for it to be bankable. Lenders will lower the amount they are willing to lend until the cash flow margin over debt repayments is sufficient if too much risk has been assigned to the private party. More capital will be required if this occurs. Simultaneously, the project firm must be expected to earn sufficient profits to compensate its equity holders for the risk they are taking.¹²⁷

Another factor to be kept in mind is the monitoring aspect, or the lack thereof, in PPP projects. According to Dominic Mitchell, in all cases, monitoring is a necessary component of effective performance. Monitoring serves two purposes in the context of PPPs: first, it ensures that partners are doing what they are meant to be doing, and second, it gives a vital chance for review, which nearly always results in improved delivery in all aspects, both technical and financial. Monitoring is especially better if it is done by a third-party organization. The majority of traditional PPPs have insufficient or non-functional monitoring mechanisms.¹²⁸ This is especially convenient for corrupt practices to take place.

¹²⁶ 'Company' is defined by the Companies Act 71 of 2008 as "a juristic person incorporated in terms of this Act, or a juristic person that, immediately before the effective date—

(a) was registered in terms of the—

(i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or

(ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;

(b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;"

¹²⁷ Government considerations: Bankability. <https://pppknowledgelab.org/guide/sections/18-considerations-for-government> Accessed 14 September 2021.

¹²⁸ Capacity Development for Partnerships in South Africa; Increasing service delivery through partnerships between public and private sector. Page 14, paragraph 4.2.3.

This research would be incomplete if it did not pay sufficient attention to notable PPP case studies in South Africa and at different levels of government.

4.2 NATIONAL PPP PROJECTS

4.2.1 N3 TOLL CONCESSION

In November 1999 South African National Roads Agency Ltd (SANRAL) signed a 30-year concession agreement with the N3 Toll Concession (N3TC) for a 415-kilometer portion of the N3¹²⁹ between the Cedara Interchange in KwaZulu-Natal and the Heidelberg South Interchange in Gauteng (the N3 Toll Route).

The design, building, financing, operation, and maintenance of the N3 Toll Route are the Company's primary responsibilities. Customers' needs for security, convenience, and mobility are prioritized, as are shareholders' needs for wealth optimization and societies' needs for long-term socioeconomic sustainability and growth. Toll roads provide the country with a high-quality transport network, resulting in increased traffic safety, reduced travel time and distance, and cheaper vehicle operating expenses. The N3 Toll Route's toll charges were first set during the concession contract bidding procedure. Since then, they've had yearly CPI-based modifications that the Minister of Transportation has approved. N3TC's "Touching Lives" strategy concentrates on creating socioeconomic value by sponsoring long-term projects that cover the whole route.¹³⁰

In January 2015 the maintenance and rehabilitation of the N3 between Harrismith and Warden had to be carried out at the cost of R413m. This multi-million rand investment would be funded by N3TC with no additional tolling required.¹³¹ It is an indication that projects of this nature involve and require large amounts of capital and financing.

4.2.2 N1 NORTH TOLL ROAD

The N1 Platinum Toll Route runs south-north between Pretoria to Bela-Bela (Warmbaths) and is believed to be 122 kilometres long. This is one of a handful of Build,

¹²⁹ The 'N' on the N3 indicates that it is a National Road that runs between and connects provinces. Other roads such as R21 or R554 are Regional roads and municipal roads start with an 'M', like M2 (North or South). This assists drivers and other road users to know whether they are on a National, Regional or Municipal road. All public roads in South Africa are named and/or labeled for reference purposes.

¹³⁰ <https://www.oldmutualalternatives.com/industry-news-and-insights/n3-toll-concession/> Accessed 16 Sept 2021.

¹³¹ N3 Toll Road upgrades to be rolled out. <https://www.news24.com/fin24/n3-toll-road-upgrades-to-be-rolled-out-20150109> Accessed 16 Sept 2021.

Operate, Transfer (BOT) highway concessions that the SANRAL has placed out to tender. A notable example of a Public Private Partnership is the N1 North initiative. For the building of tollgates, modifications to the existing road, and the creation of a new road surface, R650 million in private sector money was utilised. Over the course of the 30-year contract term, the state guarantees a total of one billion Rand in monthly toll payments. The project entails updating the existing N1 toll road and building new road surfaces and toll plazas in strategic areas, as well as the installation of Electronic Toll Collection (ETC) gates. SANRAL has chosen the Bakwena Platinum Corridor Consortium (BPCC) to develop the project's scheme. For the life of the 30-year concession, Bakwena is responsible for repairing, maintaining, and rehabilitating the N1 toll.¹³²

4.2.3 ICT: INFORMATION SYSTEMS

The government of South Africa has decided to enlist the help of the private sector to improve and replace outdated information technology through public-private partnerships (PPPs). The R2 billion PPP contract for ICT service delivery under investigation was the country's first of its type. After ten years of no development, a negotiated settlement was achieved in 2012 to terminate the contract due to the private party's inability to meet the contract's terms. PPP arrangements have been determined to be "incomplete contracts" with possibly conflicting interests and a lack of control by the public sector, which transfers authority to the private partner. Due to a lack of risk analysis, consultants may be able to breach the contract, resulting in failures and budget overruns.¹³³

It is an unfortunate situation as it is the tax payer who ultimately suffers the loss. The fact that there was a negotiated settlement creates an impression that no one may have been held accountable for the loss occasioned by the parties. Recommendations will be made in Chapter 6 below, indicating how such eventualities can be avoided.

4.2.4 STATE VACCINE INSTITUTE

This is a Public-Private-Partnership (PPP) between the South African government and the Biovac Consortium. The Biovac Institutes' mission is to be an African-based center

¹³² N.G. Meyer, M. Breitenbach, R.D. Kekana, 'An Economic Appraisal of the Impact of Traffic Diversion – N1 Toll Road and its Alternative'.

[https://www.academia.edu/24651585/An Economic Appraisal of the Impact of Traffic Diversion - the N1 Toll Road and Its Alternative](https://www.academia.edu/24651585/An_Economic_Appraisal_of_the_Impact_of_Traffic_Diversion_-_the_N1_Toll_Road_and_Its_Alternative) Accessed 16 September 2021.

¹³³ Rene Albertus, 'An Interrogation of Public Private Partnerships contracting risks; A South African case study of ICT service delivery', page 2. Accessed 16 September 2021.

[https://www.academia.edu/34753041/AN INTERROGATION OF PUBLIC PRIVATE PARTNERSHIP CONTRACTING RISKS A SOUTH AFRICAN CASE STUDY OF ICT SERVICE DELIVERY](https://www.academia.edu/34753041/AN_INTERROGATION_OF_PUBLIC_PRIVATE_PARTNERSHIP_CONTRACTING_RISKS_A_SOUTH_AFRICAN_CASE_STUDY_OF_ICT_SERVICE_DELIVERY)

of excellence for the discovery and manufacture of inexpensive, high-quality vaccinations for Africa and the developing globe. The goal of Biovac is to ensure that the country has the necessary domestic capacity to respond to local and regional vaccine needs. Biovac understands the need of having a domestic human vaccine manufacturing to help the Southern African region respond to regional outbreaks and vaccine-preventable diseases. The Biovac Institute was founded in 2003 by the Department of Health (DoH) in collaboration with the Biovac Consortium, a strategic equity partner. The organization works to research and manufacture affordable, high-quality vaccinations to fulfill the requirements of Africa and the developing globe. To guarantee that South Africa has the local capacity necessary to react to regional and local needs for basic Extended Programme for Immunization (EPI) vaccines. Over R200 million has been committed since 2003 to assist the organization's goal of a being a full-fledged vaccine producer by 2013. Biovac imports, labels, packages, and distributes vaccinations for both the South African public sector and the Southern African Development Community (SADC) countries, making it the country's largest vaccine distributor. They are in a strategic manufacturing partnership with Pfizer Laboratories, a contributor to South Africa's response to Covid 19.¹³⁴

4.3 PROVINCIAL AND MUNICIPAL PPP PROJECTS

4.3.1 GAUTENG

PROVINCIAL

4.3.1.1 GAUTRAIN RAPID RAIL LINK¹³⁵

The Grautrain Raid Rail Link Project is one of Africa's largest PPP transportation infrastructure projects. It's also South Africa's first swift railway system.

Gauteng Provincial Government (GPG) and Bombela Concession Company (Pty) Ltd have been the parties to the (concession) agreement. A feasibility study on the project was organized and consulted by a group of more than a hundred engineers and other specialist consultants. The team was retained in the second phase wherein they played the role of environmental review and a dedicated oversight handling management functions during the operational period.

At each milestone, independent certifiers were engaged to assess and approve all construction activity. According to the National Treasury, independent certifiers are important in the achievement and completion of set goals.

¹³⁴ Biovac Institution <https://www.biovac.co.za/our-story/> Accessed 16 September 2021.

¹³⁵ 2nd Publication of BRICS PPP Framework.

The GPG, as the public partner, had to maintain open communication channels with the private partner and concessionaire throughout the project's lifespan. The conduct of both parties' Chief Executive Officers was reviewed quarterly.

Original equipment makers propose that the private partner follow appropriate industry practices. Gauteng Province must ensure that the private partner preserves all assets for the duration of the concession, which runs from March 2026 to March 2027.

In 2015, Performance Measurement Description revealed that;

- a. The Train Service Availability was targeted at 95%, when measured or assessed it reached 97%, and
- b. The Train Service Punctuality was targeted at 90%, when measured or assessed it reached 93%.

There has not been a single late payment since the concession agreement was signed in 2006. The private party bears the majority of the risks related with the design, building, funding, operation, and maintenance of Gautrain. The public party only serves as a watchdog.

There is a procedure for technical difficulties and a procedure for other types of disputes.

Lessons learned include;

1. Anticipation of future needs,
2. Thorough planning and feasibility studies,
3. Challenges encountered were mitigated by variation process in the concession agreement, and
4. Dispute management was not always successful.

4.3.1.2 **CRADLE OF HUMANKIND INTERPRETATION CENTRE COMPLEX**

The Gauteng Provincial Government signed an R163-million contract with Maropeng a'Afrika Leisure (Pty) Ltd in October 2003 for the building, design, and operation of a world-class visitor exhibiting centre and recreational facilities at the site. This unprecedented public-private partnership required Maropeng a'Afrika Leisure to pay a yearly concession fee to the government in order for the government to participate in community benefit initiatives and scientific research.¹³⁶

¹³⁶ Maropeng and Sterkfontein Caves <https://www.maropeng.co.za/content/page/about> Accessed 16 September 2021.

The Cradle of Humankind is largely acknowledged as the origin of all humanity. It is the only World Heritage Site in Gauteng, and one of South Africa's ten World Heritage Sites. The 47-square-kilometer location has discovered the best evidence of our species' long journey to become who we are, and is thus a site of pilgrimage for all humanity. It's also where the famous pre-human skull known as "Mrs Ples" and an almost complete hominid skeleton known as "Little Foot," both dated at 2.3 million and 4.17 million years old, were discovered.

The Gauteng Provincial Government is the authorized management authority in charge of developing and safeguarding this unique asset for future generations.

The goal of the project is to preserve, explore, and interpret humanity's story. It's described as "a location of continual scientific research into our origins, as well as a place of reflection - who we are, where we came from, and where we're headed to" (Gauteng Tourism Authority, 2015).¹³⁷

This research observes that the impact of PPPs is not only about everyday infrastructure such as roads and hospitals, but has the potential to unearth the deepest roots of human life and existence. In the same breathe, infrastructures built today through PPP projects will shape how life is going to be in the next millennium.

4.3.2 LIMPOPO

PROVINCIAL

POLOKWANE HOSPITAL, RENAL DIALYSIS

The Limpopo Department of Health and Social Development is in charge of providing public health services and ensuring access to healthcare, particularly Health and Social Development. Since the Province's yearly budget is low and the inflow of non-South African nationals is on the rise, financial strength is important for the purpose to be effectively carried out. Due to a lack of funds, the Department was forced to consider other options for carrying out one of its imperatives: renal therapy through Public-Private Partnerships. Previously, the department had identified initiatives but had not pursued them due to financial constraints. With the goal of using Polokwane Provincial Hospital Renal Dialysis Unit as a best practice model, the research analyzed the success of risk transfer from government to private sector.

The evaluation was based on a case study of the Renal Dialysis Unit, with PPPs compared to traditional procurement. Traditional procurement practices, budget

¹³⁷ Christian M. Rogerson, 'Public Private Partnerships for tourism infrastructure development; Evidence from the Cradle of Humankind, South Africa. Page 423.

constraints, and inadequate planning were only a few of the issues uncovered by the findings. This study found that if a feasibility study is completed and the three litmus tests, namely value for money, affordability, and risk transfer, are followed, the odds of the PPP succeeding are increased. According to the findings, primary risks such as design, construction, financing, operation, and maintenance were passed to the private partner. After conducting interviews, surveys, documentary analysis, and literature analyses, the researchers found that using a PPP to achieve quality public health is possible. A successful PPP program depends on a number of variables, including monitoring and a pre-determined payment structure that ensures risk is shifted to the partner better placed to carry it.¹³⁸

The point being made in this regard is that PPP projects, if executed correctly, can assist the government in meeting its duty to provide access to adequate health services as entrenched by section 27(1)(a)¹³⁹ of the Constitution.

4.3.3 EASTERN CAPE

PROVINCIAL

EASTERN CAPE FLEET MANAGEMENT

The National Treasury oversaw an R3.2 billion contract over a five-year term, in line with the terms and conditions outlined in the Request for Proposal document sent to all bidders. Phakisa Fleet Solutions (Pty) Ltd was the successful bidder to offer the fleet and fleet-related activities through a Public Private Partnership, based on the results of the tender review process, successful completion of talks, and approval by the National Treasury's PPP Unit. The five-year tender was to be completed in six months and include a fleet of 2 888 vehicles of different kinds. To facilitate a smooth changeover, the implementation period covered the transfer period from the previous service provider to the new service provider, with emergency medical services and traffic vehicles being the most important services. The fleet solution had to be funded by the service provider on their own dime. This includes funding the fleet solution's lifecycle costs. For the first year of the PPP Agreement, the budget for fleet solutions, including fuel expenditures, was expected to be R505 million.¹⁴⁰

¹³⁸ Alfreed Pfumelani Mkansi, 'An Evaluation of Public Private Partnerships in the Polokwane Provincial Hospital' <https://wiredspace.wits.ac.za/handle/10539/12235> Accessed 17 September 2021.

¹³⁹ Everyone has a right to have access to health care services, including reproductive health care.

¹⁴⁰ Outsourcing the Eastern Cape Provincial Government fleet and fleet related services through Public Private Partnerships. <https://www.gov.za/outsourcing-eastern-cape-provincial-government-fleet-and-related-fleet-services-through-public> Accessed 17 September 2021.

4.3.4 WESTERN CAPE

PROVINCIAL

CHAPMAN'S PEAK DRIVE TOLL ROAD

In August 2001, the Western Cape Provincial Government (PGOWC) issued a request for proposals to rebuild and prevent accidents on Chapman's Peak Drive (CPD), an 11-kilometer section between Hout Bay and Noordhoek on the Cape Peninsula. The Concor Grouping was chosen as an appropriate bidder after two consortia submitted offers. The concession contract was signed in May 2002, and the financial close took place in August of that year.

Topographical surveys, 3-D rock fall modeling, 2-D profiling for catch fence design, the layout of the partial tunnel and other safety equipment, as well as an Environmental Impact Assessment (EIA) and the preparation of the Environmental Management Plan, all accompanied construction works. The design group was tasked with decreasing rockfalls while maintaining the visual grandeur of Chapman's Peak Drive, one of South Africa's most popular tourist destinations.

The advanced anti-rockfall facilities and toll road were planned and built by a private sector consortium, which will run and maintain them for the next 30 years. The initiative and its infrastructure will be handed over to the Western Cape Provincial Government at the conclusion of the time. The project's original R150 million cash was raised in two stages, with a mix of loan, equity, and grant funding.¹⁴¹

4.3.5 KWAZULU-NATAL

PROVINCIAL

4.3.5.1 INKOSI ALBERT LUTHULI HOSPITAL

The Inkosi Albert Luthuli Central Hospital opened in 2002 in Durban, KwaZulu-Natal. The hospital serves the entire population of KwaZulu-Natal and part of the Eastern Cape region. It contains 846 beds and is separated into five domains: management, medical, surgical, mother-child, and peri-operative. This is South Africa's first PPP

¹⁴¹ W. Deyer, K. Breytenbach, M. Watters, W. van Oudenhove and P. Parring, 'Innovative PPP saves Chapman's Peak: PPP brings together the Public and Private Sectors for Rehabilitation of the Famous Road', <https://repository.up.ac.za/bitstream/handle/2263/6594/051.pdf?sequence=1> Accessed 17 September 2021.

contract in the healthcare sector, with a private partner providing non-clinical services. It indicates that for 15 years after the contract is signed, the private partner is responsible for producing hospital equipment and related services. If the agreement is not extended after this time, the equipment will be given to the Ministry of Health.

The government provided assistance to the Inkosi Albert Luthuli Central Hospital. Starting in March 2000 with the original qualification request and ending in February 2002 with the financial arrangement, all procedures were accelerated and finished in less than two years. For PPP projects of this nature, this is a fairly short time frame.

Prequalification, feasibility study preparation, technical specifications preparation, request for quotation only for pre-qualified participants, Treasury approval, and contract signature in December 2001 are all included in the two-year time frame.

The government entrusted the project to foreign corporations with extensive experience in all sectors and phases. PricewaterhouseCoopers, a law firm (White & Case), chartered accountants (Gobodo), a British consultant firm on hospital projects (Hiltron), and an engineering business (Hiltron) were among the team's advisers (Saicog). PricewaterhouseCoopers conducted a feasibility assessment for the project. The initiative also shows how to employ the private sector's talents and resources to meet deadlines. The implementation began in March 2002, 12 months after the contract was signed in December 2001. Meanwhile, in June 2002, the first patients were admitted.

Impilo Consortium, which is made up of Siemens Medical Solutions (31%), Vulindlela Holdings (26%), AME Australia (20%), Drake & Scull (9%), Mbekani (7%), and Omame (7%). In 2001, the annual fee was R304 million at the time of contract signature, paid on a monthly basis and adjusted to the Consumer Price Index.¹⁴²

MUNICIPAL

4.3.5.2 **DOLPHIN COAST WATER CONCESSION**

The Dolphin Coast's economy is largely based on tourism, with trade and industry playing just a tiny part. April, July, and December, all holiday seasons, are the busiest months, with a large influx of people putting a strain on city services and infrastructure. Around July, roughly 9,000 tourists visit the Dolphin Coast, but by December, the number has risen to almost 19,000 people (excluding day visitors). During the first five years of the contract, SWC would invest around R30 million in capital.

¹⁴² Inkosi Albert Luthuli Central Hospital, a success case of PPP in healthcare.
<https://projectshealthcare.blogspot.com/2020/05/inkosi-albert-luthuli-central-hospital-ppp-success.html.html>
Accessed 17 September 2021.

The tender stipulates that funds be invested in the development, preservation, and management of water and sanitation services throughout the region. The concession has made a direct commitment of R130 million, according to former Minister of Water Affairs and Forestry, Valli Moosa. On November 27, 1996, the government decided to seek a private partner for water and sanitation services. The private sector's involvement was expected to improve management efficiency and provide access to low-cost funding. The Concession was expected to lose money for several years before turning a profit, a tactic that municipal governments are barred from doing.¹⁴³

4.3.6 FREE STATE

PROVINCIAL

UNIVERSITAS & PELONOMI HOSPITALS

This case study illustrates a co-location PPP, a sort of PPP in which the public and private sectors cooperate rather than compete to provide a similar service, generating revenue for the public sector and profit for the private sector in a win-win situation. It arises when the public sector has excess assets and the private sector has good commercial motives to use them.

In the year 2000, the Free State Department of Health began a procedure to make underutilized hospitals available for the construction of private hospitals in collaboration with public institutions in the Free State. Through a co-location model of public-private partnerships, the Pelonomi and Universitas Hospitals in Bloemfontein were recognized as viable institutions for the construction of an independent private hospital employing excess infrastructure from both institutions.

The national health facilities assessment in 1997 found that the Free State needed R825 million to deal with its backlog of facilities. The facilities backlog at Pelonomi Hospital alone was projected to be around R100 million.

The FSDoH and Community Hospital Management (Pty) Ltd (CHM) agreed to a 20-year concession deal in November 2003. PelonomiUniversitas Hospital Co-location PPP was the name given to the project. To run a private hospital, the private CHM partner was assigned an empty ward at Universitas Hospital (known as Universitas Private Hospital). Pelonomi CHM contributed R20 million to the upgrade of a public medical

¹⁴³ https://repository.lboro.ac.uk/articles/book/Public_private_partnerships_and_the_poor_-_Dolphin_Coast_water_concession_Case_study_Dolphin_Coast_South_Africa_/9457103 Accessed 17 September 2021.

ward, theatres, and ICU blocks as part of the concession deal. Aside from the R20 million initial input, the public sector would earn a share of the private hospital's revenue, and the state would keep ownership of all the structures after the agreed period.¹⁴⁴

4.3.7 MPUMALANGA

MUNICIPAL

MBOMBELA WATER AND SANITATION

The Council decided that a public-private partnership was the most effective way to ensure proper and effective water delivery to the local population without giving up complete control of the intended results (universal access to water) or taking on an unaffordable burden of debt as the city or through a city-owned company. Given the lack of legislative or policy framework and inadequate experience in the formation of PPPs in South Africa, public bodies have to rely on outside help to structure agreements. The Municipal Infrastructure Investment Unit, based in DBSA and funded by USAID, provided grant funds for the Mbombela PPP.

The concession, which lasted 30 years, required the construction project, then known as the Greater Nelspruit Utility Company (later renamed Silulumanzi, which means "water bucket" in the local siSwati language), to operate, maintain, and manage the existing water and sewerage structure and also arrange funding for both asset overhaul and system expansion.

For the first five years, the agreement called for a capital investment of 83 million Rand (or 13.6 million US dollars, based on a 6.1 Rand to 1 US dollar exchange rate), with equity financing accounting for 25% of the total. As a means to evaluate, review, and reconcile the agreement between the city and the concessionaire, the contractual relationship would be reviewed every five years. The City and the concessionaire would engage into a binding additional agreement every five years, according to the legal conditions.¹⁴⁵

4.4 CONCLUSION

The focus of this Chapter was to give an indication of the extent and use of Public Private Partnerships in South Africa. As it may have been noticed, this research also

¹⁴⁴ Shadrack Shuping & Siphon Kabane, 'Public Private Partnerships; A case study of Pelonomi & Universitas Hospital Co-location Project' <https://journals.co.za/doi/pdf/10.10520/EJC35485> Accessed 17 September 2021.

¹⁴⁵ J.D. Gorelick & N. Diamond, 'Lessons learned from Mbombela, South Africa, in Public Private Partnerships in the Water Sector.' <https://core.ac.uk/download/268085791.pdf> Accessed 17 September 2021.

quantified the cost implications of each PPP project discussed above. There are more projects that have been carried out and others that are still in construction. It is hereby contended that the current national infrastructure would not be the same if it was not for the contribution of Public Private Partnerships. It is important to note that PPPs have created thousands of jobs and continues to impact the economy in a positive manner. Yet, more can be done to improve the lives and livelihoods of all who live in South Africa. This can be achieved by following the best PPP practices in world, and they are discussed in detail on the next Chapter.

CHAPTER 5

BEST PPP PRACTICES

5.1 INTRODUCTION

In addition to successfully completed PPP projects in South Africa as presented by Chapter 4 above, more lessons are drawn from some of the best and international PPP practices in this Chapter.

A basic but difficult-to-achieve construct lies at the heart of successful PPP infrastructure projects: each side must be as devoted to the other's goals as they are to their own. This necessitates leaders from each institution sharing their interests and concerns on a regular basis and assisting in their resolution. One important component of this is for each participant to acknowledge their own interests in the project, which may or may not be the same as the other parties'.

Although PPP partners rarely specify their interests in a project beyond their common goals, such unstated interests include dealing with minor public concerns, creating a reputation to earn future PPP work, and profiting from the project (even if it is a small amount). An important success aspect is expressing such desires openly and honestly. When failures or setbacks occur, team members on successful PPP initiatives admit them and immediately remedy them. In this approach, they can turn mistakes into opportunities to increase their relationship commitment.

Project leaders that have a defined plan for achieving the project's objectives and maintain excellent working relationships with all stakeholders throughout the process have a far better chance of success.¹⁴⁶

5.2 LEGAL AND REGULATORY FRAMEWORK

Political will, an adequate legal framework, adequate public-sector institutional capacity (both to handle the PPP program as a whole and to deal with individual projects), an underlying pipeline of economically justified and affordable projects that meet the suitability criteria to be procured as PPPs, and a steady stream of such PPP projects, making it worthwhile for the private sector to develop the necessary technical, investment, and financial capabilities.¹⁴⁷

¹⁴⁶ Elyse Maltin, 'What Successful Public-Private Partnerships Do.' <https://hbr.org/2019/01/what-successful-public-private-partnerships-do> Accessed 20 September 2021.

¹⁴⁷ Farquharson & Yescombe, 'Public-Private Partnerships for Infrastructure Principles of Policy and Finance', 2011, page 39.

PPP initiatives, according to Farquharson, are also subject to other rules and regulations, such as environmental, tax, employment, and procurement legislation. Special measures may be necessary to cope with concerns such as value-added tax (VAT) increasing the cost of the project at the contracting authority level, even if the overall impact on the government is substantially less. A percentage of countries all over the world have managed to pass special tax measures for PPPs (often as part of a broader set of investment incentive activities), such as tax holidays, lower tax rates and investment allowances, and additional deductions for eligible operating costs, to reduce the rate of tax for the private sector.¹⁴⁸

PPPs are appropriate for a wide range of infrastructure projects. What needs to be done is to make sure that all of the key criteria that lead to successful PPP installations are well-structured so that high accuracy can be assured. It would also aid in the development of a body of PPP knowledge by identifying the important components. This information would allow the development of effective frameworks for best PPP practices as well as the implementation of related laws, rules, and recommendations.¹⁴⁹ This study will recommend, among other things, in Chapter 6 below, that a body of PPP knowledge be conserved and shared with important role actors for the benefit of all people and institutions involved in PPPs.

Building legal frameworks and institutions from the start, presenting sound laws designed to protect private sector investment, using negotiated safeguards against foreseeably disputable matters, and incorporating governance and accountability frameworks, according to Pongsiri, are all important aspects of regulatory and legal frameworks necessary to support public and private sectors to effectively deliver products and services.¹⁵⁰

Regulation ensures that the private partner is protected against expropriation, that business disputes are arbitrated or resolved speedily, that contract commitments are respected, and that expenses and profits are legitimately recovered in proportion to the risks incurred. A strong regulatory framework can also boost government benefits by ensuring that critical partnerships run smoothly and that the resources available to them are optimized in line with broader policy goals.¹⁵¹

¹⁴⁸ *Ibid.*

¹⁴⁹ Solomon Babatunde, 'Critical Success Factors in Public-Private Partnership (PPP) on Infrastructure Delivery in Nigeria', https://www.researchgate.net/publication/235263928_Critical_success_factors_in_public-private_partnership_PPP_on_infrastructure_delivery_in_Nigeria Accessed 22 September 2021.

¹⁵⁰ N. Pongsiri, 'Public-Private Partnerships and Urban Infrastructure Development in Southeast Asia'. <https://journals.sfu.ca/ipmr/index.php/ipmr/article/view/94/94> Accessed 22 September 2021.

¹⁵¹ Mounir Zouggari, 'Public-Private Partnership: Major Hindrances to the Private Sector's Participation in the Financing and Management of Public Infrastructures via Delegated Management' 2003, https://www.researchgate.net/publication/232981696_Public-

The legal and regulatory PPP framework in South Africa will function more effectively if it strikes a balance between the needs of end-users represented by the public partner, and those of investors who are represented by private partner. It may not be easy, however, it is recommended that all participants in PPP projects do their utmost to ensure successful completion of every project and maintaining the said balances.

5.3 GOOD GOVERNANCE

Good governance is important in PPPs, according to a 'Guidebook on Promoting Good Governance in Public-Private Partnerships.' In order to actually profit from PPPs, governments must set up the necessary institutions, procedures, and processes surrounding PPPs in order to move up the growth curve. This entails assisting governments in their crucial role in the process, and involving citizens and other stakeholders. Many nations, regional and international organizations, and non-governmental organizations (NGOs) now understand the value of good governance in economic growth.¹⁵²

"Good governance is open to much interpretation but overall six core principles have become widely accepted:

- (a) Participation: the degree of involvement of all stakeholders;
- (b) Decency: the degree to which the formation and stewardship of the rules is undertaken without harming or causing grievance to people;
- (c) Transparency: the degree of clarity and openness with which decisions are made;
- (d) Accountability: the extent to which political actors are responsible to society for what they say and do;
- (e) Fairness: the degree to which rules apply equally to everyone in society; and
- (f) Efficiency: the extent to which limited human and financial resources are applied without waste, delay or corruption or without prejudicing future generations."¹⁵³

The PPP area's principal goal is to improve governments' potential to recognise, bargain, supervise, and implement successful PPP initiatives. This is accomplished by member states exchanging PPP expertise and experiences, including expectations from the public and private sectors, notably in the discovery and testing of best practice.

[Private Partnership Major Hindrances to the Private Sector's Participation in the Financing and Management of Public Infrastructures via Delegated Management](#) Accessed 22 September 2021.

¹⁵² United Nations Economic Commission for Europe; Good Governance in Public-Private Partnerships, 2008, page 13. <https://unece.org/DAM/ceci/publications/ppp.pdf> Accessed 22 September 2021.

¹⁵³ *Ibid.*

Standards, best practice guides, studies, and creative tools will be developed as a result of the activities, which can be used in capabilities and training programs.¹⁵⁴

It is hereby submitted that the AU with its African Peer Review Mechanism (APRM) is better placed to champion capacity-building and training for the development of PPP projects and provide support where needed within the continent.

People's participation in decision-making, their welfare, and socioeconomic progress in society are three key features of good governance. In the conception and execution of projects, PPP practices such as participation, decency, transparency, accountability, fairness, efficiency, and economic development can be met. Many initiatives have been launched by the national and state governments in areas such as education, energy, healthcare, industrial infrastructure, tourism, transportation, and others, all of which have contributed to India's good governance.¹⁵⁵

According to Madeleine C. Fombad,¹⁵⁶ if the PPP mega-rail transport network can provide a fresh strategy to delivering goods and services to common people in post-apartheid South Africa, PPPs must be viewed as governance tools, promoting transparency, accountability, allocation of risk, attentiveness, cooperation, renewed interdependence, social and community obligations, and proper strategic repositioning. Furthermore, good governance, project governance, and corporate governance are all aspects of governance in PPPs.

5.4 ENABLING ENVIRONMENT

The Public-Private Infrastructure Advisory Facility (PPIAF) assists developing-country administrations in strengthening laws, rules, and institutions that support private-sector participation in infrastructure development. PPIAF supports knowledge transfer by documenting lessons learned while sponsoring research and tools, as well as building ability to scale infrastructure provision and assisting sub-national entities in obtaining financing without the need for sovereign guarantees. Their effort, which is funded by donors and overseen by the World Bank, helps to create hundreds of millions of dollars in infrastructure investment. While numerous efforts aim to develop and finance infrastructure projects with private participation, PPIAF lays the groundwork for this to happen.

¹⁵⁴ <https://unece.org/ppp> Accessed 22 September 2021.

¹⁵⁵ Amir Ullah, 'Public Private Partnerships; A Tool in Promoting Good Governance in India'. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2565225 Accessed 22 September 2021.

¹⁵⁶ 'Governance in Public-Private Partnerships in South Africa; Lessons from the Gautrain' <https://www.tandfonline.com/doi/abs/10.1080/03057070.2015.1117240> Accessed 22 September 2021.

According to the PPIAF, global experience has shown that a successful execution of a PPP program necessitates the creation of an enabling environment in order for PPP projects to be executed successfully and with ultimate value to the public sector. A positive investor atmosphere, public commitment, risk management, and public sector competence are the four main components of the enabling environment. To ensure adequate certainty and predictability of investing, the public sector must be in existence. The public sector requires the same enabling environment to ensure that private sector participation is gained at the lowest possible cost and hence to the public sector's best benefit.¹⁵⁷

One of the government's key obligations is to create a PPP-friendly environment. In order to overcome the bureaucracy's administrative obstacles, rules and clear guidelines describing the administrative procedure involved in project implementation are required. In order to execute a successful PPP program, protocols for various activities must be established, as well as administrative permission from competent authorities at various phases of the project implementation process. Streamlined administrative procedures eliminate uncertainty at various phases of project development and approval, boosting investor trust in a public-private partnership.¹⁵⁸

5.5 TRANSPARENCY & DISCLOSURE

PPP transparency and disclosure increases budgetary cost management and governance, as well as a better awareness of their effects on service delivery. Cameroon, Ghana, Kenya, Nigeria, South Africa, and Tanzania have regulatory frameworks that mandate the release of award notices but do not necessitate the disclosure of the entire PPP contract. In both Ghana and Kenya, it is expressly essential that the PPP award be published with some additional information. In Kenya, for instance, the award notice must include information about (a) the project's form; (b) its scope; (c) the winning bidder; (d) the project's budget at present value; (e) the project's value and tariff; and (f) the project's length. While it is not clearly stated in the statutory framework in South Africa, it is common practice to give unsuccessful bidders the reasons for the winner's selection.¹⁵⁹

It is this research's view that the Kenyan approach discourages secrecy and lawlessness that can occur and undermine proper and transparent bidding processes.

¹⁵⁷ *Ibid.*

¹⁵⁸ United Nations Economic and Social Commission for Asia and the Pacific, Enabling Environment and Administrative Mechanism https://www.unescap.org/tdw/ppp/ppp_primer/313_administrative_mechanism.html Accessed 22 September 2021.

¹⁵⁹ Benchmarking Public-Private Partnerships Procurement 2015, A pilot in 10 economies, World Bank, page 17.

Other processes are required to prevent insider information from being used to manipulate the process. Bids, for example, should be submitted in private but open to the public. To avoid the temptation to bid low in order to win the award, with the purpose of later renegotiation, experience demonstrates that behaviour following the selection should be monitored by thorough procedures and objective criteria. PPP governance necessitates the definition of clear and transparent protocols for each step of the PPP process.¹⁶⁰

The effective delivery of public services and the creation of a business climate that encourages investment and supports private sector development require public-private partnerships that promote transparency and institutional quality. Lack of openness and sincerity has been proved to have a negative impact on a country's productivity and economic progress. Corruption is frequently blamed on opaque and onerous regulations that limit access to information and create opportunity for discretionary behaviour, as well as inadequate government agencies responsible for monitoring.¹⁶¹

Transparency and accountability are two of the most widely discussed elements of governance in the literature, according to Michael R. Reich, but they have not been employed in this way to develop a model of government. Transparency is valuable in and of itself since it allows for learning, accountability, and the shaping of organizational performance. Accountability is a method for ensuring that a PPP is meeting its public-interest objectives while also improving organizational performance. Both lead to public perception and democracy.¹⁶²

Transparency is one of the eight 'Batho-pele' principles that are contemplated above.

5.6 UNSOLICITED PROPOSALS

Generally, the government sought the help of the private sector to create infrastructure through a government planning process. A government agency comes up with a project proposal that addresses an identified infrastructure difficulty (as outlined in an infrastructure plan or strategy), then plans and implements the project (together with its external advisors). It then holds a competitive bid to select the best private-sector bidder

¹⁶⁰ UN ESCAP Public-Private Partnerships Readiness Assessment, page 11.

¹⁶¹ Inter-American Development Bank, 'Public-Private Partnerships to Promote Transparency', April 2018. <https://publications.iadb.org/en/public-private-partnerships-promote-transparency> Accessed 22 September 2021.

¹⁶² 'The Core Roles of Transparency and Accountability in the Governance of Global Health Public-Private Partnerships' 2018. <https://www.tandfonline.com/doi/full/10.1080/23288604.2018.1465880> Accessed 22 September 2021.

to carry out the project. Unsolicited proposals (USPs) are an exception to the rule that infrastructure projects must be launched by the public. A USP occurs when a private organization approaches a government agency with a proposal for an infrastructure or service project without first receiving an explicit request or invitation from the government.¹⁶³

While USPs may bring possibilities, they can also present obstacles. Some of constraints are institutional: governments, for example, must devote resources to allow USPs to complete essential procedures and clearances. Other difficulties arise from the need to connect public and private interests, as a project plan proposed by a private business must meet public goals. Finally, the government agency may need to combat negative preconceptions about USPs.¹⁶⁴

Given of the nature of unsolicited proposals, the widespread use of this unconventional procurement method, in which the private sector rather than the government takes the lead in initiating and developing a project, raises significant concerns for government infrastructure practitioners on both technical and political levels (USPs). According to the World Bank Group's Private Participation in Infrastructure (PPI) Database, between 10 and 30 percent of global infrastructure projects with private-sector participation in low- and middle-income countries are unsolicited, meaning the proposal was submitted by a private sector entity without an explicit request from a government. Governments can benefit from USPs, but history demonstrates that they can also create issues, such as diverting public resources away from the government's strategic aims, failing to encourage competition, and ultimately leading to chances for corruption.¹⁶⁵

“The five questions for governments, based on the above cited article are;

- 1) As a general policy rule, shall we allow USPs or not?
- 2) What should we use USPs for? For a specific project concept, or a specific sector? Or as a complement to the public planning process?
- 3) How should we incorporate the USP policy in the existing regulatory framework?

¹⁶³ Policy Guidelines for Managing Unsolicited Proposals in Infrastructure Projects, Volumen II, by the World Bank Group and PPIAF, page 15, <https://library.pppknowledgehub.org/documents/4580/download> Accessed 23 September 2021.

¹⁶⁴ *Ibid*, at page 17.

¹⁶⁵ Managing unsolicited proposals in infrastructure: 5 key questions for governments, 2017. <https://blogs.worldbank.org/ppps/managing-unsolicited-proposals-infrastructure-5-key-questions-governments> Accessed 23 September 2021.

4) To what extent should the USP proponent be included in the development of the project?

5) During the procurement phase, how can we enhance competition? In what circumstances could direct negotiation be considered? And shall we provide incentives to the USP proponent? Here, the Guidelines recommend governments to competitively tender USPs whenever possible."¹⁶⁶

Unsolicited proposals enable governments to draw from the private sector's experience and ideas, but they can also pose new obstacles. One of the most significant concerns with unsolicited proposals is that they fall outside of the public sector's investment planning framework because they come from the private sector. As a result, a clear process for evaluating unsolicited offers must be established, ensuring compatibility with public sector aspirations and demands, particularly where public commitments are required.

Only the Arab Republic of Egypt, out of the examined economies, does not monitor unsolicited PPP proposals. Although the National Treasury does not encourage their usage, the South African regulatory framework says that PPP unsolicited bids must follow the same procedure and meet the same conditions as if they came from the public sector.¹⁶⁷

Peruvian and Colombian regulatory systems have the most thorough mechanisms for evaluating unsolicited applications. Unsolicited ideas in Colombia are assessed in two stages: prefeasibility and feasibility. The procurement authority must ensure if the unsolicited proposal is of public interest in light of sectoral policies and investment priorities during the prefeasibility stage. The regulatory framework in Peru has developed a unique evaluation system that includes determining the "relevance and coherence of the unsolicited proposal with national, regional, or local priorities."¹⁶⁸

Unsolicited PPP projects, according to Abdel Aziz and Nabavi, could result in numerous protests and demonstrations from the general public, poor value for money, failure to meet the country's real societal and economic needs, and satisfaction of only a few public and private officials if not managed effectively.¹⁶⁹

This research is of the view that individuals appointed to process and adjudicate on proposals to PPP projects have to be credible, honest, and should not have a vested

¹⁶⁶ *Ibid.*

¹⁶⁷ Benchmarking Public-Private Partnerships Procurement 2015, A pilot in 10 economies, World Bank, page 19.

¹⁶⁸ *Ibid.*

¹⁶⁹ Unsolicited Proposals for PPP projects: Private Sector Perceptions in the USA, 2014, https://www.researchgate.net/publication/269048417_Unsolicited_Proposals_for_PPP_Projects_Private_Sector_Perceptions_in_the_USA Accessed 23 September 2021.

interest in the process. It is suggested that this could work well if the said individuals could be post through a vetting process. Vetting will be discussed in Chapter 6 below.

5.7 RISK MANAGEMENT

According to a Guidebook for Risk Assessment in Public Private Partnerships,¹⁷⁰ there is risk identification, risk management, risk allocation and risk valuation. Each of these four risk functions are briefly explained below;

Risk identification is not a goal in and of itself; instead, it is a phase in the risk assessment process that directly supports the other parts of risk assessment: risk valuation, risk management, and risk allocation. Depending on the circumstances of the analysis, the level of information in the identification can vary. It's critical to be thorough when it comes to risk assessment. Risk management necessitates the identification of the most significant hazards, including those that exist during development. Risk management does not necessitate identifying all risks, simply the most significant ones.

The goal of 'risk management' is to reduce the adverse effects of risks on project objectives. There are three major steps in risk management. The first step is to decide which risks to manage, followed by defining risk management measures and finally selecting and implementing risk management techniques.

The goal of 'risk allocation' as part of a risk evaluation is to maximize risk transfer from the government to the private sector. The transfer of risk accounts for a considerable amount of the total expected Value for Money of the PPP strategy, according to international and domestic studies. One of the main ideas of PPPs is risk allocation between the public and private sectors.

The aim of 'risk valuation' is to get an exact estimate for the project's risks so that well-informed investment decisions may be made. Risk assessment is necessary for establishing the project's financial viability (the "go or no-go" decision) and comparing various delivery methods.

Due to the significant degree of risks influencing projects that typically involve many stakeholders, large sums of money, extended concession periods, and other factors, risk management is at the heart of PPP issues. These risks should not be absorbed by one party, but rather by the party (public or private) that is most equipped to manage them. To help with risk distribution in PPP projects, a number of standard risk allocation matrices have been offered. In practice, it is critical to recognize that these methods are

¹⁷⁰ By US Department of Transportation, Federal Highway Administration, 2013.
https://www.fhwa.dot.gov/ipd/pdfs/p3/p3_guidebook_risk_assessment_030314.pdf Accessed 23 September 2021.

limited because risks must be assessed and handled project by project. Furthermore, the ideal risk allocation will be determined by how private parties price risk and whether or not this is appropriate for the public sector. Once risks have been assigned, it is critical to develop appropriate strategies for reducing risks incurred by each partner in order to ensure a win-win situation for all parties involved and the success of the PPP project.¹⁷¹

A project risk register, according to Jessica Everitt, is a tool that project managers use to document and monitor any risks that may affect their projects. Because it is how one proactively combats possible difficulties or setbacks, risk management is an essential component of project management. A project risk register, often known as a risk log, is an important component of the risk management process. A project management risk register's aim is to identify, track, and log potential project hazards. In project management, a risk is something unforeseen that could occur and have a good or negative impact on the project. When someone notices something that could have an effect on their project, the team should examine it and enter it in the risk register. As projects grow in size, duration, and complexity, it becomes more difficult to remain on top of everything that could be overlooked or forgotten. Some risks may appear little or improbable at first, but they can have a significant influence on your project. Data/security risk (materials being stolen or hacked), legal risk (litigation or changes in the law affecting your project), catastrophic disasters (fire, flooding, and storm damage), and distribution network disruption are all examples of project hazards.¹⁷²

It is prudent for project managers of PPPs in South Africa to be required to generate risk registers for their projects and hand the same to the PPP Unit at the completion of the project or the termination thereof. This will be useful in empowering the said Unit to apply the lessons learned to future projects. This may be provided for in the PPP Manual or other legal instruments such as contracts.

5.8 CONFLICT MANAGEMENT

Conflict management is the ability to recognize and resolve problems in a rational, fair, and efficient manner. Because conflicts are an unavoidable aspect of doing business, it's critical to have individuals who understand them and know how to resolve them. This is more vital than ever in today's market. Everyone wants to prove how important they

¹⁷¹ Nunzia Carbonara, 'Risk Management in PPP projects: an empirical study on the motorway sector' <https://www.pomsmeetings.org/confpapers/051/051-1250.pdf> Accessed 23 September 2021.

¹⁷² 'What is a Risk Register in Project Management?', 2020, <https://www.wrike.com/blog/what-is-a-risk-register-project-management/> Accessed 23 September 2021.

are to the organization they work for, which can lead to conflicts with other team members.¹⁷³

Conflict management, as defined above, exists between two or more persons. This can be between two employees, an employer and employee, two managers, or a manager and employee. It differs from dispute resolution in that dispute resolution requires the intervention of a third person who is in a position of authority to assist with negotiating, mediation or arbitration. Further, contracts generally have a dispute resolution clause and not conflict management.

Due to the general long-term commitment and the diversity of parties with differing opinions and interests, conflict is unavoidable in public-private partnerships (PPP). However, a detailed grasp of how conflict can be managed among project parties and stakeholders can assist PPP project arrangements avoid it.¹⁷⁴

Disagreements, on the other hand, may not be confined to contractual matters. Other issues are likely to arise as a result of day-to-day work across the PPP organizational interface. The commercial and public sectors frequently have distinct working styles and organizational cultures, which can lead to conflict. A lack of cross-organizational information sharing, for example, could lead to misunderstandings and disagreements among partners.¹⁷⁵

If not handled properly, conflict can be detrimental to a project. It could result in project delays, a lack of team spirit, an increase in project costs, and the breakdown of personal and professional relationships. Because of the negative consequences of conflict, project stakeholders should effectively manage it.¹⁷⁶

5.9 CONCLUSION

The above discussions are an indication of challenges that can be improved on and taken into consideration by the policy makers regarding South African PPP legal framework. They are based on some of the lessons and experiences learned around the world. Appropriate recommendations will be made in the next Chapter and in line with outlined practices.

¹⁷³ <https://study.com/academy/lesson/what-is-conflict-management-definition-styles-strategies.html> Accessed 24 September 2021.

¹⁷⁴ Osei-Kyei Robert, 'Conflict Management in Public Private Partnership Projects'. https://www.researchgate.net/publication/349191421_Conflict_Management_in_Public-Private_Partnership_Projects Accessed 23 September 2021.

¹⁷⁵ Denise Currie and Paul Teague, 'Conflict Management in Public-Private Partnerships: The Case Study of the London Underground' page 5.

¹⁷⁶ Harmon, 2003.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSION

6.1.1 INTRODUCTION

To make sense of Public-Private Partnerships from a broader perspective one has to understand that the concept of an economy first, and economic activity second.

Will Kenton defines an Economy as “the large set of inter-related production, consumption, and exchange activities that aid in determining how scarce resources are allocated. The production, consumption, and distribution of goods and services are used to fulfill the needs of those living and operating within the economy, which is also referred to as an economic system.”¹⁷⁷

Economic activity, on the other hand, is understood to mean “those steps related to the consumption of goods and services and activities in which money is exchanged for a product or service. Economic activities are performed for the purpose of making money, gaining wealth, and creating and producing items that can be offered to the public for sale. Restaurants, large retailers and even small businesses engage in economic activities every day. The outcome of economic activities is measured monetarily.”¹⁷⁸

Economic activities between individuals and businesses, from different places such as cities, countries and even regions make up a larger economy which is interconnected in a number of ways. Individuals and institutions who consume these products and services require infrastructure to reach or be reached by other actors within the said system. It is the responsibility of the public partner to avail these infrastructures in order to enable trade and investment to take place, however, governments do not always have sufficient capital to make this possible. This necessitates the private partner participation. The two parties form a partnership known as a PPP.

The construction of infrastructure through PPP projects ultimately opens up the economy and this in turn makes a particular country or region investor-friendly. PPP projects also have to be bankable. Bankability of projects is defined in Chapter 4 paragraph 4.1 above.

6.1.2 OVERVIEW OF THE STUDY

The first Chapter gave a clear background of the study, the relevance and importance of PPPs to do well and how everyone benefits from a thriving economy when there is adequate infrastructure to provide the necessary support.

¹⁷⁷Economy <https://www.investopedia.com/terms/e/economy.asp> Accessed 2 October 2021.

¹⁷⁸Economic Activity <https://study.com/academy/lesson/economic-activity-definition-examples.html> Accessed 2 October 2021.

The second Chapter provides key components of the legal PPP framework in South Africa and the role of clear Agreements in the successful completion of projects. Prior to one trying to improve the local legal framework of anything, they first have to understand it and its shortcomings. Chapter 2 presents this understanding and lays down the foundation for a better view of challenges that are faced by projects.

The third Chapter specifies problem areas that impedes on projects being completed with success. Upon a thorough understanding of a legal problem, it becomes easier to find solutions and contingency plans to circumvent the challenges one is faced with. An outline of common PPP problems means that solutions have to be generated to effectively deal with those problems.

The fourth Chapter deals with specific projects that have been successfully completed at different levels of government. This is a direct indication that, although there may have been challenges that led to failures in the past, there is still good stories to tell about PPPs in South Africa. Without well structured and clear Agreements and concessions, the projects investigated in this Chapter may not have been completed in the way that they did.

The fifth Chapter pays attention to best practices, locally and internationally. The lessons observed in this Chapter can certainly improve the efficiency of PPP projects and their prospects of success. A well supported legal framework stands a better chance to realising the much needed infrastructure in South Africa. This has the potential to boost the economy and inspire other frameworks in developing and underdeveloped countries.

This Chapter focuses on overall lessons from previous Chapters and makes a number of recommendations that will certainly ensure that South Africa has a better functioning legal framework on Public-Private Partnerships.

6.2 RECOMMENDATIONS

6.2.1 LESSONS LEARNED FROM PPP PROBLEMS

The selection of the correct and most capable private partner is crucial to the successful completion of the project. It is only through transparent and fair processes that this can be achieved. In the event that an incompetent private partner is selected through an open process, and as a consequence the project is not completed with success, the person or group of individuals making the selection should be held accountable. This should be on condition that, upon investigation, there is an apparent wrongdoing on the part of the

selection panel and that the undesirable outcome could have been avoided. If the work is not completed due to the fault being on the private partner, losses occasioned should be quantified and recovered accordingly and through appropriate legal processes.

The public party represents tax-payers and they should at all times act and conduct themselves diligently and with due regard to the fact that they have been entrusted with a lot of responsibilities. Non-compliance with the set guidelines should entail that appropriate disciplinary or corrective action is carried out. It is recommended that public officials who are involved with PPP projects undergo a thorough vetting process and/or lifestyle audit to ensure that no unlawful conduct takes place and to serve as a deterrent to would-be offenders. Individuals with previous criminal records that involve an element of dishonesty should not be allowed to partake in PPP projects. Given the large amounts of capital that is involved in the development of PPPs, the National Treasury should have a means of blacklisting individuals and companies that have caused failures and losses in the conduct of PPP projects at all levels of government.

This research has observed that political interference presents challenges that can lead to project failure. The recommendation herein is that PPP agreements should have a clause that prohibits this interference by imposing a duty to report any conduct that constitutes interference by external factors to the final outcome of the project. That said, action should be taken against anyone who became aware of the interference and failed to report it. Reporting channels can be stipulated in contract.

The recommended thorough vetting process can be utilised to establish or give an indication if an individual has conflict of interest in any PPP project.

Although negligence is not an offence in a criminal sense of the word, parties who act negligently and/or causes financial loss to any project should be held accountable. The extent of the loss should be measured and recovered from the wrongful party or individual.

The BEE policy has the potential to enable persons from previously disadvantaged background to have access to South Africa's productive resources. Fronting should, however, be discouraged and offenders should have their companies de-registered and blacklisted. The business community needs to be more informed in this regard and the National Treasury website should have an article on the subject including the steps to be taken if and when one is guilty of contravention.

6.2.2 LESSONS LEARNED FROM BEST PRACTICES

Good governance is a necessary feature of PPP project success. It unlocks the need for fair and reasonable practices. Without good governance, culprits will take advantage of

the lack of consequence management and misappropriate funds with ease. With good governance, perpetrated can be apprehended and be held to account. It is through this process that loss funds can be recouped.

It is the responsibility of the public partner to establish and maintain an enabling environment that comprises of a positive investor atmosphere, public commitment, risk management, and public sector competence. Failure to do so creates a threat to the successful and timeous completion of any project.

Unsolicited bids can create challenges for the public partner. As a result the National Treasury needs to come up with clearer guidelines on how to deal with unsolicited bidder. This research is yet to know of an unsolicited bidder or company that completed a PPP project successfully, on time and without cost overruns.

All risks that have to be identified managed evaluation and allocated accordingly. Failure to do so is a risk itself as unintended consequences can befall the project prior to its completion.

6.2.3 ENFORCEMENT CAPACITY

Where there are disputes or non-compliance with any part of a PPP contract, the first consideration is that contract's dispute resolution clause. In other instances, parties can agree to settle the matter amicably. This research recommends that this approach should be given first preference and it is indicative of the fact that parties are intent on overseeing the completion of the project.

Depending on the extent of the non-compliance with the agreement, other institutions that can be involved in the South African Police Service if one has a reason to believe that an offence has been committed. If necessary, the police may refer the matter further to a more specialised investigative institution such as Directorate for Priority Crimes Investigation (DPCI), Special Investigating Unit (SIU), Asset Forfeiture Unit (AFU), Financial Intelligence Centre, National Prosecuting Authority, Offices of the Public Protector and/or Auditor-General. The nature of the offence alleged to have been committed will inform the relevant investigative body to carry out the investigation. Where is a prima facie case, the matter will be taken to a criminal court for prosecution.

This research recommends that a PPP Ombud should be established to investigate and make recommendations on matters that are PPP specific. This institution would have to be accountable to the Minister of Finance. Their findings and recommendations would have to be binding on all the parties to the dispute and would have to be made an order of court to be fully enforceable. A party who may feel aggrieved by its findings may take

their report for Judicial Review at a High Court with jurisdiction. Due to the time-sensitive nature of PPPs, all litigation would have to be dealt with on an urgent or semi-urgent basis. This institution would have jurisdiction to investigate any PPP related matter from any level of government and across the whole country. Its structure should comprise of individuals who are credible, who have as well been vetted and of sound legal background, such as law professors, former chief magistrates, Senior Counsel, former High Court judges for instance. They would, of course, have to be thoroughly trained on the legal framework of PPP in South African and internationally.

National Treasury could also do well to establish a PPP College where every key participant in PPP projects would have to undergo training and assessment. This would ensure that persons appointed as transaction advisors, project managers, accounting officers and the like, actually know what is required of them. This institution would also streamline all lessons into standard working procedures and standard operating procedures. Students and graduates would receive manuals and other self-study material for future reference. Individuals who completed successful PPPs would offer lectures to students on lessons learned and file reports to develop and build a knowledge bank on PPPs. Students would have their tuition paid for by the institutions they represent, and most importantly, other countries, especially African countries could also send their own students to learn and master PPPs.

In addition to the proposed enforcement mechanism, it is submitted that the National Treasury should only pay 75% of calculated amounts to parties to the agreements. The remaining amount being payable upon certification that signed contracts have been paid in full. Should this not be the case, the remaining 25% may be used to remedy whatever shortfalls there are.

6.2.4 MUNICIPAL VIABILITY

Municipalities are placed at the local sphere of government and are in essence supposed to be run as corporate institutions that are fully capable to generating their own capital. When well managed, they can be self-sufficient regardless of whether they are metropolitan, district or local.

According to King Code IV; Report on Corporate Governance for South Africa,¹⁷⁹ “Municipalities are autonomous but operate within a system of cooperative governance in terms of the Constitution. Cooperative governance requires that the various spheres of government cooperate in exercising their powers and performing their function. The

¹⁷⁹ King Code IV Report on Corporate Governance for South Africa
https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf Accessed 4 October 2021

governance of municipalities should be view in the context of cooperative governance without detracting from municipal autonomy”.

Although municipalities are autonomous, this does not make any PPP projects undertaken at the local sphere of government to be less important. Accountability and transparency must still be present and visible, especially at the municipal level as this is where services are required and expected to be delivered.

6.2.5 MONITORING

One of the factors that lead failure or non-completion of PPP projects is that there is not mandatory monitoring capability by an independent body or institution. This aspect is important for ensuring that the project delivers infrastructure of the best quality possible. Figure 3* below illustrates the generic structure of a Public-Private Partnership in South Africa according to the National Treasury. Figure 4* is an illustration of a PPP structure of India which has an Independent Consultant responsible for supervision and monitoring. It is hereby recommended that a monitoring function should become a permanent feature of South Africa’s PPP structure.

6.3 CONCLUSION

A legal role that can be played by a regulatory authority in the form of a PPP Ombud will certainly ensure that parties to a PPP project fulfill their duties in time, that there is consequence management that disputes are resolved speedily and that contract terms are adhered to.

Its findings and recommendations would be binding on all parties to the transaction. It would have jurisdiction to investigate matters at all levels of government and at any stage of each project cycle where a dispute may arise between the partners. This includes differences between project companies that have formed an SPV. The focus of the PPP Ombud would be to encourage continuation and thus completion of the project by any means necessary. It would also have the powers to hold wrongdoers accountable.

Its findings and recommendations may be taken on judicial review on an urgent or semi-urgent basis without necessarily halting the progress of the project.

TABLE OF FIGURES



Figure 1* (From the National Treasury's PPP Manual)



MUNICIPAL PPP PROJECT CYCLE

Reflecting Municipal Financing Management Act, Act 56 of 2003
Municipal Public Private Partnership Regulations, and the
Municipal Systems Act, Act 32 of 2000

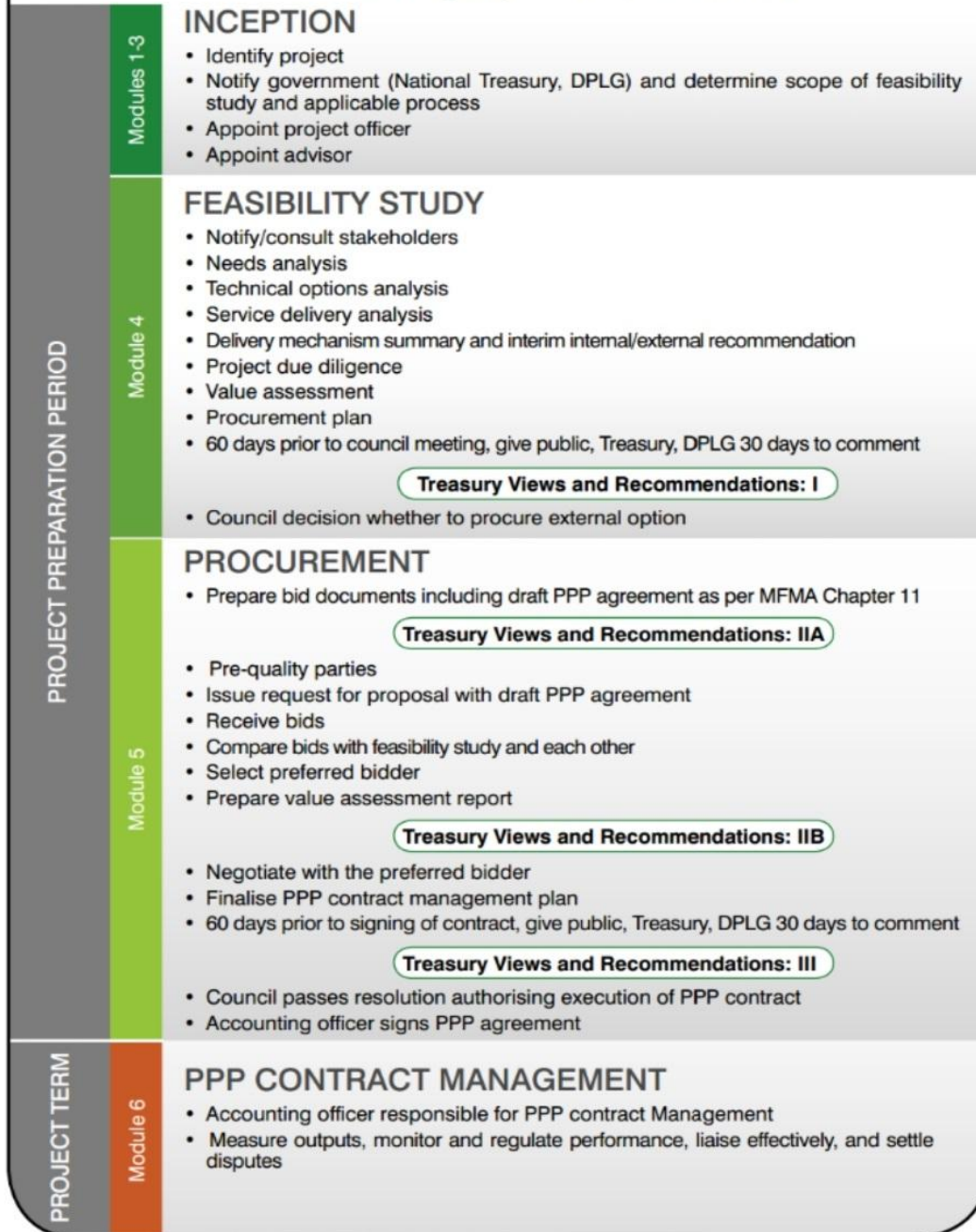


Figure 2* (From the National Treasury website)

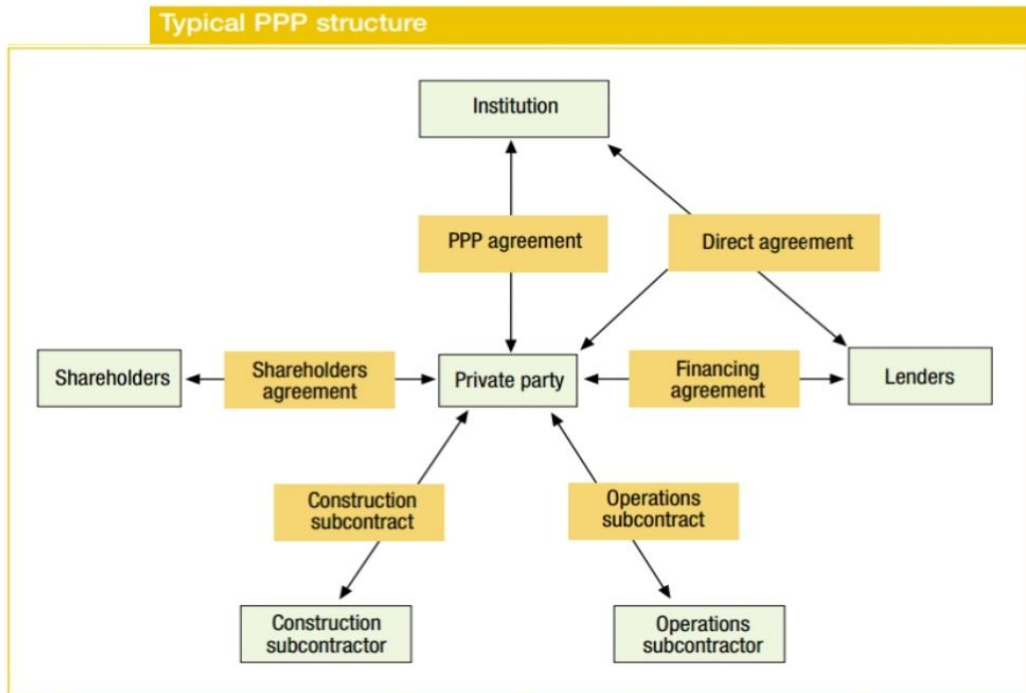


Figure 3* (From the National Treasury's PPP Manual)

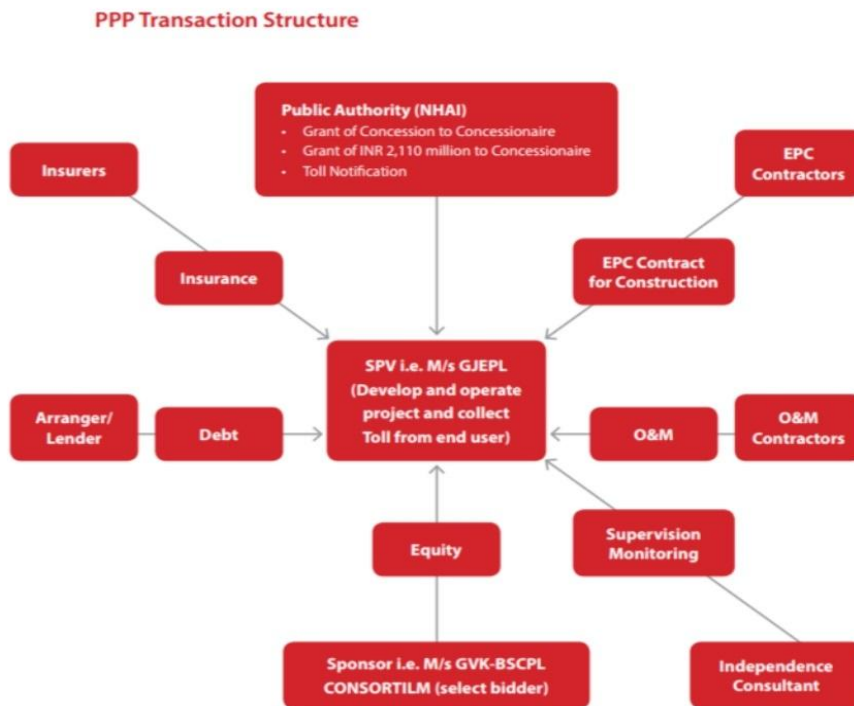


Figure 4* (From the BRICS Good Governance on Public-Private Partnerships Frameworks)

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